Case No 195/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

GUARDIAN NATIONAL INSURANCE COMPANY LIMITED Appellant

and

MATTHEW STEPHEN CHARLES SEARLE N O Respondent

CORAM: VIVIER, HOWIE, MARAIS, OLIVIER and SCHUTZ JJA

DATE OF HEARING: 23 February 1999

DATE OF DELIVERY: 1 March 1999

Appealability - Rulings during trial.

J U D G M E N T

/HOWIE JA:. . .

This case concerns a loss of support claim brought on behalf of Samantha Searle whose parents were killed in a motor accident on 22 December 1989 when she was 13. The action was instituted under the applicable motor vehicle insurance legislation, the appellant insurance company being the defendant.

The joint will of her parents appointed Samantha and her brother equal heirs and directed that her share of their estates be held in trust for her care and maintenance until majority. Apart from insurance monies (which, in terms of the Assessment of Damages Act 9 of 1969, have to be left out of the reckoning in a matter such as this), Samantha inherited shares and cash as well as an undivided half-share of immovable property and certain furniture and personal effects. The monies thus due to her were later paid into trust and from time to time the trustee made payments in respect of her maintenance and education.

When the case came before Ngoepe J in the High Court at

Pretoria the only unresolved element of the claim was the quantum of damages. By that stage the parties had each employed an actuary. On certain aspects of quantum the actuaries were in agreement, *inter alia*, that a deduction from the assessed loss of support had to be made in respect of the value of the accelerated receipt of the inheritance. They differed, however, amongst other things, on the method of calculation of that deduction. Accordingly, for the purposes of the hearing, the parties drew up a memorandum. In it they stated their agreement that "the value of the inheritance" (*sic*) should be determined as at the date of trial but declared their inability to resolve the divergent actuarial approaches to calculation, which they recorded as follows:

> "2.1 The Plaintiff (relying upon the views of Actuary G W JACOBSON) assumes a nil increase in the value of the estate assets between the date of death and the date of trial.
>
> 2.2 The Defendant (relying upon the views of Actuary R J KOCH) assumes escalation in line with inflation as from 1

> March 1995 to the date of the trial as a means for estimating the actual current value of the assets as at date of trial. In addition the Defendant asserts that the payments actually received by the claimant from the trust to date of trial should be taken into account."

In his opening address at the start of the trial counsel for the plaintiff informed the Court that the parties, through their actuaries, were able to perform all the necessary calculations involved in the assessment of quantum and that what they sought from the Court was "a determination of principle", which, once made, would enable them to undertake the "mechanical process" of calculating the amount of Samantha's loss. The principle, said counsel, was really a legal question and involved three parts: (a) whether, by way of the payment from the estates to the trust, Samantha had received accelerated benefits as a result of her parents' death; (b) whether the income received by her from the trust fell to be deducted from the amount of support lost; and, (c) the method of calculating the value of any accelerated benefit received. The

response of counsel for the defendant was to challenge the relevance of (a) (given that accelerated receipt of benefits was in effect admitted in the particulars of claim) and to confirm that (b)and (c) were indeed the issues on which the parties sought "a ruling".

Question (c) was, of course, the question formulated in the memorandum and (b) was thus informally added. It would appear from the record that the learned Judge was neither asked to make any determination under Rule 33(4) defining the ambit of the hearing or the questions sought to be resolved, nor did he.

The hearing then proceeded and evidence was given by Mr Jacobson and Dr Koch on behalf of the respective parties. It is unnecessary for present purposes to summarise their testimony. Through little fault of their own much of their evidence was unclear and perhaps gave rise more to uncertainty than finality. At all events, in the course of the hearing it emerged that the actuaries also differed as to whether any

allowance should be made for Samantha's inheritance of a share of the furniture and other movables (as distinct from her share of the immovable property) and, if so, how such allowance should be computed. This dispute arose because she had already enjoyed their use during her parents' lifetime. Although these questions were not put to the Court for a ruling it would seem that counsel for defendant, subsequently, during the course of argument, urged that they be answered in the judgment.

Having reserved its decision, the Court below delivered a judgment which concluded with four rulings. Only two are presently relevant. They read as follows:

> "(ii) No escalation to meet inflation is to be made in respect of Samantha's inheritance for the period 22 December 1989 to date of trial.
>
> (iii) With regard to property and movables, the calculation of Samantha's benefit be made on the basis adopted by Mr W Jacobson, with the proviso that the 25% also applies in respect of movables."

