IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 5857/2006
APPEAL CASE NO: 010/2010

In the matter between:

THE ROAD ACCIDENT FUND **Appellant**

and

ADVOCATE WAYNE SALEEM COUGHLAN
In his capacity as Curator Ad Litem to
MARC ATHOL GORDON BLACKBEARD **Respondent**

JUDGMENT : 2 MARCH 2011

GAMBLE, J:

INTRODUCTION

[1] On 25 March 2005 the picturesque Helshoogte Pass between Stellenbosch and Franschoek claimed yet another victim. On that day 27 year old Marc Athol Gordon Blackbeard was riding a motor cycle which was involved in a collision with a motor vehicle on the pass. He sustained extensive injuries both to the body and to the brain and in due course a claim was brought against the Appellant for damages arising from those injuries. Due to the extent of the brain injury it was considered necessary to appoint the Respondent as *curator ad litem*. For the sake of convenience I shall refer further to Marc Blackbeard as "the patient".

[2] The issue of liability was settled between the parties before the matter went to trial in May 2009 and it was agreed that the patient's damages would be apportioned on a 70/30 basis in his favour.

[3] Prior to the commencement of the trial before Justice H.J. Erasmus on 12 May 2009 the parties settled all other heads of damages and the trial proceeded only on the issue of the patient's loss of earnings.

[4] After a protracted hearing of some fifteen days the court *a quo* granted judgment in favour of the patient in the amount of R8 799 232,47 after application of the agreed apportionment together with the customary undertaking to pay medical and related expenses. Included in the award was the sum of R 8 425 130,00 in respect of the estimated loss of future earnings. No award was made for notional earnings from the date of the collision to the date of the order.

[5] The Appellant's application for leave to appeal against this award was refused by the Court *a quo*. This appeal is with the leave of the Supreme Court of Appeal. As at the trial, the Appellant was represented on appeal by Mr D.O. Potgieter SC and Mr. A. Boopchand while the patient was represented by Mr. R.D. McClarty SC and Mr. M.J. Eagles. The Court is indebted to counsel on both sides for their detailed and thorough heads of argument and for the helpful argument in Court. As will emerge during the course of this judgment, by the time the Appellant's reply was delivered on the second day of the appeal hearing, the outstanding disputes between the parties had been refined to only a few pertinent issues.

THE PATIENT'S ENVISAGED CAREER PROGRESSION IN THE UNINJURED STATE

[6] The patient's father, Mr. Gordon Blackbeard ("Blackbeard Snr") runs a family business with his brother Brian Blackbeard known as the Atlantis Group ("the Group"). The shares in the Group (a holding company) are held by two family trusts effectively controlled by Blackbeard Snr and his brother, who are also the directors of the holding company and various of its subsidiaries. In summary it would be fair to say that the Group and its subsidiaries are beneficially owned and effectively controlled by the two brothers in equal part.

[7] In its judgment the court *a quo* described the business of the Group as follows:

> *"The Atlantis Group operates within a 'hi tech' environment and has benefited from contracts awarded in the 'Counter Trade Industrial Programs' which require that certain foreign imports to South Africa must be accompanied by local foreign investment. In recent years, the Atlantis Group has, for example, been involved, with other entities, in the development of an Offshore Oil Rig Component capacity at Saldana Bay with reciprocal capacity at Cape Town Harbour. Another example is its involvement, along with the German firm MAN Ferrostaal, in the development of a 10m by 15m yacht lift at Saldanha Bay."*

[8] In evidence before the trial Court Blackbeard Snr described the manner in which the Group went about its business as follows:

> *"...Our company develops new business. Every new business we treat as a project, so the basic requirement is to be able to manage projects, no matter how large or how small they are. Every business opportunity is operated and*

conducted as a separate project. So he [i.e. the patient] needed to be capable to be able to work in the project domain."

