IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 83/2001

In the matter between:

ANTONY LOUIS MOSTERT N O Appellant

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED Respondent

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CORAM: Smalberger, Howie, Schutz JJA, Nugent and Chetty AJJA

Date Heard: 15 September 2001

Delivered: 25 September 2001

J U D G M E N T

HOWIE JA

[1] Since the judgment in this appeal was delivered disputes have arisen between the parties concerning certain aspects of the order. As a result, the appellant has brought an application, and the respondent a counter-application, each aimed at achieving amendment of the order in various respects. For convenience I refer to the parties as "the appellant" and "the respondent" respectively.

It must be said at the outset that these additional proceedings have come about solely because the issues they raise were not dealt with before us when the appeal was argued.

[2] The order reads:

> "1. The appeal is allowed with costs, including the costs of two counsel and junior counsel's reasonable travelling costs from Canada to attend the hearing of the appeal.

2. The order of the court *a quo* is set aside and the following order is substituted in its stead:

2.1 Payment of the sum of R32 340847,60 together with interest at the legal rate on the said sum from 7 December 1994 until date of payment;

2.2 Payment of the sum of R95 545,66 together with interest at the legal rate on the said sum from 20 December 1994 until date of payment;

2.3 From the amounts referred to in 2.1 and 2.2 are to be deducted all amounts recovered to date by the plaintiff on behalf of the CAF Pension Fund, interest to be adjusted accordingly from the date of each such recovery;

2.4 Payment of the plaintiff's agreed or taxed attorney and client costs in respect of the recoveries made by him to date;

2.5 Costs of suit including

2.5.1 the costs of two counsel and junior counsel's reasonable travelling costs from Canada in respect of attendance at the trial;

2.5.2 The qualifying fees of Mr Cameron-Ellis and Professor Wainer.

3. In the event of the appellant (Plaintiff) having recovered any amounts on behalf of the CAF Pension Fund between the date of judgment of the court *a quo* (21 December 2000) and the date of this judgment, he shall pay such recoveries (net of expenses as agreed or taxed), together with interest at the legal rate, forthwith to the respondent (defendant); and in the event of the appellant

(Plaintiff) recovering further dividends from the estate of Corporate Acceptances Finance (Pty) Limited (in liquidation), he shall pay such recoveries (net of expenses as agreed or taxed) forthwith to the respondent (defendant)."

[3] In response to the order the respondent has paid the appellant R28 303 099 which the former considers to be the balance due after making what it calculates as the deductions referred to in para 2.3 of the order. The appellant disagrees that that is the correct balance. It now seeks an order, firstly, which adds a fourth paragraph to the appeal order, fixing the sums and interest in paras 2.1 and 2.2 of the order as one specific total, namely, R52 806 618. Secondly, the appellant requests an order directing the respondent to pay the appellant that amount less the sum of R28 303 099 paid so far. And, thirdly, there are prayers for special costs orders, including an order that the costs of the application be paid on the scale as between attorney and client.

[4] The respondent opposes the application on the basis of its view of what para 2.3 of the order, on a proper interpretation means. In addition, it moves in its counter-application for three amendments of the appeal order. One aims to extend para 3 of the order to include all amounts which the appellant recovers subsequent to the appeal judgment. The other two proposed amendments seek to extend the ambit of the recoveries referred to in para 2.3 of the order to include, firstly, amounts which the respondent says were recovered by the CAF Pension Fund before the appellant's appointment as curator and, secondly, to include benefits such as waivers of rights which were not then quantified in monetary terms but which are, allegedly, quantifiable.

[5] In dealing with the parties' contentions it has to be borne in mind that the general rule is that a court's final judgment is not capable of being altered or supplemented. However, there is a limited number of exceptions to the

rule. The only one which could apply here is that a court may clarify its judgment or order if, on a proper interpretation, the meaning remains uncertain and it is sought to give effect to its true intention. Even then the sense and substance of the order must not be altered. *Firestone South Africa (Pty) Ltd v Gentiruco A G* 1977 (4) SA 298 (A) at 306 F - 307 A.

[6] It is convenient to undertake the required interpretative analysis in conjunction with the parties' competing submissions.

[7] The point of contention fundamental to the main dispute centres on the last phrase of para 2.3 of the order, "interest to be adjusted accordingly form the date of each such recovery", and arises in this way. The appellant proposes to deduct recovered amounts from the interest component of paras 2.1 and 2.2. The respondent maintains that all deductions should be effected from the capital sums referred to in those paragraphs.

