THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 279/08

DR ROY BANE	First Appellant
DR K MICHALOWSKI	Second Appellant
DR HAYHURST	Third Appellant
DR BOWDEN	Fourth Appellant
DRS MORTON & PARTNERS	Fifth Appellant

and

MARCO D'AMBROSI	Respondent

Neutral citation: *Bane v D'Ambrosi* (279/08) [2009] ZASCA 98 (17 September 2009).

Coram: BRAND, JAFTA, MAYA JJA *et* HURT, LEACH AJJA
Heard: 7 MAY 2009
Delivered: 17 SEPTEMBER 2009
Summary: Delictual damages - measure of – Plaintiff claiming loss of earnings which would have accrued in United Kingdom – Plaintiff, as a result of delict unable to work in United Kingdom and remaining in South Africa – adjustment to measure of loss in sterling currency to allow for lower cost of living in South Africa.

ORDER

On appeal from: High Court, Cape Town (Van Zyl J and subsequently Traverso DJP sitting as court of first instance).

1. The appeal succeeds to the extent set out below:

1.1 Paragraph (b) of the order made by the court below on 31 January 2008 is amended to read:

'(i) The value of the plaintiff's net past loss of earnings will be the difference between GBP128 714 and ZAR 791 835;

(ii) The value of the plaintiff's claim for future loss of earnings will be the difference between GBP578 884 and ZAR 3 911 705;

(iii) The exchange rate will be the one prevailing at noon on the date of payment.'

1.2. Paragraph (c) of the said order is amended to read:

'Interest at the rate prescribed in terms of s1 of the Prescribed Rate of Interest Act, 55 of 1975, is payable by the defendants as follows:

(i) on the amount of R1 189 253,09 (past hospital and medical expenses) from 17 March 2004 to 31 January 2008;

(ii) on the amount of R400 000 (general damages) from 20 August 2007 to 31 January 2008;

(iii) on the expenditure incurred by the plaintiff, during the period between 6 April 2004 and 31 January 2008, on items categorised in the pleadings as 'future medical and hospital expenses', from the date on which such expenditure was incurred to 31 January 2008;

(iv) on the capital amount of R2 434 630.09 (being the sum of the awards in respect of past and future hospital and medical expenses and general damages) from 31 January 2008 to date of payment;

(v) on the capital amount of the awards for past and future loss of earnings as determined in paragraph (b) hereof, from 31 January 2008 to date of payment.'

2. Save as aforesaid the appeal and the cross appeal are dismissed.

3. The respondent is ordered to pay the appellants' costs of appeal and the costs of the cross-appeal.

JUDGMENT

HURT AJA (BRAND, JAFTA, MAYA JJA *et* LEACH AJA concurring):

[1] 'The figure of justice carries a pair of scales, not a cornucopia.'[1] The principal issue in this appeal is whether the Cape High Court used the correct notional implement in assessing its awards to the respondent for loss of earnings and for future medical expenses in a claim for damages based on negligence. The respondent instituted action against the appellants claiming damages flowing from various negligent acts by the appellants in the course of rendering medical and surgical services to him. The appellants conceded liability to compensate the respondent and the action proceeded on the issue of quantum only. Van Zyl J was asked to decide certain legal issues on the basis of a stated case to enable the parties to narrow the ambit of the evidence which would be necessary. These issues having been ruled on, the matter came before Traverso DJP who made an award in respect of past hospital and medical expenses, general damages and costs on 20 August 2007 and a further award (after directing that an actuary determine the quantum of the claims for future medical expenses and future loss of earnings) on 31 January 2008. Leave to appeal and to cross-appeal against the judgments of both judges was granted by Traverso DJP.

[2] Compared to the complicated course followed in the litigation, the issues in the appeal and cross-appeal are refreshingly narrow. To put them in context it is necessary to sketch the factual background against which the respondent made his claim. I think it is fair to say that the following was common cause when the matter was argued before us. The respondent was born in 1975 and, after completing his schooling and qualifying in various training courses, he started work as a salesman for the office equipment supplier, Canon, in Cape Town. He proved to have exceptional ability in this

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[1] Per Greenberg J in *Innes v Visser* 1936 WLD 44 at 45 to 46.

