THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 176/2002
REPORTABLE

In the matter between:

A T W De Klerk	**Appellant**
and	
Absa Bank Ltd	**First Respondent**
Absa Insurance Brokers (Pty) Ltd	**Second Respondent**
Commercial Union Life Assurance Co of SA Ltd	**Third Respondent**
Neville G Du Toit	**Fourth Respondent**
Gert van Rooyen	**Fifth Respondent**

Before: Marais, Schutz, Cameron, Cloete JJA and Shongwe AJA

Heard: 18 February 2003

Delivered: 6 March 2003

Absolution from the instance at end of plaintiff's case – stringent test applied before granted – damages – loss of a chance to invest – distinction between causation and quantification – absolution set aside.

JUDGMENT

SCHUTZ JA

[1] Counsel who applies for absolution from the instance at the end of a plaintiff's case takes a risk, even though the plaintiff's case be weak. If the application succeeds the plaintiff's action is ended, he must pay the costs and the defendant is relieved of the decision whether to lead evidence and of having his body of evidence scrutinized should he choose to provide it. But time and time again plaintiffs against whom absolution has been ordered have appealed successfully and left the defendant to pay the costs of both the application and the appeal and with the need to decide what is to be done next. The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.

[2] The plaintiff is Mr De Klerk, a Pretoria attorney, who carries on practice as a firm styled De Klerk en Vennote. His case was based on fraudulent or negligent misrepresentation, leading him to make a poor investment. The damages which he ultimately claimed were for the difference between what this investment yielded and the return that he would have obtained had the money so invested been available to be more fruitfully applied. Van der Walt J, sitting in the Transvaal Provincial Division, granted absolution on the ground that De Klerk had failed to lead any evidence that could prove his loss, particularly because he had not at all proved that he would have invested elsewhere had the money been available to him. Other grounds for absolution were also advanced. I shall deal with them later.

[3] Before setting out the facts it is pertinent to repeat what was said by Schreiner JA in *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 at 340D-G:

> '[O]n appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed. Where, however, the issue turns on the interpretation of a document, the Appellate Tribunal, if it does not agree with the trial Court's view that the interpretation of the crucial document is so manifestly in favour of the defendant as to justify the granting of absolution at the close of the plaintiff's case, should at least make its reasons clear enough to provide some assistance to the trial court in its eventual decision of the case. I think, however, that the Appellate Tribunal should preferably refrain from stating its reasons in such a way as to tie the trial Judge's hands unduly, for the proper interpretation of the document may be affected by circumstances appearing in the evidence led by the defendant.'

[4] Three witnesses gave evidence, De Klerk himself, Professor Marx, whose evidence may, in the circumstances, be ignored, and an actuary, Mr Gouws.

[5] De Klerk described how he was approached by a broker, Mr *Du Toit* (the fourth respondent and fourth defendant below). He was employed by United Insurance Brokers (Pty) Ltd (the second respondent and second defendant below – now known as Absa Insurance Brokers (Pty) Ltd). I shall refer to this company as '*United Insurance*'. Du Toit requested to see him about an investment plan developed by United Bank Ltd ('*United Bank*' – the

first respondent and first defendant below – now known as Absa Bank Ltd) and Commercial Union Life Insurance Company of SA Ltd (‘*Commercial Union*’ - the third respondent and third defendant below). De Klerk was not wholly won over by Du Toit as to the merits of the scheme, so Du Toit introduced Mr *van Rooyen* to confirm what he had said. Van Rooyen was the local manager of United Insurance and was later to be the fifth defendant and is the fifth respondent on appeal.

[6] In persuading De Klerk to invest Du Toit and van Rooyen made use of a brochure described as a ‘Leningsrekening – Delgingsplan’ under the name of Commercial Union. In the introductory part it describes all the disadvantages for a director of a company or for a proprietor of a professional firm if he makes long term loans to the company or firm. One of those is that if he takes interest it is taxable in his hands. Then, certain requirements for admission to the scheme are set out. De Klerk could meet them all. The workings of the scheme follow. United Bank will lend the firm (to take De Klerk’s case) a sum equal to the proprietor’s loan account for a fixed ten year period. The firm will pay interest to the bank on the loan for ten years. Such interest will be tax deductible. On receipt of the loan the firm will repay the proprietor’s loan account. He will then invest this sum in a specially evolved ‘Prima-Groeiplan’ issued by Commercial Union. At the end of the ten years the ‘Prima-Groeiplan’ is paid out to the proprietor free of tax. (Du Toit stated to De Klerk that the Receiver of Revenue had agreed to this.) The proprietor

would then lend to the firm an amount equal to the original bank loan, which money would be used to discharge the bank loan. The difference between what the proprietor would receive from Commercial Union and the amount of the original bank loan would be retained by him free of tax. This would represent the proprietor's 'return' after ten years. The other benefit offered (as already mentioned) was that the interest on the bank loan over ten years would be tax deductible. De Klerk said that it was those benefits that had persuaded him to invest.