[9] The patient's case was that at the time of the collision he had been working in the family business since April 2001 after leaving a technical position in the South African Air force and became a permanent appointee on 1 February 2002. He was an only child and it was Blackbeard Snr's earnest desire that his son should follow in his footsteps and eventually take over his interest in the Group. While there was some serious debate before the Court *a quo* as to the patient's prospects within the Group, ultimately it was common cause between two expert witnesses – industrial psychologists – called to testify by the parties that the patient would indeed have continued to be employed in the family business and would ultimately have taken up his father's mantel as the "heir apparent". As the appeal before us progressed the Appellant's case seemed to crystallize even more to the extent that it was only the evidence of these experts, as well as that of Blackbeard Snr which remained contentious.

[10] At the trial the patient relied on the evidence of **Mr. Donovan Shaw**, an industrial psychologist with more than twenty years forensic experience while the Appellant presented the evidence of **Mr. Piet Crous** who also has extensive experience as an industrial psychologist, both in the Navy where he was previously employed, as well as in private practice. Before the Court *a quo* the parties did not hold back on their criticism of various of the experts, including the industrial psychologists. In his judgment Erasmus, J summarised these as follows:

"[21]....The essence of the attack on Shaw is that he had in effect surrendered his professional independence and allowed himself to be misled and overwhelmed by Blackbeard. As I have indicated, there is no evidence to support this allegation and I have no reason to doubt the professional integrity of Shaw. Although he favoured the case of the Plaintiff he did not do it in a manner and to an extent that undermined his objectivity and professionalism."

[22].... As regards Crous, his opinion may be flawed in that it is based upon inadequate information, but the allegations that he was 'disingenuous' and that he was 'a self-serving recalcitrant, evasive and argumentative witness', and that his evidence is not worthy of being termed 'expert' are not justified. Valid criticism is his unwillingness to reconsider his opinion in the light of facts not known to him at the time when he compiled his report, and more particularly his unwillingness to give consideration to the information concerning the patient's overall performance as testified to by Dr. Gowans and Dr. Taylor. In this respect, he might have been wrong, even wrong-headed, but his scepticism as to the value of that evidence is an opinion honestly held."

THE APPROACH OF A COURT ON APPEAL

[11] It is trite that the powers of this Court to interfere on appeal are limited. The position was summarised as follows by Nicholas, JA in Southern Insurance Association v Bailey N.O.[1]:

"It is well settled that this Court does not interfere with awards of damages made by a trial Court unless there is 'a substantial variation' or 'a striking disparity' between the award of the trial Court and what this Court considers ought to have been awarded; or the trial Court did not give due effect to all the factors which properly entered into the assessment; or the trial Court made an error in principle, or misdirected itself in a material respect."

[1] 1984 (1) SA 98 (AD) at 109H

[12] Coupled with that is the general approach on appeal to the findings of the trial Court on questions of credibility and demeanour which are applicable, not only in respect of Blackbeard Snr, but also in respect of Shaw and Crous. [2]

THE PATIENT'S PRE-ACCIDENT WORK RECORD

[13] In light of the fact that there was no dispute between Shaw and Crous regarding the proposal that the patient would have continued being employed in the family business, it is not necessary to go into this aspect in any great detail. Suffice it to say that after matriculating with an average pass the patient pursued a course in marketing at the University of Johannesburg. This was not his first choice, (rather it seemed to be something which his father had suggested) and he then joined the South African Air Force where he obtained a technical qualification and an artisan certificate as an aircraft weapons electro-mechanician. The patient was keen to become a fighter pilot but due to the absence of a matric mathematics qualification he was unable to do so. Nevertheless the patient joined the Defence Force Flying Club and in his own time obtained a private pilot's licence in June 2000. In 2001 and 2002 he obtained certificates in, *inter alia*, Practical Project Management, Computer Architecture and Computer Networks.