field. He was described by an erstwhile superior as having 'innate sales ability' and outshone the majority of his co-employees. In 2000 he decided to emigrate and applied for several posts in the United Kingdom. He attended a number of interviews pursuant to these applications and received a large number of job offers. He eventually accepted a position as an office equipment salesman with the company Ikon, which is Canon's biggest competitor in London. He planned to depart for London in January 2001 but, since he had been experiencing persistent heartburn for some time, he decided, in December 2000, to take medical advice with a view to curing the condition. The advice was that he should undergo surgery to treat an oesophageal hernia. He took this advice with catastrophic consequences as far as his health and physical ability are concerned. It is not necessary to outline these consequences because they have been carefully and exhaustively dealt with in the proceedings in the court below and were not in issue before us save in one very limited respect. It will suffice to say that the medical and surgical treatment to which the respondent was subjected so damaged him that he was constrained to cancel his plans to take up employment with Ikon and, instead, decided to stay in South Africa to be near to his family.

[3] The awards for loss of earnings involved a pounds sterling conversion. That for past loss of earnings was to be the difference between £160 893 and R791 835 and the future loss was fixed at the difference between £723 605 and R3 911 705, the exchange rate for both these conversions to be the one prevailing at noon on the date of judgment. On the claim for future medical expenses, Traverso J made an award of R845 377.

[4] The first issue on appeal concerns the question whether the award for loss of earnings should incorporate a deduction based on the circumstance that the cost of living in South Africa is lower than that in London (I shall refer to this as 'the cost of living adjustment'). The second relates to the award of future medical expenses, the appellants' contention being that the respondent's compensation under this head should be limited to the present day value of the additional premiums which the respondent is now, and will in

future be, obliged to pay to his medical aid because he is classified as a chronic sufferer. The cross-appeal relates to whether Traverso DJP should have made allowance, in her assessment of loss of future earnings, for future increases in income and to whether the appellants should have been ordered to pay interest on the award from the date of service of the summons upon them.

The Awards for Loss of Earnings.

[5] It is common cause between the parties that the respondent would, but for his misfortune, have lived and worked in London. Nor is there any dispute as to the computation of the past and future loss of earnings as actuarially discounted to their 'present-day values'. The appellants' complaint is that the court below, in assessing the notional earnings in pounds sterling and deducting therefrom the post-injury earnings in Rand (with an appropriate directive as to the exchange rate to be applied), failed to take into account the fact (both admitted and proved in evidence) that there is a substantial difference between the cost of living in London a nd that in South Africa. Without taking this into account, so the appellants contend, the respondent is receiving the benefit of the higher salary which he would have received in London, without having to cope with the increased cost of living that would have been his lot if he had had to live there to earn it.

[6] To discuss the merits of this submission it is convenient, first, to trace its course through the court below. After pleadings had closed and the parties had complied with the prescribed pre-trial procedures, the appellants (as defendants) admitted their liability to compensate the respondent, leaving as the remaining issue in the trial the quantum of such compensation. Counsel were apparently able to reach agreement on a number of the issues relating to quantum, but remained at odds in regard to the questions of loss of earnings and future medical expenses.

[7] Having thus considerably narrowed the issues between them, counsel agreed to submit a stated case to the court in terms of rule 33(1). I have little doubt that they jointly considered that the procedure which they adopted in

this regard was the most expeditious one and one which was in the interests of their clients, but it was not in accordance with the rules and could have resulted in prejudice to one or other (or perhaps both) of the parties. The stated case was divided into two parts, the one relating to the issue concerning the cost of living adjustment and the other to the issue concerning future medical expenses. Each section contained an introductory paragraph prefaced by the heading 'Factual Assumptions' and the words:

'The Court is requested to determine the legal issue on the basis of the following factual assumptions (without any finding by the Court or concession by the parties being made in this regard) . . .'

Rules 33(1) and 33(2) make it clear that the resolution of a stated case proceeds on the basis of a statement of agreed facts. It is, after all, seen as a means of disposing of a case without the necessity of leading evidence. The case drafted by the parties, with both of them reserving their position with regard to the factual 'assumptions', was plainly contrary to the basic object of the rule and the procedure of asking the court to rule on the issues thus defined was really tantamount to asking the court to give advice on possibly abstract questions. In my view, Van Zyl J should have declined to rule on the issues until each party had unequivocally accepted that it was bound by the facts stated. Nevertheless, the learned judge grasped the nettle. Having considered the arguments presented to him, he rejected the contention that the cost of living adjustment should be taken into account for the purpose of computing the claim for loss of earnings. At most, he said, the potential saving in cost of living expenses might be relevant for the purposes of assessing general damages or 'determining contingency deductions'.