[7] Paragraph 6 of the brochure proceeds with the statement that:

> 'Die volgende voorbeeld van 'n tipiese Leningsrekening-Delgingsplan *sit duidelik uiteen* hoe die plan werk sowel as die *voordele* vir beide maatskappy en direkteur' (emphasis supplied).

The brochure then states that in the example given it is assumed that the loan is for R100 000, that the proprietor will be 45 on his next birthday, that his marginal tax rate is 45 % and that the interest rate on the bank loan would be 15 %. The amount borrowed by De Klerk was R100 000, and although he would be 48 on his next birthday, Gouws gave evidence that the difference in age would result in the benefit being reduced by only some R5 000. The last phase of the example is depicted in paragraph 9. It shows an amount of R320 622 being paid to the proprietor after ten years, so that after paying off the bank loan of R100 000 he would be left with R220 622. There follows the statement that one of the options open to the proprietor after ten years will be to retain the net amount remaining, ie R220 622, free of tax.

[8] In the brochure there are no further qualifications to the statements to which I have referred. This is De Klerk's main complaint. He did not enquire into the internal workings of the scheme and relied on the assurances in the brochure as fortified by Du Toit and van Rooyen. In fact he says that both assured him that the R320 622 was a minimum amount – but the payout might be more.

[9] In contrast to the statements that De Klerk says were made to him in unqualified form is a document provided under discovery by Commercial Union, dated 7 October 1988. (The commencement date of the plan was 18 October 1988.) The document of 7 October bears the names of De Klerk and Du Toit, and it reflects the 'Illustrative Values on the Basic Plan' after ten years as R244 823. De Klerk says he knew nothing of this. Towards the end of the ten years Commercial Union wrote to De Klerk, on 12 October 1998, claiming that in 1988 it had sent a quotation to him which reflected an illustrative value of R244 823. De Klerk denies that he ever received such a quotation. At this stage of the case his denial must be provisionally accepted.

[10] The correct approach to an absolution application is conveniently set out by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A:

> '[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:
>
> > "…(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led

> by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173*; Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).)"
>
> This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (*Gascoyne* (loc cit)) – a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'

[11] Mr Joubert, appearing for Absa Bank, Absa Insurance, Du Toit, and van Rooyen, confined his attack to absence of evidence of damages, to which I shall return after dealing with the other grounds for absolution advanced by Mr Roos, for Commercial Union. Those further grounds are that there was no evidence upon which it could or might reasonably be found:

1 that such representations as may have been made were proved to be false,

2 that fraud had been committed,

3 alternatively to 2, that there was any negligence,

4 that there was any unlawful conduct,

5 that Du Toit and van Rooyen had acted as the agents of Commercial Union.

Falsity

[12] In order to establish whether there was potentially acceptable evidence of falsity it is first necessary to establish what it is that the brochure says. As appears from *Gafoor's* case, when it comes to the interpretation of documents an appeal court need be less slow to give guidance to the judge below. To my mind the brochure, standing alone and unqualified, that is without reference to any further evidence which may yet be led, plainly says that after ten years De Klerk will receive R320 622 free of tax (R220 622 after repaying the loan). According to Gouws's unchallenged evidence that amount must be reduced by R5 000 because of De Klerk's age. Yet Commercial Union's own discovered document says that it actually had in mind a value of R244 823. That may call for an explanation from Commercial Union. Moreover the value is merely an 'illustrative' value and such values, according to one of Commercial Union's own letters, depend upon its future profits, which in turn depend upon a number of factors, such as future investment performance, taxation of

insurers, future administration costs and mortality experience. Knowing that, it had no right to make an unqualified statement yet it made one. In the result it tendered to pay no more than R216 435, out of which the bank loan had to be repaid. If there is no more evidence, which is the postulate, I am of the view that a court could reasonably find the brochure to have been false in the respect complained of.