[14] The patient joined the Group with effect from 1 April 2001 and served a period of probation as a so-called project specialist. This involved him working on various projects within the Group, one example being a project aimed at submarine stability verification trials. He was also involved in certain projects which necessitated him visiting Germany.

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[2] Rex v Dhlumayo and Another 1948 (2) SA 677 (A) at 696-698; 705.

[15] In March 2002 the patient was appointed as a project specialist and with effect from 1 October 2004 he was appointed as an IT manager. The latter position he held together with that of project specialist. It is common cause that as of 1 October 2004 the patient's total monthly remuneration was R11 500,00 per month.

[16] On 1 March 2005, just a few weeks before the accident, the patient was appointed as project co-ordinator on a project known as the "RSA Offshore Oil and Gas Project". His total remuneration at that stage was R18 000,00 per month.

[17] The latter appointment was a matter of great contestation before the Court *a quo* because of a letter of appointment which had been generated post-accident and which the Appellant claimed to have been fraudulently concocted. However, on appeal, the Appellant abandoned this point and it was common cause before us that as of 1 March 2005 the patient held the position of project co-ordinator within the Group at a total remuneration of R216 000,00 per annum. This remuneration was calculated on the so-called "cost to company" of the patient's employment.

[18] In forecasting the patient's likely employment progression, Shaw relied fairly heavily on information conveyed to him by Blackbeard Snr and the company auditor, Mr. Philip Kempson, a director of an accounting firm known as LDP Polaris International. Shaw was roundly criticised in the Court *a quo* (and to a lesser extent on appeal) for slavishly accepting the information and projections furnished by Blackbeard Snr.

[19] In my view the Court *a quo* correctly dismissed this criticism. In considering the evidence of Blackbeard Snr who was an important witness for the patient on the issue of his career projections, the Court *a quo* commented as follows:

> *"Blackbeard is a man of strong personality who promoted his son's case with vigour, but there is no evidence that he 'overwhelmed' any of the experts, or that of any of the experts sacrificed their professional independence and integrity in the face of pressure from him."*

[20] In compiling his report and formulating an opinion, Shaw was confronted with a *de facto* situation of employment within a family business. His information could only be obtained from the company and its auditors. However Shaw went further than that. He made use of certain recognised tools in the human resources and remuneration field namely the "Paterson" and "Peromnes" job grading systems. These systems are based on extensive industry research and reflect industry norms as far as remuneration is concerned. Further, the systems grade employment positions according to recognised levels of responsibility, so that one is able to take a position, look at the job description, assess the responsibilities and match them to particular bands within the system. According to Shaw the Paterson system commences with a level known as "Paterson A1" which is usually descriptive of unskilled work with a low level of responsibility. There is thereafter a progression up to the ranks to level E which is a high level of responsibility in which one would ordinarily find senior managers and directors. Peromnes on the other hand commences with grade 19 in respect of unskilled employment and moves up to grade 1 in respect of top management or director level responsibility.

[21] To demonstrate levels of income Mr. Shaw placed before the Court a survey conducted by a company known as P-E Corporate Services (Pty) Ltd which is evidently conducted according to certain geographical regions in South Africa. The document which he relied on was a "General Staff Survey" for April 2008 for the Western Cape. That survey was based on the Paterson system.

[22] Crous on the other hand relied on an extract from an annual update by an actuary, Robert Koch: The Quantum Yearbook 2009, in which both Paterson and Peromnes grades are reflected with a variety of appropriate salary scales.

[23] As I have said, in both cases the experts worked with the total annual cost of employment or the so-called "cost to company" of employment. The P-E Corporate Service document is more detailed than The Quantum Yearbook 2009 extract in that it reflects the total annual costs of employment over three levels - a lower quartile, a median and an upper quartile. Furthermore it distinguishes between small/medium sized companies, intermediate companies and large companies.

