

Case no 119/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

S A EAGLE INSURANCE CO LTD

Appellant

and

GRAEME ERIC HARTLEY

Respondent

CORAM: JOUBERT, ACJ, E M GROSSKOPF, MILNE, KUMLEBEN,

JJA, et NICHOLAS, AJA

HEARD: 28 August 1990

DELIVERED: 26 September 1990

J U D G M E N T

E M GROSSKOPF, JA

The respondent was injured in a motor car collision on 5 February 1983. He instituted a third-party action in the Cape Provincial Division against the appellant, who was the statutory insurer of the vehicle with which the respondent had collided.

The matter was heard by FAGAN J, who gave judgment in favour of the respondent on 21 December 1988. The respondent's total damages were calculated by the court at R464 245. However, it was common cause at the trial that fault in respect of the collision should be apportioned on a fifty/fifty basis.

Consequently judgment was granted in the respondent's favour for payment of R232 123 as damages, with ancillary orders for the payment of interest and costs.

Included in this award was an amount for past loss of earnings, i e, earnings lost by the respondent, as a result of his injuries, between the date of the collision and the trial. This amount was calculated as follows. But for the accident, the respondent would have been able to earn R155 698 between the date

of the accident and the date of the calculation of his damages (1 October 1988). The court reduced this figure by a 5 percent contingency allowance, which then gave a figure of R147 913. The court found that the respondent's actual income during this period was R77 554. By subtracting the actual income from the potential income the court derived a figure of R70 359, which reflected the respondent's loss of earnings in rand terms. The court then added this figure to the amount awarded for future loss of earnings, and (by consent) made an allowance to compensate for the period between the date of calculation, i e, 1 October 1988, and the date of judgment, 21 December 1988. This gave a figure of R382 228 for a total of past and future losses of earnings as at 21 December 1988. To this was added what the court called an "Everson adjustment" of R31 457. This was an adjustment to compensate the respondent for the loss of purchasing power of money since the dates upon which his past losses of earnings had been incurred, and it is the propriety of this adjustment which is in issue in the present appeal. The

addition of the "Everson adjustment" resulted in a total loss of earnings (past and present) of R413 685, which was added to the amounts found due in respect of past medical expenses and general damages to reach the total figure of R464 245 which I mentioned earlier. As I stated above, half this amount was awarded to the respondent as damages, and it is accordingly half the amount of the Everson adjustment which will fall to be deducted if the appeal were to succeed (i e, R15 728). The court a quo granted leave to appeal against that portion of its judgment in which it held that the "Everson adjustment" should be added to the respondent's past loss of earnings.

The expressions "Everson adjustment" and "Everson principle" derive from the title of the pioneering case on this topic, viz. Everson v Allianz Insurance Ltd. 1989(2) SA 173 (C). In that case also the plaintiff was entitled to an award in respect of past loss of earnings. What was not in dispute were the sources and quantum of the sums which the plaintiff would have earned had he not been injured, and those which he had in

fact earned over the period; and therefore what in rand terms he had lost. The plaintiff's actuary, Mr. Koch, had expressed the opinion in evidence that to place the plaintiff in the position in which he would have been had he not been injured, it was necessary to add to the sum of the loss as expressed in rand terms an allowance to compensate for the reduction of the buying power of the rand during the period between the date of the accident and the date of the trial. The fact and extent of the reduction were common cause. The court (HOWIE J) dealt with the matter as follows (at p 174 I to 175 F):

"What is in dispute in the present connection is whether I should add on the aforesaid allowance for lost buying power. Counsel intimated that they were not aware of any reported case in which such addition had been effected with regard to loss of earnings up to the time of trial. Nor am I. In my view the question of an allowance for lost buying power is not a question involving legal policy but one of fact and the application of established principles. It is trite that plaintiff is entitled by the Court's award to be placed in the position, as far as is reasonably possible, as that in which he would have been had he not been injured.

The evidence of Mr Koch established without any question that if one were simply to award plaintiff

the number of rands he has lost he would not be placed in the required position and that it is necessary, in order to achieve that position, to adjust the numerical value of the rand sum involved by addition of the lost buying power allowance referred to. That adjustment does not amount to an indirect and legally incompetent award of interest on damages as defendant's counsel sought at one stage to suggest. Factually the evidence proves that plaintiff has indeed suffered loss in respect of the diminished buying power of the rands he would have earned uninjured. The allowance made by Mr Koch for increased earnings during the period, even assuming that such increases were prompted or necessitated by inflation-related considerations, do not serve to eradicate that loss of buying power. The allowance for increased earnings is merely one of the factors used in arriving at the number of rands lost. The fact is that plaintiff did not receive those increased earnings which he would have done if uninjured. He has had to wait until the trial to receive them. Therefore, having determined the number of rands lost, what is then required is the adjustment of that number so as to reflect the real value of the rands lost. This is all part and parcel of establishing the damages. It is not some addition to an already established sum of damages.