Fraud, Negligence and Unlawfulness

[13] For the reasons just given, again I think that it is possible that a court might reasonably conclude that there was at least negligence, in not warning De Klerk about possible qualifications, when the brochure was pressed upon him. Whether there was fraud present is so intimately bound up with the enquiry into negligence that it would be wrong to isolate and remove it prematurely from the arena. As to unlawfulness, if all the other elements of the cause of action were to be established, I have little doubt as to what the man in the street would say about Commercial Union's liability.

Agency

[14] Commercial Union launched its brochures into the investment world, intending that they should be used by brokers and acted upon by investors. That is enough for a court to say that Commercial Union could be held to be answerable for the representations complained of. It is unnecessary to enquire whether technically the two brokers acted as its agents or whether their statements as to the minimum benefit payable are attributable to it.

[15] In the result, in respect of all five additional grounds, I am of the opinion that De Klerk has crossed the threshold and that at this stage at least the judge *a quo* (although he did not expressly deal with all of them) was correct in not upholding any of them.

Evidence of damage

[16] We now come to the real issue in the case, whether De Klerk has produced enough evidence to escape on absolution finding. I must say that there has been much falling around in the presentation of this part of De Klerk's case. Initially he relied on Professor Marx as his expert on damages. His evidence was interposed during De Klerk's evidence. Essentially, his calculations involved the deduction of what remained of the Commercial Union's actual payment after the bank had been repaid, from the figure in the brochure – R320 622. Although there are cases in which the calculation of contractual and delictual damages may fortuitously come to the same amount, it seems to me that at the end of De Klerk's own evidence what he was really claiming was contractual damages, whilst disavowing in his evidence that he was relying on a contract. (I share the trial judge's query whether he might not successfully have contended that the brochure formed part of his contract.) After De Klerk's evidence had been concluded the case was postponed. A summary of an opinion by Gouws was then served and the particulars of claim were amended. Upon the resumption of the trial Gouws gave his evidence. The plaintiff's case was closed without De Klerk being recalled to state that he

would have acted in accordance with the Gouws assumptions as to how a reasonable investor would probably have deployed the sums available for investment. This is the nub of the respondents' absolution attack. They say that, absent such evidence, one of the essential legs of the proof of damage - that De Klerk would in fact have invested more advantageously elsewhere - was lacking. Van der Walt J agreed.

[17] I have set out the outline of the damages claim in para [2] above. To expand upon it, Gouws lists the periodic payments made by the firm to United Bank between 1 November 1988 and 1 October 1998. The total is R199 230,42, of which about R10 000 represents a repayment of capital. The rest is interest. Gouws then made certain assumptions. The first is that if De Klerk had not invested in the plan he *could* have applied these payments in making other investments. This is self-evidently so. The next assumption is also obviously correct. If he had not invested in the plan he would not have received the sum of R131 257 that Commercial Union ultimately paid him. The third is also uncontentious, that by investing in the plan he saved on income tax, as the interest payments were tax deductible at an average rate of 44 %.

[18] Then he made assumptions as to the manner in which De Klerk *would* (this is how his evidence proceeded) have invested (these assumptions are crucial), namely two-thirds in growth stocks, for instance unit trusts or shares, one-sixth in taxable interest-bearing investments and one-sixth in redemption

of interest-bearing debt, for instance a mortgage bond. Based on these assumptions he arrived at an average rate of return of 12.5 % p a. His ultimate calculation commences with a figure of R456 680. This represents the periodic payments amounting to R199 230-42 escalated at 12,5 % p a from the date of each payment over the ten year period. From this sum is deducted two others. The first is the value of what was received from Commercial Union, a net R131 257 plus interest, totalling R143 940. The second deduction is the sum of R200 940, being 44 % of R 456 680, which represents the income tax saving. After making these two deductions the total loss estimated by Gouws comes to R111 800, which is what is claimed.

[19] Gouws's report was drawn up in a hurry and he did not have much discussion with De Klerk. The assumptions he made as to the alternative investment pattern were his own, although he was acquainted with some aspects of De Klerk's affairs. For instance, he knew that he had been active in developing a property. De Klerk mentioned to him an investment in a growth fund made through De Klerk's firm and the fact that he had an overdraft. (The first statement is hearsay but the second was confirmed by De Klerk.) He was quite frank. It was, he said, impossible to say exactly what De Klerk would have done. But, he said, De Klerk was an educated professional man and it would be unfair to him to assume that he would have placed his money under the proverbial mattress. On the other hand, he said, it would be unreasonable to assume that he would have invested all in particular shares, which, with the

aid of hindsight, would have made him a millionaire. Nor would he have assumed, against De Klerk, that he would have chosen all the duds. What he had attempted to do was to arrive at a reasonable middle of the road picture of the way markets behave over the longer term. He postulated that De Klerk would have behaved sensibly. However, he conceded that he did not know what investments De Klerk had made before 1988 or after 1998. Gouws's evidence, also, stands uncontradicted. Naturally he conceded that it was possible, as far as he knew, that De Klerk might simply have consumed the money had it been available to him.