Appropriation of the recoveries to capital, so it is said in the papers, would reduce the Court's award by some R7 million.

[8] The dispute has spawned much debate both in the papers and in written and oral argument. Interpreting the order against the contextual background of the judgment and the relevant facts, it must be remembered that this case did not concern a claim for a liquidated money debt but a claim for unliquidated damages which had to be judicially determined. In that determination this Court adopted the liquidated debt formula of "capital" plus "interest" as the appropriate yardstick and assessed the damages on that basis. It follows that the sums and interest referred to in para 2.1 and 2.2, constitute the awarded damages at the date of judgment. Had the deduction of recoveries not been necessary the damages could just as well have been expressed as one globular total. However, deduction of the recoveries referred to in 2.3 must be effected and the problem that has arisen is that

when the order as it reads now is applied to the facts and circumstances which the order was intended to govern, it is uncertain (notwithstanding the respondent's contention that no intrinsic ambiguity exists) whether the word "amounts" in the first line of paragraph 2.3 was intended to mean only the capital sums or only the accumulated interest or the capital and interest taken together.

[9] Counsel's competing submissions have sought to resolve the uncertainty by reference to the various common law approaches to the appropriation of a debtor's pre-judgment payments to either capital or interest. In particular, counsel for the respondent urged that the deductions required to be made fall within an exception to the general common law rule that such payments are to be appropriated first to interest. Consequently, so ran the argument, the recoveries here must be appropriated to capital.

[10] It was further argued for the respondent that deductions from interest or from the globular total of the damages would not effect the benefit to the respondent which the concluding phrase of para 2.3, quoted above, appears to have been intended to confer. In developing this contention it was shown that the result of those deductions would be no different from that consequent on making the deductions from the accumulated interest as at the date of each recovery, which is, after all, exactly the approach the appellant proposes to adopt.

[11] The respondent's counsel went on to point out that para 3 of the order permits deduction from the damages not only of recoveries made between the date of the trial Court's judgment and the date of this Court's judgment, but deduction of interest (at the legal rate) on those recoveries. He accordingly contended that, logically, the recoveries referred to in para 2.3 must have been intended to benefit the respondent in similar fashion.

Consequently the effect of interest on the recoveries had to be achieved by appropriating the recoveries to capital and thereby reducing, as at date of each recovery, the resultant interest burden.

[12] The first answer to the submissions for the respondent is that the recoveries made by the appellant constitute, as far as the respondent's indebtedness to the appellant is concerned, *res inter alios acta*. They were not payments by or on behalf of the respondent nor were they payments by a third party in discharge of the respondent's debt. Accordingly none of the common law rules and principles referred to by counsel in argument apply.

[13] Secondly, sight must not be lost of the fundamental purpose of the Court's award - expressed in paragraphs [76] and [77] of the judgment - to place the fund, as far as it is possible to do so, in the position it would have been in had there been proper performance by the respondent. To

appropriate to capital would impede the attainment of that object. To appropriate to interest would promote it.

[14] Thirdly, because the respondent did not put up the case that the appellant failed to mitigate the Fund's damages, the question whether interest was or could have been earned on the recovered amounts was not an issue dealt with at the trial or on appeal. Nothing advanced in argument by the respondent's counsel in this regard could overcome that obstacle.

[15] The interest referred to in paragraph 3 of the order is quite another matter. There is no necessary correspondence between the manner in which recoveries before and after the date of judgment are to be dealt with, bearing in mind that the former are relevant to the determination of damages at the date of judgment, whereas the latter are appropriated in reduction of a judgment debt. Accordingly the fact that they are not dealt with in the same manner is not necessarily inconsistent.

[16] Finally, although there is substance in the respondent's argument that the adjustment of interest referred to in the concluding words of paragraph 2.3 implies some reduction of the capital sums referred to in paragraphs 2.1 and 2.2, the fact is that no calculations were presented for consideration and analysis by either party in arguing the appeal, nor were the details and form of the Court's possible order debated. As already stated, the present issues were not dealt with then, conceivably because they were overshadowed by what were thought to be more important questions, and in the circumstances the Court chose to lay down a formula rather that to determine a final sum. Since then it has emerged, when applying the formula in order to calculate the respondent's indebtedness, that recovery deductions, if appropriated to interest, do not impact on capital at all. Therefore, if the order requires appropriation to interest it would strip the concluding phrase of paragraph 2.3 of practical effect. On the other hand, to ensure it does have practical

effect would involve appropriation to capital and that would run counter to what is said in [13] above to be the Court's prime objective in awarding damages. Weighing up these two alternatives, it would be more important to achieve that objective than to render the formula effective in a way which impedes attainment of that objective.