[24] Having received the information from Blackbeard Snr and the auditor, Mr. Shaw then attempted to match the patient's position in the company in March 2005 to an appropriate Paterson grading level. This he found to equate to Patterson C1. Shaw then progressed the patient up to a Project Manager (Paterson C3) in 2007, General Manager (Paterson D4/5) from 1 March 2010 and thereafter to Junior Executive Director (Paterson E1) from 1 March 2015.

[25] Because the patient was not as highly qualified as either his father or his uncle, Shaw did not believe that it would be fair to track him on an identical path to his father. Shaw's projection is therefore more conservative and limited in that respect.

[26] Crous's expert opinion on the other hand proceeded from an incorrect premise since he was not informed of the patient's promotion to Project Co-ordinator with effect from 1 March 2005. He was of the view that the patient would have moved from Paterson C1 to C2 two years later and thereafter to C3 after approximately 3-5 years. Crous did not believe that the patient would move beyond Paterson D1 after a further period of 4-6 years. Graphically speaking Crous's projection is not as steep as Shaw's.

[27] The trial Court weighed up all this evidence and came to the following conclusion:

> *"[45] In my view, it is apparent from the foregoing that the Defendant's projected career path which takes the patient, who was at the time of the accident in the Paterson C1 job grading band, no further than the Paterson D1 level, is unrealistic and not in accordance with the evidence. In my view, the career path projected by Shaw is, with one qualification, more realistic. Shaw's projection takes the patient from Junior Executive Director (D4/5 on the Paterson job grading band to be attained by 2015) into the Paterson E1 job grading band as Executive Director by 2020. In my view the upward step from Junior Executive Director to Executive Director is a progression too uncertain to project."*

[28] This finding of the Court *a quo* was not seriously attacked on appeal and in my view there is no basis to do so. Having heard a plethora of evidence and opinions the trial Court came to a view which cannot really be faulted in the circumstances. Indeed, in his argument in reply before us Mr. Boopchand accepted that it would be fair to assume, as the Court *a quo* did, that the patient would have ultimately attained the level of Junior Executive Director in March 2015.

[29] At the end of the day the Appellant's real complaint on appeal related to the level of remuneration which the Court *a quo* attributed to the grade of Junior Executive Director. Once again I quote from the judgment of the Court *a quo*:

> *"[49] Shaw suggested that the cost to company figures should be utilized for the purposes of comparing the actual earnings and projected income against the industry norms as represented by the Peromnes scale. On that approach, the following career path must be accepted as the basis for the computation of the patient's loss of earnings:*
>
> *(i) Project Co-ordinator from 1 March 2005 at R216 000,00 per annum.*
>
> *(ii) Project Manager from 1 March 2007 at R325 000,00 per annum.*
>
> *(iii) General Manager from 1 March 2010 at R650 000,00 per annum.*
>
> *(iv) Junior Executive Director from 1 March 2015 at R1 250 000,00 per annum."*

[30] During the course of the reply Mr. Boopchand conceded that the scenario set out by the Court *a quo* in paras [49] (i), (ii) and (iii) of the judgment could not be faulted. As far as the Junior Executive Director projection was concerned, counsel accepted that but for the accident the patient would have achieved that level of employment as of 1 March 2015. But, it was argued most strenuously, that the Court *a quo* erred in fixing the remuneration for that level at R1 250 000,00 per annum. This error, it was further contended, constituted a material misdirection by the Court *a quo* which would entitle this Court to intervene on the basis of Bailey's case (supra). The misdirection, it was argued, was based on a misreading or a misunderstanding of Shaw's evidence as to the level of remuneration of a Junior Executive Director.

[31] In the main argument advanced on behalf of the Appellant before us Mr. Potgieter SC stressed that there was no basis for the figure of R1 250 000,00 – he said that neither in the expert summaries filed on behalf of Shaw and Crous nor in their evidence was there any reference thereto.