[20] I now turn to such evidence as De Klerk himself gave which may be relevant to proof of the damages ultimately claimed. This evidence is to be found scattered around the record, presumably because a different case was being sought to be proved when he gave evidence. One strongly suspects that when De Klerk's case was being prepared an advice on evidence was not sought nor given. Such an advice focuses the minds of the legal team *before* the trial commences, on what facts have to be proved and how they are to be proved. An advice is not simply an item in a bill of costs, but is vital to the preparation of all but the simplest cases. If a proper advice had been given there would have been no need for a postponement, while running repairs were effected to the case, and there would almost certainly have been no application for absolution and no appeal. That said, I turn to what De Klerk did say.

[21] From the nature of his practice as an attorney he had to invest his clients' money daily, in transactions generally, including those related to property and deceased estates. Some of the investments would be in call accounts, others in notice deposits, and others in deposits for fixed terms of various durations. Concerning his own affairs, he had life policies, endowment policies and annuities, the latter two payable when he turned 60 or 65. An old friend was his broker and each year, before 28 February, they would review his affairs so as to ensure that he took out insurance and annuities in a way that would minimise his tax liability. He had insurance policies other than the one with Commercial Union. Then comes a passage which Mr Maritz, De Klerk's counsel (who did not appear in the court below), emphasized heavily in argument. Some time in 1996, to his great shock, he learned for the first time that Commercial Union intended paying him much less than he believed he had been promised. In a letter to United Bank dated 15 November 1996 he said, with reference to the scheme:

> 'Ek het die skema by u aanvaar met die *uitsluitlike bedoeling om my aftredingsannuïteit te versterk*' (emphasis supplied).

De Klerk confirmed this intention in his evidence. This statement, said Mr Maritz, expressly tells us that his client was bent on investment and, he submitted, it is reasonable to infer that had he not invested in this scheme he would have invested similar amounts elsewhere. Generally annuities, he said,

are not speculative investments. Add to this that not only did De Klerk in fact invest in the scheme but he saw the matter through for the whole of the ten years, notwithstanding that in 1996 he found it difficult to keep up his payments. Indeed, by 1998, when the ten years had run he had not only paid all the interest but had repaid some R10 000 of the loan, without any obligation to have done so.

[22] Two arguments are raised by the respondents. One is that the fact that De Klerk's circumstances were straitened in 1996 indicates that he would not, in all likelihood, have invested the full R199 230,42 elsewhere. The other is that it was Du Toit's active marketing that caused De Klerk to invest, so that it is not to be assumed that, Du Toit absent, he would have invested. As I shall seek to explain later these points may be relevant when it comes to quantification of the damages, but they do not in themselves negate a reasonably possible inference that De Klerk would have invested elsewhere.

[23] Further, Mr Maritz stated that De Klerk might have invested in interest-bearing investments, having regard to who offered the best returns and the possibilities of their being tax-free. Also, in 1988, he did have a bond with United Bank, the unstated inference being that he might have chosen to pay it off, thus saving interest payments without incurring liability for income tax. He already had sufficient life insurance, so that the probability was that he would not have expended further moneys in obtaining such cover. Finally, in 1988 he was involved in a property development in consequence of which he

had a high level of exposure to his bank, which he and his wife sought to cover by taking out life policies of R500 000 on each of their lives. Engagement in property development may be seen to identify an active investor.

[24] I shall comment later on what bearing the evidence of Gouws and De Klerk has on the adequacy of proof of damage. But I would point out that, had the respondents asked for the recall of De Klerk after Gouws had given evidence, their request must surely have been granted. This does not mean that the onus of proof shifted to them, only that if such evidence as had been given had significance, they made no attempt to break it down through further cross-examination.