[17] Proper interpretative analysis being unable to remove the uncertainty regarding the word "amounts" in the first line of paragraph 2.3, there is only one way to give effect to the Court's true intention and that is to amend the paragraph, firstly by inserting the words "first from interest, then from capital" after the word "deducted" and by adding, in the culminating phrase of the paragraph, the words "where applicable" after the word "accordingly".

[18] As regards the appellant's request for an order reducing the contents of paras 2.1 and 2.2 to a specific sum, the relevant data were either agreed by the parties before trial or, in the absence of their being dealt with in

argument on appeal, were due to be applied by the parties themselves after delivery of the appeal judgment. There was therefore good reason for our order to be no more specific than it was. Save for the amendments which would be appropriate, there is no good reason to be more specific now. It may be that there are yet further matters not canvassed in argument on appeal, and which may be important and relevant, which we do not know. The appellant's request for an order in a specific sum cannot be acceded to.

[19] As far as the counter-application is concerned, the amendment sought by the respondent to para 3 of the order is a simple matter. Had it been raised in argument it would have taken no time at all to resolve. Even now the appellant concedes the point readily. I have no doubt that, even if not raised at the appeal hearing, it could have been disposed of between the parties by discussion. It certainly did not in itself warrant the trouble and costs of an application.

[20] The other amendments which the respondent wishes to have made involve rendering the words "all amounts recovered by the plaintiff on behalf of the ... Fund" as "all cash amounts and quantifiable benefits recovered by the ... Fund and by the plaintiff on behalf of the ...Fund". Once again one is confronted not by an intrinsic ambiguity but one which is said - this time by the respondent - to arise on application of the order to the facts. In short, the question is: what "amounts recovered" did the Court have in mind? At the trial and on appeal frequent reference was made to a schedule compiled by the appellant of the recoveries he allegedly made. It was referred to in the record as schedule C1 and appears at p 2654. The contents of the schedule constituted facts, among many, that were agreed by the parties before the trial. The schedule was never challenged after that and it was not suggested at the trial or on appeal that there had been any other recoveries, whether in cash or otherwise, which ought to be taken into

account. The case was therefore presented and fought, in both courts, on the basis that all the deductible recoveries appear in the schedule. The proposed amendments therefore concern issues that were not canvassed at trial and therefore not justiciable on appeal or not raised in argument on appeal. The short answer in either event is that they cannot be raised in these proceedings: see *Thompson v SABC* 2001 (3) SA 746 (SCA) at 749 G-I. The counter-application therefore cannot succeed. However, for the sake of greater clarity a reference to the schedule should be inserted in para 2.3 of the order.

[21] As to costs, the appellant asked for the travelling costs of his junior counsel who, as had been the case for the hearing of the appeal, had had to travel from Canada. Given the limited issues involved in the present proceedings I do not think it can be said that this was an expense which was reasonable in all the circumstances. The request must be declined. Then

there is the prayer for attorney and client costs. There have been times in the course of this litigation, from trial onwards, when it has been difficult to avoid the impression that the respondent has pursued points with a persistence quite unwarranted given their lack of merit. However, I do not think that the opposition and counter-application can be stigmatised as deserving of a punitive costs order.

[22] The following order is made:

1. The application is allowed, with costs, such costs to include the costs of two counsel.

2. Paragraph 2.3 of this Court's appeal order is altered to read:

> "From the amounts referred to in 2.1 and 2.2 are to be deducted, first from interest, then from capital, all amounts recovered to date by the plaintiff on behalf of the CAF Pension Fund (as reflected in schedule C1 on p

2654 of the record), interest to be adjusted accordingly, where applicable, from the date of each such recovery;"

3. Save that paragraph 3 of this Court's appeal order is altered by the deletion of the words "from the estate of corporate Acceptances Finance (Pty) Limited (in liquidation)", the counter-application is dismissed with costs, including the costs of two counsel.

CT HOWIE
JUDGE OF APPEAL

CONCURRED:

Smalberger JA
Schutz JA
Nugent AJA
Chetty AJA