[32] In arguing the patient's case on appeal Mr McClarty SC maintained that there was indeed a basis for the Court's finding in this regard. He referred us to the following passage from Mr Shaw's expert summary filed in terms of Rule 36 (9)(b) which he said had obviously been used by the court *a quo* in determining the figure:

"Junior Executive Director by 2015:

- Earning a basic salary of R900 000,00 per annum plus an annual bonus of R75 000,00 and a profit share of R1 000 000,00 (total earnings would be R1 975 000,00 per annum)"

[33] Mr. McClarty SC argued then that the Court *a quo* had reduced Shaw's figure from R1,975m to R1,25m and thereafter applied a 25% contingency deduction. This he argued was demonstrative of the conservative approach adopted by the Court *a quo* to the future earning scenario.

PROFIT SHARE

[34] The forensic accountant who gave evidence on behalf of the patient at the trial, Mr De Kroon, demonstrated how Blackbeard Snr and his brother Brian derived their total remuneration packages from the Atlantis Group in a tax-efficient manner. The brothers had set up family trusts in which the relevant shareholding in the Group was held. Because of the earlier sale of certain trademarks by the Group loan accounts had been created in respect of each of the brothers, the effect whereof was to create a tax shield in the amount of R2,5m each against which dividends which had been declared in the company and paid to the trusts as shareholders could be withdrawn by the principal beneficiaries of the trusts (i.e. the two brothers) without incurring any personal tax liability.

[35] In his expert summary (which was confirmed in evidence) Mr De Kroon explained the position as follows:

"*The effect of the aforesaid transactions [i.e. the sale of the trade mark] was to create a R2 500 000,00 tax shield in favour of the two brothers (ignoring for the moment the intervention of the ... Trusts which appeared to have re-acquired their loan accounts in 2005) so that what in effect occurred was that the brothers were paid a salary but* ***also given the benefits of drawings out of their respective Loan Accounts****. I have given recognition to this event by adding such drawings to the benefits enjoyed by Mr Gordon Blackbeard annually. ...*

The dividend declared on 28/2/2008 of R2 150 000,00 to each of the director's Trusts ... is again indicative of the sums flowing through the business. After having declared the aforementioned dividend cash reserves still stand at R10 million with virtually no other liability than SARS. "

[36] One of the issues which was raised in evidence and debated before the Court *a quo* was the value (if any) that should be given to the profit share which the patient may have forfeited in the business by virtue of his injury. The trial Court dealt with this conundrum as follows:

"*[48] The Plaintiff submitted that a profit share component is to be brought into the calculation of loss of earnings. The submission derives from Blackbeard's evidence that the son would receive 30% of his (Blackbeard's) shares on his retirement, entitling [him] to 30% of the profits. This would increase to 50% upon the demise of either Blackbeard or his wife, and 100% when they had both passed away. The acquisition of a shareholding is not dependant upon the patient fulfilling any management position within the Group; he is a member of the family and the shares may (will?) in any event accrue to him.*"

[37] I am inclined to agree with Mr. Boopchand that this paragraph in the judgment suggests that the Court *a quo* decided to ignore any profit sharing as part of the patient's notional remuneration package. On that basis, then, any reliance by the Court *a quo* on profit share by the patient when he attained the level of Junior Executive Director was erroneous.

[38] The passage from Shaw's report referred to in para 32 above reflects that the basic annual remuneration for a Junior Executive Director would be R975 000 with a further component of profit share of the order of R1 million.

[39] It was common cause in argument before us that the Court *a quo* had intended to exclude any reliance upon shareholding in the company. Indeed, Mr McClarty SC used this factor to argue that the judgment was in fact based upon a conservative approach. And lest there be any doubt about it, the evidence-in-chief of Shaw regarding the remuneration of a Junior Executive Director was as follows:

> *"What is your comment on him moving to a position of Executive Director after his father has now retired, in your view is that a reasonable promotion? —Well there's, ja it is following this path this would be a D4/5 level position, a Junior Executive Director. When you get to Executive Director you're heading into the E-bands into the E-band, Paterson E-band remuneration terms. If you look at the Junior Executive Director earnings 900 goes up to 1.9, obviously there's an element here of profit share involved which is different if you're working in a corporate you don't get that level of profit share, you may get some but you're not going to get as high a level of profit share if you own your own business. But the basic salary clearly it fits, well its well up there."*

[40] The reference to "900 goes up to 1,9" is once again a reference to the passage from the expert summary referred to in para 32 above. As I understand it, Mr Shaw was saying that annual remuneration of the order of R900 000,00 was compatible with a Paterson D4/5 level and that any remuneration in excess of that figure would effectively be acquired through the benefits of shareholding in the company and the ability to ultimately divert dividends to oneself through the family trust.

[41] It follows then in my view that the anticipated level of remuneration of a Junior Executive Director with effect from 1 March 2015 was incorrectly assumed by the Court *a quo* as R1 250 000,00: the cost-to-company figure should have been R975 000,00 per annum. This misdirection on the part of the Court *a quo* is material and would have a significant effect on the actuarial calculation made in this case, particularly in light of the protracted period over which the calculation was eventually made. I am therefore of the view that the actuarial calculation which was ordered by the Court *a quo* falls to be revised by the assumption of the correct remuneration at the Junior Executive Director level.

POST-MORBID EARNINGS

[42] The patient's future earning capacity in the injured condition was also the subject of considerable debate both in the Court *a quo* and on appeal. The factual basis was summarised by Erasmus J as follows:

> *"[50] The notional value of the patient's future injured earning capacity has been agreed at between R1 000,00 and R3 000,00 per month. The parties are not in agreement as to the likelihood of the patient*

generating such earnings, and whether any such earnings would be deductible, as opposed to earnings which are gratuitous in nature.

[51] The patient's post-injury positions of employment, where he earned an income in a minimal amount, were created especially for him and he was unable to sustain them. This outcome was consistent with the evidence of the experts of both parties, in particular that of the clinical psychologists Reneé de Wit and Frances Hemp, and the occupational therapists Thea Coetzer and Joan Andrews. Thus Ms Coetzer says that she agreed with the views of Joan Andrews and Frances Hemp that the patient –

> *...is not going to be able to work in any setting other than some form of sheltered employment and such a position is going to be difficult to procure to suit his profile.'"*

[43] The Court *a quo* went on to find that it was highly improbable that the patient would receive any earnings generated by "the sweat of his brow" and was of the view that any income that may accrue to him would in all likelihood be gratuitous. In Santamversekeringsmaatskappy v Byleveldt [3] Wessels JA said that the approach was to establish whether, post-accident, there had been an employment relationship in the true sense of the word i.e. as a result of an agreement between employer and employee or whether payments made by the employer were made as a consequence of genuine concern for the lot of the erstwhile employee. The Court recorded the following facts in that case to demonstrate the approach:

> *"Dit sou geheel en al onrealisties wees om te bevind dat Byleveldt in staat was tot die maak van 'n redelike wilsluiting in verband met die sluiting van so 'n dienskontrak. Dit blyk uit die getuienis dat Byleveldt se indiensneming deur sy moeder en skoonouers op 'n ad miserecordiam-grondslag met die*

[3] 1973 (2) SA 146 (A) at 166F-167D

> *werkgewer gereël is. Daar is trouens, geen suggestie in die getuienis dat Byleveldt self te eniger tyd met die werkgewer onderhandel het nie. Sy verstandelike vermoëns was dermate afgestamp dat hy, na my mening, geen werklike en genoegsame begrip kon gehad het aangaande die sluiting van 'n kontrak om by die werkgewer as werktuigkundige in diens te tree nie."* [4]
> *(emphasis added)*

[44] In Dippenaar v Shield Insurance Company Limited [5] Rumpff CJ put it thus:

> *"If in our law earning capacity is to be considered an asset of a person's estate, it follows that the terms of a contract of employment in a particular case, if relied upon, constitute evidence of such earning capacity at the time the delict was committed. I think it is also correct to say that the notion of 'capacity to earn' excludes receipts and benefits arising from benevolence or ordinary contracts of insurance, and that that is the real reason why such receipts and benefits are generally excluded, though not without criticism."*
> *(emphasis added)*

[45] The Court *a quo* heard persuasive evidence that the patient's ability to hold down employment after the injury was severely compromised – to such an extent that no employer was prepared to offer him meaningful permanent employment. There is therefore no basis to interfere with the finding of Erasmus, J that any remittances accruing to the patient in the future will be anything but gratuitous acts of benevolence.

[46] While awaiting settlement of his claim against the Appellant, the patient's family secured a social security grant for him. This step was criticised by Appellant's counsel as being an unnecessary waste of State resources given the apparent wealth of the patient's family. It is not necessary to comment on this aspect further

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[4] 166H-167A
[5] 1979 (2) SA 904 (A) at 920C

other than to say that it does not fall in the mouth of the Appellant to express such criticism in circumstances where the process of litigation has taken well in excess of five years and the patient has had to fend for himself in the interim.

[47] In any event, Mr. McClarty indicated that it had always been common cause between the parties that this amount fell to be deducted by the actuaries in calculating the final amount of damages due to the patient. For the sake of clarity, such an indication will be contained in the order which I propose.

CONTINGENCY DEDUCTIONS

[48] The Court *a quo* held that a contingency deduction of 10% should be applied to the patient's past loss of earnings and 25% to his future loss of earnings. On appeal it was argued that these figures were skewed in favour of the patient and that deductions of 25% and 50% respectively were fairer.

[49] In Bailey's case *supra* at p116G Nicholas JA commented as follows regarding the function of a Trial Judge when exercising the discretion implicit in damages awards:

> *"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right' (per Holmes JA in Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general*

economic conditions. The amount of any discount may vary depending upon the circumstances of the case. See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A) at 114-5. The rate of the discount cannot of course be assessed on any logical basis. The assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case....It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, Windeyer J said in the Australian case of Bresatz v Przibilla (1962) 36 ALJR 212 (HCA) at 213:

> *'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse. All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'"*

[50] As I have already remarked above, Mr. McClarty SC argued that the Court *a quo's* approach was a cautious one and notwithstanding that, that a fairly substantial contingency deduction had been applied to the future loss scenario. I agree. The approach is all the more conservative in light of the finding on profit sharing and the reduction in the patient's anticipated level of income at the Junior Executive Director level. Erasmus, J carefully weighed up all the relevant considerations and there does not seem to me to be any basis to interfere with the exercise of the trial Court's discretion in relation to the applicable contingency deduction.

COSTS

Record

[51] The record on appeal originally filed by the Appellant's attorneys was hopelessly inadequate and did not comply with the provisions of Rules 49(7) and (8). This shortcoming resulted in the patient launching an application in terms of Rule 49(7)(d) for an order declaring that the appeal had lapsed.

[52] In response to this application the Appellant eventually got its affairs in order and a proper record was filed. This step necessitated an application for condonation for late filing of the record on the part of the Appellant. When the appeal was called Mr. McClarty SC indicated that he did not oppose the application for condonation but asked that the Appellant be directed to bear the Respondent's costs of suit in regard thereto. Further, Mr. McClarty SC indicated that the Respondent would not be proceeding with the application to have the appeal declared lapsed but he asked that the Appellant be ordered to bear the costs of that application.

[53] In an application for condonation the Court looks at the explanation proffered and weighs up against that the prospects of success on appeal. [6]

[54] The explanation in the instant case amounts to one of *mea culpa* on the part of the Appellant's attorney who says that he was unfamiliar with the rules relating to the compilation of a record on appeal. In my view the prospects of success on appeal in this matter outweigh the attorney's manifest shortcomings and condonation

[6] P.E. Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 798-9

should accordingly be granted.[7] However, the Appellant must bear all the costs related thereto, including the Respondent's costs in the abortive application to have the appeal declared lapsed.