The recognition of the fact that loss has been incurred in respect of the diminished buying power of what plaintiff would have earned had he not been injured and the making of an allowance to compensate for that loss is, to my mind, fully supported by the approach and the reasoning of the Appellate Division in General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo 1987

(3) SA 577 (A) at 615H-616A. Plaintiff is therefore entitled, subject to 10% contingency deduction, to an award comprising the numerical rand value of his past loss of earnings and an upward adjustment of that value so as to express the loss in real terms."

Everson's case was followed in Jonker v President Insurance Co Ltd, case no 87/14715 in the Witwatersrand Local Division (SCHABORT J) and in the present case. It was not followed by PREISS J in Moekoena v President Insurance Co Ltd 1990(2) SA 112 (W). Its correctness has to be determined in the present appeal.

A convenient point of departure is the decision of this court in General Accident Insurance Co SA Ltd v Summers; Southern Versekeringssassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo 1987(3) SA 577 (A); to which I shall refer as the Summers case. HOWIE J relied heavily on this decision in the Everson case, and it is important to have clarity on what exactly was decided by it.

The relevant part of the judgment in the Summers case dealt with the time at which past loss of earnings or past loss of support should be calculated. For convenience I shall deal

only with past loss of earnings: the same considerations apply to past loss of support. The issue may be illustrated as follows. Assume that it appears at the trial that the plaintiff lost income in an amount of R1000 in the period between the accident and the trial. Should he then be awarded the full amount of R1000, or should this amount be discounted back to the date of the injury, which would result in a substantially lower amount being awarded? The argument in favour of discounting rested on the premiss that damages are to be calculated as at the date of the delict. This premiss was not accepted in the Summers case in respect of loss of earnings - such a loss, the court held, manifested itself at a date later than the date of the delict, and its extent could properly be determined as at that later date (at p. 613 C-G).

Of course, if it be supposed that judgment had been given the day after the delict was committed, the amount of R1000 would have had to be discounted, and the plaintiff would have received a smaller amount. The reason is that the plaintiff

would then have been paid for his loss even before it was incurred. The purpose of discounting in such cases is to award the plaintiff a sum of money which, if invested at an appropriate rate of interest, would provide him with the amount of R1000 (which we assume to be his loss of earnings) at the time when he would have received it had the injury not been sustained. In this way he would be placed in the same position as that in which he would have been if the delict had not been committed.

However, if the loss of R1 000 had already been sustained when the award is made, there could be no reason why it should be discounted to any earlier date. The plaintiff should then be awarded the full amount. This is in essence what is said in the passage from the Summers case quoted by HOWIE J in Everson's case at p 175 E-F. It provides no support for the contention that the loss of earnings already suffered (the R1 000 which I am using as an example) should be increased in any way for the reduction in purchasing power of money or any other reason.

If the Summers case affords no justification for such an increase, how does the matter stand in principle? Now, ex hypothesi, the R1 000 represents the actual financial loss incurred some time before the trial. Let us assume it was incurred on a single occasion. If judgment had been given a day later an amount of R1 000 and no more would have been awarded. That represents "the number of rands he has lost" in the words of HOWIE J (Everson's case, at p 175 A). The application of the Everson principle would entail that the plaintiff would be awarded a different number of rands at the trial if it took place some time after the loss was incurred and there had been a change in the purchasing power of the currency in the interim. (In recent decades we have suffered a decline in purchasing power, but the same rule must in principle apply to an enhancement). The application of the Everson principle would thus "be tantamount to altering the quantum of the debt according to when the (plaintiff) seeks to exact it"

(Cosmopolitan National Bank of Chicago v Steinberg 1973 (4) SA

579 (R) at p 581 F; Voest Alpine Intertrading Gesellschaft M B H v Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W) at p 151 D).

This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation.

See Farlam and Hathaway, *Contract: Cases, Material and Commentary*, 3rd ed., p 719 note 2; H.J Delpont, *Inflation and South African Law*, (1982) 4 *Modern Business Law* 115 and A Spandau, *Inflation and the Law*, 1975 S A L J 31.

Nominalism is the norm in the common law of western states with similar systems to our own. Thus in Deutsche Bank Filiale Nürnberg v Humphrey (1926) 272 U S 517 at p 519 the

United States Supreme Court said:

"An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Obviously, in fact a dollar or a mark may have different values at different times, but to the law that establishes it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account."

The same applies in England. In Treseder-Griffin and Another v Co-operative Insurance Society Ltd (1956) 2 Q B 127 (CA) at p 144 DENNING L J said the following:

" ---- in England we have always looked upon a pound as a pound, whatever its international value. We have dealt in pounds for more than a thousand years - long before there were gold coins or paper notes. In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events. --- Creditors and debtors have arranged for payment in our sterling currency in the sure knowledge that the

sum they fix will be upheld by the law. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything else is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same."

As far as the Netherlands are concerned, see
 Verbintenissenrecht, Part 1, in the Asser Series, 8th ed.(1988)
 at p 450:

"De schuldenaar moet het nominale bedrag van de verschuldigde som betalen. Niet terzake doet of wellicht de metaalwaarde van de munten waarmee wordt betaald, tengevolge van verandering van gehalte of gewicht gewijzigd is (intrinsieke waarde), noch welke prijs het geld waarmee de betaling moet geschieden in het internationaal verkeer doet (koerswaarde), noch of er wijziging optreedt in de koopkracht van het geld, d.w.z. het aantal goederen en diensten dat men zich ermee kan verschaffen. In geval van waardedaling zal de schuldeiser met betaling van het gedevalueerde of gedeprecieerde geld naar zijn nominale waarde genoegen moeten nemen. Een koersdaling of

koopkrachtdaling (geldontwaarding) van de gulden komt dus ten laste van de schuldeiser."