[25] Turning to the Court *a quo's* detailed reasons for granting absolution, what has been described as the first pillar of the judgment is a conclusion that because De Klerk invested R199 230 over ten years and was returned R213 163 at the end of that period, he suffered no loss. Indeed it was said, obedient to the principles of nominalism which our law recognizes, he actually made a profit of R14 033. In other words a 1993 rand or a 1998 rand was equal to a 1988 rand. The effects of inflation are to be ignored. This was the argument which found favour below. Inflation over the last 30 years or so has been such a basic fact of life that a judge who is not prepared to take judicial notice of its existence and very approximate extent removes himself from the real world. However, in the case before us, whether a profit or a loss was occasioned by

the investment in the scheme is not the point in issue. How good or bad a scheme it may have been need not be explored at this point, as the damages claimed by De Klerk are not based on any such estimation. His case is based upon the contention that had the respondents' false representations not been made, his moneys would not have been locked into the scheme, but would have been employed to better advantage, having regard even to the tax benefit lost. If he can prove that, I fail to see why he should be non-suited because he made a nominal 'profit' of R14 033.

[26] That brings me to the real issue in the case, has De Klerk produced such evidence that at this stage a court could reasonably find that he is entitled to some damages? A negative answer to this question is the second pillar of the Court *a quo's* judgment.

The law

[27] Without prescribing to the trial judge what principles of law may be appropriate of application at the end of the case, when all the evidence has been led, I think that it will be helpful to indicate some of the avenues, hardly explored before in this case, which may be open to him.

[28] At the outset it should be said that this is not a case in which exact quantification is possible. Proceeding further, it seems to me important to draw attention to differing standards of proof which may apply, depending upon whether the issue is one of causation or one of quantification. In this

connection particularly, the judgment of Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602 (CA) is instructive. The plaintiff's case was that because the defendant, a firm of solicitors, had been negligent in drawing an agreement for the acquisition of certain department stores by the plaintiff, the plaintiff had lost the chance of obtaining appropriate warranties from the sellers that there were no contingent liabilities, which it later appeared that there were. The trial judge had held that there was a real and not merely a speculative chance that had the solicitors advised the plaintiff correctly it would have obtained the warranties, so that it was entitled to substantial damages. Stuart-Smith LJ said (at 1609E-1610D):

> '[Counsel for the defendant] submitted that there was no evidence that Gillow would have given the protection sought by the plaintiffs because neither Gillow [the sellers] nor Theodore Goddard [the sellers' solicitors] gave evidence to say that they would, or alternatively that the plaintiffs could not establish on a balance of probability that Gillow would have done so, and/or that these findings of the judge were against the weight of the evidence.
>
> However, the court pointed out to Mr. Jackson [counsel for the defendant] that he might be approaching the case on the wrong basis and that once the judge had found that the plaintiffs would have sought to negotiate with Gillow to obtain appropriate protection, provided there was a real and not a mere speculative chance that they would have succeeded in the negotiation, that aspect of the case fell to be considered on the *basis of evaluating the chance, a question of quantum, and not causation; and that issue did not depend on a balance of probability*. In the light of this intervention by the court, Mr. Jackson submitted that the suggested approach of the court was wrong, Gillow's favourable reaction had to be proved by the plaintiffs as a matter of causation on balance of probability. But, if that

was incorrect, he challenged the judge's finding (1) that the plaintiffs if properly advised would have sought by negotiation to obtain full, or at least partial, protection. Furthermore, he submitted that the plaintiffs had not passed the threshold of establishing that they had a realistic chance of success in such negotiations.

In these circumstances, where the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.

(I) What has to be proved to establish a *causal link* between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.

Questions of *quantification* of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions *are not decided on a balance of probability, but rather on the court's assessment*, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least, on the hypothetical acts of a third party, namely the plaintiff's employer' (emphasis supplied).

And at 1611G-H:

> 'Secondly, Mr. Jackson submitted that the plaintiffs can only succeed if in fact the chance of success can be rated at over 50 per cent. It so happened that in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, *Otter v Church, Adams, Tatham & Co.* [1953] Ch. 280 and *Hall v Meyrick* [1957] 2 QB 455, to which I shall shortly refer, the plaintiff did recover more than 50 per cent of the full value of the loss. But this is fortuitous and there is no reason in principle why it should be so. In *Yardley v Coombes* (1963) 107 SJ 575 Edmund Davies J awarded one-third of the full liability value of the plaintiff's claim against the negligent defendant solicitors.'

And in conclusion (at 1614C-E):

> '[I]n my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.'

[29] Transposing these *dicta* to the facts of this case, at the end of the trial De Klerk will have to have proved, on a balance of probability, that he would have invested at least some of the moneys used to make the monthly payments (causation). But if he surmounts that hurdle, then I think that the court may be entitled, in quantifying the amount of his damages to form an estimate of his chances of earning a particular figure. This figure will not have to be proved on a balance of probability but will be a matter of estimation.