[8] In argument before the court below, it seems that counsel tended to focus on matters such as 'currency nominalism'[2] and the relevance of a plaintiff's standard of living and lifestyle to the computation of his loss of earning capacity. The reasons for the conclusion reached by the learned judge appear, I think, from the following passages in his judgment:

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[2] See paras 15 to 17 of the judgment of Van Zyl J, now reported as *D'Ambrosi v Bane* 2006 (5) SA 121 (C).

'However useful and interesting it may be to compare cost of living in different countries or cities, such comparison must of necessity be based on any number of variables. Chief among these must be the requirements and needs of the particular individual residing and working in such country or city. He or she may choose to live on a voluptuous or luxurious scale, spending his or her full allowance on living expenses. On the other hand he or she may prefer to live frugally with a view to saving as much as possible. Any attempt to quantify such living expenses would inevitably be of a speculative or hypothetical nature, based, as it is, on uncertain and frequently indeterminate factors.[3]

. . . . There are, in my view, no grounds clearly justifying the treatment of reduced cost of living expenses as a benefit to be taken into account in assessing damages for lost earnings. Nor do I believe that justice, fairness, reasonableness or policy considerations require that it be so treated . . . At best for the defendant (*sc* 'appellants') it is a collateral benefit, which is irrelevant for purposes of determining the *quantum* of loss of earnings or earning capacity.'[4]

The ruling which the learned judge made, read as follows:

'The cost of living differential between Johannesburg and London should not be taken into account in assessing the plaintiff's claim for past and future loss of earnings or earning capacity.'

Although he had mentioned, in the course of his judgment, that comparative living costs might justify a contingency adjustment in the overall claim, I think that the clear terms of the above ruling should be taken to have overridden any such suggestion.

[9] The appellants gave notice of an application for leave to appeal against this ruling, as well as against the one concerning future medical expenses. After discussion, however, counsel agreed that the application would be deferred until after judgment had been delivered in the action and it seems that it was on this basis that counsel agreed that the evidence of the appellants' witness, Dr C P van Walbeek, would be adduced before Traverso DJP.[5] Traverso DJP took the view (whether correctly or incorrectly, it is not

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[3] Para 35.
[4] Para 39.
[5] This agreement, I may say, was fortunate since its result was that evidence which, in my view, is plainly relevant to a proper assessment of the claim for loss of earnings was placed before the trial court notwithstanding the ruling on the 'stated case'.

necessary to decide) that she was bound by the ruling and did not consider van Walbeek's evidence in arriving at her conclusion as to the amount to be awarded.

[10] The contentions, alluded to by Van Zyl J in his judgment, against the proposition that the evidence relating to the cost of living adjustment should be considered for the purpose of assessment of loss of earnings fell, broadly, into three categories. The first was the theory of 'currency nominalism' to which reference was made in paras 15 to 20 of the judgment. The second was that any attempt to compute the effect which differences in cost of living might have on a London salary as opposed to a South African one would be so beset by imponderables and speculation that it would be worthless.[6] The third was that the 'reduction' in the respondent's cost of living due to the circumstance that he would not be moving to London, should not be treated as a 'collateral benefit' which fell to be deducted from his loss.[7]

[11] I do not consider that the principle of currency nominalism has anything to do with the enquiry. Indeed, as Mr van Riet, who appeared for the appellants, was at pains to point out, the parties were *ad idem* that the past and future loss of earnings should be assessed in pounds sterling and that the resulting figure should be converted to rand at a fixed date. In the circumstances, this principle had no bearing upon the appellants' contentions.

[12] The respondent's contention that it was futile to attempt to quantify the effect which a difference in cost of living might have on a particular individual because of differences in the lifestyle of individuals and the imponderables associated with any attempt to predict the vagaries of economic parameters such as cost of living, price indices and the like, plainly found favour with the learned judge. The contention is, however, flawed in two respects. First, because the computation of compensation for the loss of earnings must focus on a plaintiff's *earning capacity*, what he does with his money after he has earned it can hardly be relevant. Put into bluntly commercial terms, the

[6] Paras 21 to 24, 38 and 39.
[7] Paras 27 to 30, 32 to 34 and 39.

computation is about turnover, not profit. Secondly, the fact is that the courts habitually have to grapple with problems of this nature where resort must be had to estimates and speculation in order to arrive at a figure which the court considers to be as fair as possible to both sides. This is clear from the well-known and much-quoted *dictum* by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO*:[8]

'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.'