Despite the assurances in the opening address that the parties were able and ready to proceed with the necessary calculations once the Court's requested rulings were given, they failed to act accordingly. The quantum of damages - the element of the claim awaiting finalisation - was left unresolved. Instead, the defendant sought the trial Judge's leave to appeal. At the hearing of that application counsel for the plaintiff opposed it but only on the merits, not on the ground that the rulings were unappealable. In a short judgment the Judge granted leave to appeal to this Court without addressing the question of appealability.

At the hearing of the appeal counsel were asked *in limine* to deal separately with that question. Consequent upon their argument it was ordered that the matter be struck off the roll. Judgment on the costs of appeal was reserved. The reasons for that order and the judgment on costs now follow. (I shall continue to refer to the parties as "the plaintiff" and "the defendant" respectively.)

As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties e g because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed. In this regard see Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532 I - 533 B.

In the present case, if the parties do not eventually settle the claim, the issue of quantum can only be disposed of when the trial Court makes

its award of damages. There being no separate and distinct heads under which the claim has been brought, the resolution of one or some of which could have been dealt with as a separate issue, there can also be no question here of partial disposal. Moreover, this case is clearly distinguishable from Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A), on which counsel for the defendant relied, because there the decision found to be appealable was one upholding a defence which limited the recoverable damages.

Plainly, the rulings here have neither the second nor third of the required attributes. That is enough to disqualify them as appealable decisions. I say that because the first attribute - assuming it were present - cannot on its own confer appealability. A trial court's factual findings are unalterable (absent re-opening) but they are merely steps along the way towards the final conclusion and consequent order. They certainly do not in themselves dispose of even a portion of the relief

claimed. At best for the defendant the rulings in this case were merely such findings or to be equated with such findings. However, the point goes further. Even if the rulings were unalterable it is distinctly questionable at this stage whether they will have any final effect. It is clear that if in due course the trial proceeds, the various actuarial calculations will be made and presented to the Judge. On long-standing authority he will not be bound by any of them. Rather, it will be for him to consider their impact and assess their conformity to the general equities of the case before making such award as in his view is fair to both sides. (Hulley v Cox 1923 AD 234 at 243 - 4; Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A) at 614 F; and General Accident Insurance Co SA Ltd v Summers 1987 (3) SA 577 (A) at 608 I - J.) This process of assessment may well involve, subsequent to the Judge's acceptance of a particular sum as correctly calculated in accordance with his rulings, its effective reduction as a result of allowances for contingencies not yet

considered or allowances to accommodate the equities. Such reduction could be substantial. It could in fact bring the awarded sum closer to the defendant's assessment than to the plaintiff's.

That prompts one to look at the question of appealability from another angle. If the matter now before us were pursued to conclusion, our judgment would not, for reasons already stated, dispose of the issue of quantum. Accordingly, when eventually the trial Court's award is made it could be open to either party to appeal on the basis that the award was either sufficiently inadequate or excessive as to warrant appellate interference. In other words there could be two appeals in the same case in relation to the same issue. That would be squarely in conflict with the basic approach which generally shuns piecemeal appeals. The continuing need for that approach is well illustrated by the following consideration. The eventual award might bear little or no trace of having been influenced by these rulings. In other words in the postulated further

appeal they would have no relevance. In that event an appeal now would have had no bearing on the final outcome of the claim. Such a situation is to be avoided. Appeals must be entertained upon issues which are live, not academic. And cost-effectiveness is also a most material consideration. The enquiry as to appealability is therefore "whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution" (Zweni's case at 531 J - 532 A). A somewhat similar formulation is to be found in Priday t/a Pride Paving v Rubin 1992 (3) SA 542 (C) at 547 E, save that the reference there was not to "the main dispute" but to "one or more of the disputes", a phrase on which counsel for defendant sought to call in aid. It does not assist him. Manifestly the disputes which the trial judge in Priday had in mind could not realistically have been disputes on evidential issues or, as here, disputes about methods of calculation. They

were obviously disputes the resolution of which would pronounce finally upon the claim or defence concerned or a substantive element of the claim or defence. One may put it this way. If the rulings in question here are still relevant after the final award, then the defendant will be at liberty to attack them in the course of an appeal against the quantum of the award. If they are not, there will be no justification for an appeal directed against them. And if such an appeal against the rulings will not be justified then, as may be the case, plainly it will not have been justified now.