[30] There is a long line of English cases (see eg McGregor on *Damages* 16ed paras 357-359, 378-381) on the evaluation of a chance of which the plaintiff has been deprived. One of them is *Chaplin v Hicks* [1911] 2 KB 786(CA). The defendant had advertised in a newspaper that he would employ the twelve winners of a beauty contest as actresses. In the first round the readers of the newspapers would narrow down the competitors to 50, by voting their preferences, based on photographs provided by the contestants, which would be published. Ms Hicks was one of the initial 6 000 entrants and had advanced, through popular vote, to inclusion among the 50. The members of this band were invited to present themselves to the defendant so that he might select the lucky 12. But Ms Hicks's invitation did not reach her in time, because of the defendant's breach of his contractual duty to give her timeous notice. In consequence she was excluded from the final selection. A jury's award of substantial as opposed to nominal damages was upheld by the Court of Appeal. Vaughan Williams LJ said (at 791):

> 'I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damage for the *loss of the chance or opportunity* of winning the prize' (emphasis supplied).

After remarking that before she was excluded her chance of being chosen had narrowed to about one in four, the learned judge added (at 792):

> 'I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.'

[31] *Chaplin's* case was applied in *AG Hendrie and Company Ltd v McGarry* 1936 SR 209. The plaintiff had been given a sole mandate to sell a property. In breach of the mandate the owner sold it through another agent. The plaintiff claimed the amount of the commission lost as damages. The Court declined to award the full amount claimed, in recognition of the facts that the mandate was revocable and that the plaintiff might not have succeeded in selling the property. Noneless a substantial award of damages was made, because of the wrongful deprivation of the chance of the plaintiff's earning commission. *Chaplin's* case was also cited with apparent approval in this Court in *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964(A) at 970A-B.

[32] *Boyd v Nel* 1922 AD 414 is a comparable case. An exception was taken to the plaintiff's claim, which was based on the defendant's breach of his commitment under an option given to the plaintiff entitling the plaintiff to buy a certain farm. The breach consisted in selling to another. One ground for the exception was that the plaintiff had not exercised the option. This argument was dismissed. In giving judgment (at 422) Maasdorp JA quoted a similar English case (*Lovelock v Franklin* (15 LJQB at 148) where Denman CJ had said that the plaintiff was entitled to say 'I had a right to expect that you would keep yourself in a condition to fulfil your promise whenever I should choose to exercise the option…' In other words the plaintiff had been deprived of a

chance and on principle the defendant was liable to him, whatever the ultimate damages award might be.

[33] Stuart-Smith LJ's statement that where quantification of damages is dependent upon uncertain future events the plaintiff does not have to provide proof on a balance of probability (by contrast with questions of causation) and is entitled to rely on the Court's assessment of his chances, was preceded in our own country by the judgment of Colman J in *Burger v Union National South British Insurance Company* 1975 (4) SA 72(W). This was a case in which damages for personal injury were claimed. The learned judge said (at 74F-75F):

> 'It was pressed upon me that, as the burden of proof was on the plaintiff, it would be for her to prove the effects of the collision, and that she was entitled to compensation only for those effects which she proved. In so far as that submission relates to pure questions of causation, I accept it, as other Courts have done in such cases as *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (AD). It is on that basis that I exclude from consideration the black-outs, which have not been shown to my satisfaction to be causally related to the collision. I disregard for the same reason the plaintiff's theory or suggestion that the collision was the primary cause, or a cause, of her matrimonial troubles.
>
> I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the *onus* is on the plaintiff, to act on the possibility least favourable to her. *Causation is one thing and quantification is another*, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my

knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like *Turkstra Ltd v Richards* 1926 TPD 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the *quantum* of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the 'informed guess' referred to by Holmes JA in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (AD).

What the Court will not do in such a case is to select, from the range of possibilities presented by the evidence, the possibility which is least favourable to the plaintiff because he bears the *onus*, and has not proved that a more favourable possibility ought to be preferred. In the familiar bone injury case, where the evidence is that the plaintiff will probably suffer from osteo-arthritis at some future time and that it may manifest itself at any time within the next ten years, it is not the practice to assume against the plaintiff, because he bears the *onus*, that he will be free of the symptom until ten years have elapsed. Similarly, when the possible remarriage of a widow is relevant to the assessment of damages, we do not assume against her that she will remarry in the immediate future, merely because she cannot discharge the *onus* of proving that she will not encounter romance round the next corner.

A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that

> possibility is not ignored because 30 per cent is less than 50 per cent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure' (emphasis supplied).