This principle applies with equal force to the manner in which a judge is called upon to deal with any aspect of the assessment of the loss of earnings – if it is relevant to the assessment, he or she must make the best of the material before the court, notwithstanding that the result may well be open to criticism. I do not consider, therefore that the difficulties associated with making an accurate assessment can properly or justifiably be regarded as a bar to the application of the cost of living adjustment in this instance. If the mathematically-based route to the assessment is effectively blocked by unreliable assumptions and imponderables, then the judge must resort to the less desirable alternative of applying a contingency factor or simply making an estimate which he or she feels will do justice in the circumstances. The object of the exercise is always to arrive at a fair award which compensates the

[8] 1984 (1) SA 98 (A) at 113 to 114.

plaintiff for his actual loss and does not 'punish' the defendant for his delict. (See the judgment of Trollip JA in *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) at 171 and 173 to 174.)

[13] It seems to me that it is erroneous to treat the cost of living adjustment as a species of 'collateral benefit' – a concept which our courts have found difficult to develop and justify along uniform and logical lines.[9] As was stressed by Trollip JA in *Byleveldt*, at p 173:

'[The] question is what, according to law, is the quantum of [the plaintiff's] economic loss and not, is the defendant entitled to the benefit of any item? The defendant is liable for neither more nor less than that quantum, irrespective of whether or not the defendant gets any "benefit" in the process of fixing that quantum. Indeed, in that context it is fallacious to speak about a 'benefit being conferred' on the defendant by so reducing [the plaintiff's] loss of wages, for *ex hypothesi* the defendant was never liable for the amount by which the loss is reduced . . .'

Whether one refers to a 'collateral benefit' (to the plaintiff) or a 'benefit to the defendant' (arising from the fact that a deduction from the plaintiff's *prima facie* loss is to be effected) is immaterial to the clear message in this passage – the main exercise is to ascertain the extent of the plaintiff's actual loss.

[14] It follows from what I have said above that the grounds upon which Van Zyl J decided that the cost of living adjustment should not be applied, did not justify that conclusion. On the basis that she considered herself bound by the ruling, even after Dr van Walbeek had given evidence,[10] Traverso DJP expressly refrained from considering that evidence or, indeed, the question whether the cost of living adjustment should be made in any form. This court is in as good a position as the court below was, to consider the evidence and to decide whether, and to what extent, the cost of living adjustment should be applied to the claim for loss of earnings.

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[9] See *Zysset v Santam Ltd* 1996 (1) SA 273 (C) at 278 to 279.

[10] It is not necessary to consider whether Traverso DJP's view on this aspect was correct, although I must say that if Van Zyl J would have had the power to reconsider his ruling once the evidence had been adduced, then so did the learned Deputy Judge President.

[15] The essence of the computation of a claim for loss of earnings is to compensate the claimant for his loss of earning capacity.[11] As I have indicated the emphasis in the argument presented to Van Zyl J by both sides appears to have been upon the type of lifestyle and the living expenses incurred by a typical plaintiff in the position of the respondent.[12] When a court measures the loss of earning capacity, it invariably does so by assessing what the plaintiff would probably have earned had he not been injured and deducting from that figure the probable earnings in his injured state (both figures having been properly adjusted to their 'present day values'). But in using this formulation as a basis of determining the loss of earning capacity, the court must take care to make its comparison of pre- and post-injury capacities against the same background. A simple example will demonstrate where the danger lies in this regard. An employee is required to travel a substantial distance each day in connection with his work. Instead of giving him a separate travelling allowance or paying his travelling expenses, his employer pays him an additional amount as salary. The amount is designed to indemnify him against the additional expense he must incur to perform his duties. The payment of it to him could hardly be said to be attributable to his earning capacity. If he were to become injured and rendered unable to perform that particular job any longer, thus dispensing with the need to travel, he could hardly be heard to contend that the travelling allowance should be included in the computation of his notional earnings for the purpose of assessing his loss. To extend the concept to one a little closer to the case under consideration: An employee is employed in South Africa and paid a salary of RA. His employer requires him to move to London to do the same work, but, to cater for the increased expense of living in London, fixes his salary there at R(A+B). The employee could hardly contend that his *earning capacity* had increased by the quantity B simply because he had moved to

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[11] *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150; *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917; *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 at 111.