As to the disposal of disputes in an efficient and cost-effective way, what remains to be done in the trial in the instant case cannot take much Court time. Subsequent to the award, when made, the defendant will, if armed with grounds for leave to appeal, have the opportunity to appeal in any event. Accordingly no reasons of practicality or economics warrant an appeal at this juncture.

It remains to mention that counsel for defendant relied on the

judgments in Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 10 F - G and Beinash v Wixley 1997 (3) SA 721 (SCA) at 730 C - E. Moch's case concerned an appeal against refusal of a recusal application. It was held that the refusal was tantamount to a decision on a plea to jurisdiction. It therefore bore very definitely on the parties' rights and the relief claimed in the main proceedings. In Beinash the appeal before this Court was found to provide the only opportunity and the only forum the aspirant appellant could possibly have for the correction of the alleged wrong of which he complained. The situation here is so materially different that the Beinash case can have no application.

For the reasons advanced so far the rulings of the Court *a quo* are not appealable.

Contemplating the possibility of that conclusion, counsel for defendant asked that the matter be postponed rather than struck off the

roll. The short answer is that the eventual award and the reasons for it may conceivably provide inadequate grounds on which to grant the defendant leave to appeal afresh. In that event there could be no justification for having the present proceedings still pending.

Turning to the question of the appeal costs, counsel for the defendant submitted, with reference to the case of Kett v Afro Adventures (Pty) Ltd 1997 (1) SA 62 (A), that the parties should bear their own costs. In Kett the appellant sought and obtained leave to appeal from the Court of first instance. The issue of appealability was not raised then, or in the heads of argument on appeal, but only by this Court some time before the appeal. The appellant readily conceded the point and the appeal was struck off the roll. In exercising its discretion as to costs this Court took into account three factors (at 66 H - J): (i) the appellant initiated and prosecuted the appeal; (ii) she did not persist with it once the point of non-appealability was raised; and (iii) the respondents could not be

absolved entirely because the point should have occurred to their legal advisers and the Court of first instance would not have given leave had either party raised it. The appellant was therefore ordered to pay only two-thirds of the respondents' wasted appeal costs.

It was common cause between counsel in the present case that when the defendant sought leave to appeal in the Court below its counsel raised, and presented argument on, the question of appealability. Counsel for the plaintiff, however, opposed leave solely on the merits. The absence of any reference to the point in the judgment granting leave to appeal would seem to indicate that the Judge saw the matter as so clearly appealable that no discussion or reasons in that regard were necessary. He may nonetheless, of course, have been induced to think so by the omission of counsel for the plaintiff to deal with the subject. That possibility must necessarily be borne in mind.

On the other hand it is clear enough from what we were told

by counsel for the defendant that his client was most concerned to obtain this Court's resolution of the actuarial dispute for the purposes not only of the present case but many other matters as well. This would explain, no doubt, why the defendant sought leave to appeal without completion of the trial, was ready to address the Court below on the topic and, unlike the appellant in Kett's case, persisted in contending for appealability even after argument on the subject was requested by this Court in advance of the hearing. There is therefore no reason to conclude that had the plaintiff at any stage contended for non-appealability the defendant would have relented. Nor, in all the circumstances, is there really sufficient reason to think that had the plaintiff so argued the Court below would have refused leave. There are therefore material differences between this case and Kett's. Their effect is such that there is less reason here to relieve the defendant of portion of what, it would seem, should otherwise be its costs liability. Giving due weight to the above-mentioned omission

by the plaintiff's counsel to argue the question of appealability before the Judge, I rate that factor as insufficient to warrant penalising the plaintiff. It is therefore right that the defendant bear the wasted costs of appeal. It is ordered accordingly.

C T HOWIE

VIVIER JA)
MARAIS JA)
OLIVIER JA) **CONCUR**
SCHUTZ JA)

GUARDIAN NATIONAL INSURANCE CO v SEARLE N O

Appealability - Loss of support claim -Rulings on methods of calculation to be adopted by parties' actuaries - Defendant, with leave of trial Court, seeking before conclusion of trial to appeal solely against such rulings. HELD, not appealable.

1-3-99