[34] The crux of van der Walt J's decision granting absolution was that De Klerk and De Klerk alone had to come and say that he would have invested elsewhere monthly, had his money not been committed to Commercial Union. I quote:

> 'Maar steeds het ons geen enkele woord van Mnr De Klerk in getuienis byvoorbeeld ek was op soek na beleggings … as ek nie daar belê het nie [at Commercial Union] … dan sou ek daardie geld elke maand gebruik het op advies van my makelaar en dit belê het in annuï teite by X of Y of Z of ek sou 'n dergelike skema gesoek het. Daardie getuienis kort. Daardie getuienis is absoluut noodsaaklik om die ekonomiese verlies daar te stel, want onthou die getuienis is hy is genader om hierdie beleggings by [Commercial Union] te maak, hy het nie gesoek na 'n belegging nie… As daar nie getuienis is dat hy wel beleggings gesoek het en elders sou belê het, getuienis van hom af nie, dan waar kom sy verlies in, waar lê die grondslag vir sy skade?… die eiser moet kom sê ek het skade gely, ek sou belê het, ek het gesoek en hierdie wanvoorstellings het my ontneem van daardie moontlikheid … Gouws … kan dit nie getuig namens die eiser nie, die eiser moet die grondslag lê. Die eiser het nie, die eiser het geen titseltjie getuienis aangetoon dat hy hierdie bedrag … elders sou aangewend het nie, dit is spekulasie, hy moes dit kom sê het …'

It was for these reasons that Van der Walt J granted absolution. He regarded his hands to be tied. I do not think that that was so.

[35] I would agree that it was incumbent on De Klerk, during the course of his case, to present some evidence upon which it might reasonably be found that he would have invested elsewhere. That is a question of causation. If he would not have done so, then he did not lose by having his money committed. Whether he may have proved this element on a balance of probability I shall consider later. But that said, I have several difficulties with the passage quoted. In particular I do not agree with statements to the effect that:

1 It had to be shown that (a) every month he would have invested (b) in a similar scheme.

2 It had to be shown that he would have acted on his own initiative and looked for another investment.

3 That he and he alone could give evidence of what his investments would have been.

4 That there was no tittle of evidence as to what he would have done.

[36] As to points 1 (a) and 1 (b), it seems to me that these are matters relevant to quantification rather than causation. If the trial judge should wish to consider whether in some months De Klerk may not have invested because

he was short of cash, the judge might be disposed to make an allowance for that possibility, whilst bearing in mind that in the end De Klerk actually repaid some capital. Nor do I see why De Klerk ought to have said he would have invested in another annuity rather than in some other way. As to point 2 it seems to me to be subsumed in the requirement that he present some evidence upon which it might reasonably be found that he would have invested elsewhere.

[37] As to point 3, that it was De Klerk and he alone who had to give the evidence, I doubt that that is necessarily so, or even that he is necessarily the best person to give that evidence. After all, he was a man who acted on advice, so that what might have determined his conduct might have been the opinion of another rather than his own. Our courts have constantly emphasized that in assessing damages the court must have regard to the particular facts of the case. That being so it may be wrong to apply what might seem to be stated as principles of general application to cases which are quite different from those in which the statements were made. There have been numerous decisions in which our courts have said that a court will come to a plaintiff's aid in a case of uncertainty and make an estimate in his favour, provided he has led the best evidence available – see for instance *Enslin v Meyer* 1960 (4) SA 520(T) at 523F-524A. Ordinarily the measure of the damage that a car owner has suffered is taken to be the reasonable cost of repairs. But that cost is not necessarily in itself the true measure, merely a

frequently encountered way of arriving at it in particular cases. But when a court says, in the case of an old car, where cost may not be the measure, that the plaintiff has not produced the best evidence or that he has not provided evidence of value before and after the collision, the court is really saying that the evidence that the law requires in the particular case has simply not been led. It may be dangerous to extrapolate from cases such as *Enslin* a general principle as to 'best evidence', that a plaintiff must always personally say what he would have done. Facts may be proved not only by direct evidence but by inference also - a man's intentions may be provable through the observations of others.