[12] This was probably due to the manner in which the stated case was framed, viz

'That at all material times the cost of living expenses (*sic*) in the United Kingdom have been and will be considerably higher than in South Africa;

That various agencies compile, on an annual basis, comparative figures regarding the relative cost of living in many major cities around the world, which information is used *inter alia* to assist multinational companies in determining cost of living allowances for expatriate or seconded workers.'

London. Once again it would be a case of the increase in salary being primarily a form of indemnity against the extra expense which the employee would be expected to encounter in order to maintain the standard at which he was able to live in South Africa at a salary of RA. If such an employee were to be the victim of a delict which rendered him unable to continue working, and if he were consequently to return to South Africa, I do not think that it could be contended, fairly, that the wrongdoer should be obliged to compensate him for his loss of earnings based on the rate of his London income.

[16] The first question is whether the evidence of Dr van Walbeek was such as to give the court a 'logical basis' for arriving at a quantitative assessment of the effect of the London cost of living on the South African award to the respondent. I regret to say that it was not. Dr van Walbeek's evidence was aimed at proposing a method of formulating, quantitatively, the degree to which the income of employees in London has been and will in future be affected by the cost of living there and, thereafter, of factoring this into the claim for loss of earnings so as to ensure that the respondent would not be unduly benefited by being paid his compensation in South Africa. He acknowledged that his approach involved a considerable amount of speculation and, in the end, his evidence, as I understand it, left the court with an array of suggestions as to how to co-ordinate the numerous variable factors that are relevant to matters such as price indices, inflation and the other ephemeral concepts in which economists deal. I do not consider that his evidence can be treated, by any stretch of the imagination, as being equivalent, for instance, to that of an actuary who performs his calculations on the basis of mathematical formulae applied to fairly well-established patterns of currency behaviour, mortality tables and the like. Although Mr van Riet endeavoured to persuade us to use Dr van Walbeek's evidence as a basis for calculating the degree of benefit which the respondent would derive if no provision is made for the cost of living adjustment, I do not think that the court should embark upon such an exercise. In other words, and applying the second example discussed in para 16, above, there is not sufficiently cogent evidence on which to attempt to quantify the 'B' factor in the example or, at

least, to identify the portion of that factor which could fairly be described as an allowance to cater for the higher cost of living in London.

[17] What *is* clearly established by the evidence is that it is common practice (and, indeed, the only sensible one) for companies to include a 'factor B' in their salary structure in these circumstances. The evidence also establishes that the same would apply to the commission structure for a salesman such as the respondent. As I have indicated, however, the inability to arrive at a quantitative assessment in this regard does not mean that the court should ignore the circumstance that the loss of earning capacity is not truly reflected by the difference between the discounted London earnings and the South African figure. To do so would plainly be to ignore the metaphorical scales and allow the respondent to receive more compensation than would be necessary to make up for his lost earning capacity. In this situation, it becomes necessary to resort to a 'contingency deduction' in an attempt to offset any advantage which the respondent might otherwise derive from an award in the form made by the court below. I should perhaps stress that, in so resorting, the court can do little more than make the 'blind guess' to which Nicholas J referred in *Bailey*. But at least this will have the effect of balancing the scales to an extent and eliminating an anomaly from the computation of the award. Traverso DJP incorporated a contingency deduction of 20 per cent into her computation of the notional earnings in London. This was to cater for the uncertainties associated with the respondent's prospects of making a success of his London venture. This is a fairly robust reduction but it was made without the cost of living adjustment in mind. In my view, a further reduction of the notional past and future London income by 20 per cent should go some way toward achieving a balanced award.

[18] The actuary, Mr Lowther, adjusted the computations of past and future London earnings in accordance with directives given by Traverso DJP. He arrived at a 'past' figure of £160 893 and a future one of £723 605. These figures should each be reduced by a further 20 per cent, ie to £128 714 and £578 884, respectively.