Concerning German Law, see Larenz, Lehrbuch des Schuldrechts, 12th ed. (1979) at p 142 and p 144. See also, generally, Delpont (supra) at pp 120 -1.

Delpont (op.cit. at pp 116-8) sets out the reasons commonly given for currency nominalism. It is not necessary to consider them in detail, except to point out that it would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. I need not, however, labour this point: currency nominalism, for whatever reason, is firmly entrenched in our law.

The principle of currency nominalism is in my view to be applied as follows in the present case. The respondent suffered a loss of income, expressed in rands, prior to the

trial. That loss had to be made good by the appellant by paying to the respondent the number of rands which he has lost, irrespective of whether the purchasing power of the rand has varied in the interim.

This does not, of course, mean that the effects of inflation are never relevant in the computation of damages, as, indeed, is shown by examples mentioned in argument by the respondent's counsel. Take, for instance, damages for future loss of earnings or loss of support. In computing such damages one must have regard to what the plaintiff or the breadwinner would have earned in the future. Loss of purchasing power of the currency is relevant to this enquiry, but only indirectly. As stated by Lord FRASER OF TULLYBELTON in Cookson v Knowles 1979 AC 556 at 576 E-F:

"What is relevant here is not inflation in general, but simply increases in the rate of earnings for the job in which the deceased person would probably have been employed. The reason for the increase is irrelevant. There would be no justification for attempting to protect dependants against the effects of general inflation, except to the extent that they might

reasonably expect to have been protected by increases in the deceased person's earnings."

The same applies, mutatis mutandis, where a plaintiff claims for his own future loss of earnings. Ultimately, in respect of both future loss of support and future loss of earnings, the court must calculate what such loss is likely to be in rand terms. The expected rate of inflation is only one of the features bearing on this enquiry.

Then reference was made to awards of general damages. As stated by Lord DIPLOCK in Wright v Railways Board (1983) 2 All ER 698 (HL) at p 699 j, non-economic loss is not susceptible of measurement in money. Any figure which is awarded cannot be other than artificial, and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncracies of the assessor, the figure must be "basically a conventional figure derived from experience and from awards in comparable cases" (Ward v James (1965) 1 All ER 563 (CA) at p 576 E). The need for even-handedness requires that, when

comparing awards in comparable cases, regard must be had to the purchasing power of the currency at the time when such cases were decided, otherwise one would not be comparing comparables. This does not offend against the principle of currency nominalism.

In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss. Such a valuation must obviously be made in terms of currency values as they are at the time of valuation, and not in terms of the values of an earlier time. In the same way, as it was put in argument, a valuer determining the present value of a farm would not use the currency values of the past. A monetary debt is not, however, subject to a similar type of valuation. It has to be paid according to its nominal value.

From what I have said it follows that Everson's case was, in my view, incorrectly decided. In the present case FAGAN J followed and applied Everson's case, and his judgment therefore cannot stand.

The result which I have thus reached is

not satisfactory. If a plaintiff through no fault of his own has to wait a substantial period of time to establish his claim it seems unfair that he should be paid in depreciated currency. Of course, in respect of many debts this problem is resolved (or partially resolved) by an order for the payment of interest, and the Prescribed Rate of Interest Act, no 55 of 1975, is flexible enough to permit the Minister of Justice to prescribe rates of interest which reflect the influence of inflation on the level of rates generally (see sec 1(2)). Its application is, however, limited to debts bearing interest (sec. 1(1)); and it is trite law that there can be no mora, and accordingly no mora interest, in respect of unliquidated claims for damages.

See Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at pp 31-33, a decision which has been consistently applied and followed, also in this Court. It follows that there is no mechanism by which a court can compensate a plaintiff like the present for the ravages of inflation in respect of monetary losses incurred prior to the

trial. In other jurisdictions a statutory power to award interest is used for this purpose. See e.g., Cookson v Knowles (supra) and Wright v British Railways Board (supra)

Whether our courts should have a similar power, and what precise form it should take, is not, however, something we can lay down. It is essentially a matter of policy which is for the legislature to decide. Cf. Mc Loughlin v O'Brian & Others (1982) 3 All E R 298 (H L) at p 310 e - h. It is comforting to know that the Law Commission is at present considering this topic.

In the result the appeal is allowed with costs.

The order of the Court a quo is altered by substituting in paragraph (a) of the order the amount of R216 395 (two hundred and sixteen thousand three hundred and ninety-five rands) for the amount of R232 123 (two hundred and thirty two thousand one hundred and twenty three rands).

E M GROSSKOPF J A

JOUBERT, ACJ.
MILNE, JA Concur
KUMLEBEN, JA
NICHOLAS, AJA