[38] That one should not be doctrinaire about what constitutes 'best evidence' is well illustrated by the case of *Arendse v Maher* 1936 TPD 162. A widow sued for damages resulting from the loss of her husband's support. Greenberg J pointed out that had the evidence of an expert on actuary been led it would have been of great assistance. Without it he had to make all sorts of calculations and assumptions. But this did not deter him from arriving at an amount. He added, though (at 165):

> 'It remains, therefore, for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the Court should suffer. The means at hand are extremely unsatisfactory, but …'

It should be remarked that in *Arendse's* case absolution was sought at the end of the whole case, at which stage the requirements of proof by the plaintiff are at a higher level than at the end of his case – 'ought to find' instead of 'might find'. If the trial judge should consider that De Klerk's failure to give evidence on certain matters detracts from the allowable *quantum*, then that is his decision but it is not a basis for entirely non-suiting him.

[39] The reasoning implicit in Greenberg J's judgment is spelt out more fully by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) 98(A) at 113F-114E, as follows:

> 'The second attack on the judgment of the trial Court was that an actuarial computation was inappropriate in the present case for the reason that it was based on assumptions and hypotheses so speculative, so conjectural, that it did not afford any sound guide to the damages which should be awarded.
>
> Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.
>
> It has open to it two possible approaches.
>
> One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.
>
> The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the

assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v Shapiro & Co* 1926 TPD 367 at 379 per STRATFORD J:

> "Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

And in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445(A) HOLMES JA is reported as saying at 451B-C:

> "I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284(N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 *in fin*-283."

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf *Goldie v City Council of Johannesburg* 1948 (2) SA 913(W) at 920.)'

[40] There are two other considerations. The first is that although this case is concerned with the past, in reality what is being looked at is the unpredictable future as it appeared in 1988 and thereafter. And what would particularly have bedevilled any evidence given by De Klerk was the fact that he had the benefit of hindsight. It would be nice if one could place one's bet after the race has been run. How much content or weight his evidence would have had is questionable. In the case of most persons I do not think that an honest plaintiff could have said, other than in general terms, what he would have done. The evidence of the actuary Gouws, whom I assume to have been impartial, might well be better evidence of *quantum* than any that De Klerk might have given, provided, that is, that the prior conclusion may be reached that De Klerk would have invested elsewhere.

[41] The second consideration is this. If, as may be found to be the case, an unlawful negligent (or, *a fortiori*, a fraudulent) misstatement has resulted in the plaintiff being placed in the invidious position of having to ask the court to assess, with all the difficulties inherent in the exercise, the value of his lost opportunity of investing elsewhere, the court should not be too astute to entertain dire and pessimistic speculations emanating from the defendants that the plaintiff may have been even worse off if he had not been culpably misled into making the investment which he did.

[42] This brings me to point 4 – the final and critical question – whether the trial judge was right in saying that there was not a tittle of evidence that De

Klerk would have found alternative investments. I have set out a summary of the evidence given by Gouws and De Klerk in paras [17] to [23]. At this stage, mindful of what was said in *Gafoor's* case, the less said the better. But I would add that once the evidence is approached shorn of the misdirections *a quo*, to which I have referred, and bearing in mind the passage relied on by Mr Maritz as to De Klerk's purpose (which seems to have been overlooked *a quo*), and applying the legal principles which may be appropriate, I do not think that it can be said there was not a tittle of evidence. De Klerk comes across as a man who was a fairly knowledgeable and an active investor. As to the quantification or evaluation of the chance that the alternative investment would have been more profitable, Gouws's evidence may reasonably be read to mean that he has had regard to a spread of investments, the good and the bad and the in between. That is also one's experience of life, that more investments come out well than badly. If not there would be very little investment. Gouws's figure is much higher than Commercial Union's (even after taking account of the tax saving), which is enough, in my view, for a court reasonably to say at least that it is reasonably possible that De Klerk would have done better. And the more likely the court may consider that prospect to be, the higher its evaluation of his lost opportunity will be. Again, we are in the realm of quantification – not causation.

[43] I refer back to what I have said in para [1] about the risks attendant upon an absolution application at the end of the plaintiff's case. I recall, when

I was young at the Bar, a story of a judge (I forget his name, but he was quite well remembered) who said to counsel 'Mr So-and-So I am prepared to give you absolution if you insist, but let the consequences of an appeal be on your head'. Counsel for the defendant (who perhaps has better cause to be well remembered) withdrew his application.

[44] The appeal is allowed with costs with the costs of senior counsel being appropriate. The defendants are to be jointly and severally liable for the costs. The order of the court below is set aside and replaced with an order that absolution be refused. The plaintiff is entitled to any wasted costs occasioned by the application for absolution, the defendants being jointly and severally liable for the same. The case is remitted to the trial court for further hearing and decision.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR

MARAIS JA
CAMERON JA
CLOETE JA
SHONGWE AJA