Future Medical Expenses

[19] The contention of the appellants is that since Medical Aid societies are now statutorily obliged to accept all applicants as members[13] – even those with pre-existing health problems, they are now to be equated to national health schemes in the English or European contexts. On the authority of *Zysset*, Mr van Riet contends that the respondent's membership of the Discovery Health Medical Scheme should no longer be regarded as a form of 'private indemnity insurance'. It could accordingly not be treated as *res inter alios acta* and payments received from the health scheme should be treated as a benefit to be deducted from the respondent's claim for future medical expenses.[14] Counsel's submission is that the claim for future medical expenses should be restricted to the additional premiums which the respondent will have to pay to his medical aid scheme because he is now classified as a 'chronic sufferer'. This argument was rejected by Van Zyl J when he ruled on the second issue in the stated case. As to counsel's attempt to equate the statutory obligation upon medical aid societies to accept all applicants as members to some sort of 'national health scheme' or 'social insurance benefit', Van Zyl J pointed out that payments which the medical aid was and is obliged to make to the respondent constitute the discharge by the medical aid of contractual obligations flowing from the contract concluded between it and the respondent. As such they constitute *res inter alios acta* and the appellants cannot claim the benefit of them.[15] I fully agree with the learned judge's approach on this issue. Nor is there any substance in the contention that the Medical Schemes Act has had the effect of creating something akin to a social insurance benefit in South Africa. While it may be obligatory for a medical scheme to accept anyone who applies to become a member, there is no obligation on the public to take up such membership. It is not for the appellants to dictate to the respondent as to how he should structure his expenditure, and the fact that he is, for the present at least, a member of a scheme does not mean that that arrangement will continue into the foreseeable future. Moreover, it would be surprising if the scheme to

[13] Section 29 (1) (n) of the Medical Schemes Act, 131 of 1998.
[14] This was thoroughly dealt with by Scott J in *Zysset*.
[15] *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 920; *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A) at 42.

which he belongs does not provide for the principle of subrogation, which will mean that the respondent will ultimately have to transfer any compensation paid to him by the appellants to his medical scheme. It is not necessary, however, to explore this aspect in any greater detail. The contention that the award for future medical expenses should be modified in any way is without substance.

The Cross-Appeal.

[20] As indicated earlier, there are two grounds of cross-appeal against the judgment of Traverso DJP. The first is that the learned judge failed to make any provision for future increases in income in computing the respondent's notional future earnings in London. The basis upon which the future earnings were computed was that the respondent's commission income would peak at £43 200. After the learned judge had adjourned the matter to enable the actuary to perform the additional calculations directed by her, the respondent's counsel raised the issue that the revised calculations made no allowance for 'promotional increases'. As Traverso DJP pointed out, however, the question of promotion had never been part of the respondent's case. Having regard to the nature of the work which the respondent would have been performing and the commission basis on which he was to be mainly remunerated, increases in his income would flow from increased commission. The assumption in this regard was that, after the first few years he would consistently achieve his 'commission target'. As Traverso DJP put it in regard to counsel's submission:

'The only room for promotion in the field in which the plaintiff would have been working, would have been if he was promoted from salesman to manager, and this scenario was never addressed in evidence.'

This, in my view, is a complete answer to the respondent's contention about future increases in his London income.

[21] The second issue arising out of the cross-appeal relates to the respondent's contention that interest should accrue on the awards made by Traverso DJP from the date of service of the summons in the action. Mr Irish submitted that Traverso DJP had erred in holding, as she did in relation to his

submissions in this regard, that 'interest can never be claimable in regard to loss of earnings and/or future medical expenses'. In stating the proposition so categorically, it seems that the learned judge may have overlooked the provisions of s 2A of the Prescribed Rate of Interest Act, 55 of 1975, but the issue has virtually been disposed of by concessions made by Mr van Riet on behalf of the appellants. These are that the parties have agreed:

(a) that the appellants are liable for interest, at the rate prescribed in terms of s 1(2) of Act 55 of 1975, on the claim for past medical and hospital expenses from 17 March 2004 (being the date on which the appellants were furnished with full particulars showing how that claim is made up); and

(b) that the appellants will pay interest, at the said rate, on any expense actually incurred prior to the date of judgment, in respect of any item categorised in the pleadings as a 'future medical expense' from the date when such expense was incurred.