Appeal

[55] The appellant's notice of application for leave to appeal is a substantial document running to 34 pages. Leave having been granted by the Supreme Court of Appeal, the Appellant proceeded to file lengthy heads of argument and labouriously traversed the bulk of the points raised in that notice. This meant that there were a host of issues which the Appellant dealt with on appeal. As I have indicated above, the matter was neatly summarised in the reply presented by Mr. Boopchand on the second day and much of that which had been dealt with on the first day paled into insignificance. The Appellant has certainly achieved a measure of success on appeal but the Respondent has likewise managed to ward off other significant attacks on the judgment of the Court a quo.

[56] In the result it seems fair to me that the Appellant should be granted the costs directly associated with the first day of the hearing on appeal with the second day's costs to be borne by the parties individually. Over and above that, I am of the view that the Appellant's limited success on appeal entitles it only to one half of the remaining costs on appeal including the application for leave to appeal. The engagement of the services of two counsel by the parties was warranted.

[7] Premier, Free State, and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) at 433 (C)

CONCLUSION

[57] In the Court *a quo* Erasmus J was requested by the parties to make certain factual findings on issues which were then still in dispute and to refer those findings to the parties' actuaries for precise calculation of the damages. Thereafter the parties reverted to Erasmus J with a draft order which incorporated the results of the actuarial calculations. That draft was ultimately made an order of Court. For the sake of clarity, in the order which I propose granting in this matter, I will refer to certain of the paragraphs in the order of the Court *a quo* made in paragraph 58 of the judgment. Save as hereunder varied, the order of the Court *a quo* in the said paragraph 58 will stand. The parties are at liberty to approach this Court again with a revised draft for an order as to the exact quantum payable by the Appellant to the Respondent after a recalculation has been done by the actuaries.

[58] In the circumstances I would make the following order:

(A) The Appellant's application for condonation for the late filing of the appeal record is granted.

(B) The appeal succeeds only to the extent that the directions to the actuaries as contained in sub-paragraphs 5 (i) and (iii) of the order of the Court *a quo* contained in paragraph 58 of the judgment are varied to read respectively as follows:

"(i) The calculation is to be based upon the assumptions contained in paragraphs [46] to [49], save that the

amount of R1 250 000,00 contained in paragraph [49] (iv) is replaced with the amount of R975 000,00;

(iii) The Plaintiff's earnings in the uninjured state would have been as set out in paragraph [49], save that the amount of R 1 250 000,00 in paragraph [49] (iv) is substituted with the amount of R975 000,00."

(C) By the addition of the following sub-paragraph after the existing paragraph [5] (vi) in the said paragraph [58]:

"(vii) All amounts received by the patient from the social security grant paid to him are to be taken into account in any actuarial calculation."

(D) Save as aforesaid the order of Erasmus J, as set out in paragraph 58 of the judgment of the Court *a quo*, shall stand.

(E) The Appellant is to bear the Respondent's costs in the application for condonation of the late filing of the record as well as the Respondent's costs in the application to declare the appeal lapsed.

(F) The Respondent is ordered to bear the Appellant's costs of the day on the first day of the appeal hearing. In respect of the second day of the appeal hearing, each party is to bear its own costs. Save as aforesaid,

and subject to paragraph E above, the Respondent is ordered to bear one half of the Appellant's costs on appeal (including the application for leave to appeal), such costs to include the costs consequent upon the employment of two counsel.

(G) The parties are at liberty to approach this Court for a further order in relation to the exact amount of the award payable to the Respondent after a fresh actuarial calculation has been made.

P.A.L. GAMBLE, J

I agree. It is so ordered.

E. MOOSA, J

I agree.

E. BAARTMAN, J