It seems to me that the clearest way in which to provide for this agreement in the order is to stipulate that these amounts are to gather interest separately from the date agreed until the date of judgment and that they will then be incorporated in the capital balance of the judgment debt on which interest will be due from the date of judgment.

[22] In rejecting the contention that the other aspects of the claim should carry interest from the date of service of the summons, Traverso DJP said:

'As this trial proved the damages suffered by the plaintiff, and the calculation thereof, were complicated, and many of the underlying facts were only unravelled during the course of the trial and, in addition, the plaintiff's claim was amended during the course of the trial. . . . '

On this basis the learned judge decided that the respondent was only entitled to interest from the date of judgment. Insofar as the claims for past and future loss of earnings and general damages are concerned, her reasons for declining to make the order sought by the respondent are convincing. The lion's share of the evidence at the trial was clearly devoted to defining and debating the principles applicable to the somewhat unusual position in which the respondent found himself as a result of his inability to proceed with his career plans. But Mr Irish contended that if the appellants had wished to

protect themselves against the running of interest in the face of what they must have known would be a very substantial award (especially after they had acknowledged liability), it was open to them to pay into court or make a tender and the position would then have been governed by subsec 2A(4), which provides that, in such circumstances, the running of interest is interrupted between the date of tender and the date of acceptance or award. There is no indication on the record that the appellants have taken a stance which has prolonged the litigation. Indeed, it seems that the appellants did what they could to crystallize the issues. They reached agreement with the respondent on past medical expenses and they co-operated in trying to crystallise the issues by way of the questionable procedure before Van Zyl J. Even if the learned judge's attention was not particularly focused on the provisions of s 2A of Act 55 of 1975, and, more particularly subsec (5),[16] I agree fully with her reasons for declining the respondent's request in this instance.

[23] There remains one matter which I should mention before considering the issue of costs. It relates to paragraph (b)(iii) of the order made by Traverso DJP in connection with the exchange rate which is to apply when the sterling currency is converted to rand for the purpose of fixing the claims for loss of earnings. The learned judge ordered that the rate prevailing at noon on the date of judgment was to be the rate used. Counsel are, however, agreed that the correct rate will be that prevailing at the time of payment.

[24] As to the question of costs, the appellants have been successful on the main issue, namely the computation of loss of earnings. It follows that they should have their costs of appeal. The costs of the cross-appeal should follow its result and there is no reason why the respondent should not pay the appellants' costs in this connection.

[25] I make the following order:

1. The appeal succeeds to the extent set out below:

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[16] Subsection (5) reads: 'Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law . . . may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which such interest shall accrue and the date from which such interest shall run.'

1.1 Paragraph (b) of the order made by the court below on 31 January 2008 is amended to read:

'(i) The value of the plaintiff's net past loss of earnings will be the difference between GBP128 714 and ZAR 791 835;

(ii) The value of the plaintiff's claim for future loss of earnings will be the difference between GBP578 884 and ZAR 3 911 705;

(iii) The exchange rate will be the one prevailing at noon on the date of payment.'

1.2. Paragraph (c) of the said order is amended to read:

'Interest at the rate prescribed in terms of s1 of the Prescribed Rate of interest Act, 55 of 1975, is payable by the defendants as follows :

(i) on the amount of R1 189 253,09 (past hospital and medical expenses) from 17 March 2004 to 31 January 2008;

(ii) on the amount of R400 000 (general damages) from 20 August 2007 to 31 January 2008;

(iii) on the expenditure incurred by the plaintiff, during the period between 6 April 2004 and 31 January 2008, on items categorised in the pleadings as 'future medical and hospital expenses', from the date on which such expenditure was incurred to 31 January 2008;

(iv) on the capital amount of R2 434 630.09 (being the sum of the awards in respect of past and future hospital and medical expenses and general damages) from 31 January 2008 to date of payment;

(v) on the capital amount of the awards for past and future loss of earnings as determined in paragraph (b) hereof, from 31 January 2008 to date of payment.'

2. Save as aforesaid the appeal and the cross appeal are dismissed.

3. The respondent is ordered to pay the appellants' costs of appeal and the costs of the cross-appeal.

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N V HURT

ACTING JUDGE OF APPEAL

Appearances:

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Counsel for Respondent:	D F Irish SC A D Brown
	Instructed by Fairbridge, Arderne & Lawton Inc, Cape Town Symington & De Kok, Bloemfontein