

REPORTABLE (19)

**WYNINA (PVT) LTD
v
MBCA BANK LIMITED**

**SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE, JANUARY 17, 2012 & MARCH 28, 2014**

P C Paul, for the appellant

G V Mamvura, for the respondent

GOWORA JA: The appellant company (“the appellant”) sued the respondent for the payment of damages in the sum of US\$61 944.81 and costs of suit. The matter proceeded to trial at the end of which the High Court found for the respondent and dismissed the claim with costs. Dissatisfied with the result, the appellant has launched this appeal.

The appellant, which was the plaintiff in the court *a quo* is engaged in the business of growing tobacco. During the 2007/2008 tobacco season, the Reserve Bank of Zimbabwe (“the RBZ”) embarked on a retention scheme in terms of which tobacco growers would be paid a portion of the proceeds on tobacco sales in foreign currency. Farmers wishing to participate in the scheme had to file applications through their commercial banks, which, in turn would forward the applications, accompanied by the requisite payment in the local currency, to the RBZ. The appellant successfully participated in the scheme and was paid a portion of the proceeds from the sale of tobacco for that season.

In September 2008 the appellant submitted an application with the respondent for participation in the scheme for the year 2008. On 9 October 2008 the appellant deposited Z\$250 000 into an account held by it with the respondent to meet the local component of the foreign currency to be paid by the RBZ under the scheme.

In April 2009 the RBZ published a list of farmers entitled to benefit under the scheme in an edition of the Herald newspaper. The appellant's name was not on the list. The appellant made enquiries with the respondent and the initial reaction from the respondent was that the appellant had not forwarded an application for it to participate in the scheme. Following further exchanges of correspondence, the application was eventually located at which stage the appellant was advised that during the relevant period its account had been overdrawn and as a result the application could not be forwarded to the RBZ. It was also advised that attempts would be made for the RBZ to accept the application even though the deadline had passed. These attempts proved fruitless and the appellant thereafter sued the respondent for damages in the sum of US\$61,944,81 representing the amount in foreign currency that the appellant alleged it would have received from the RBZ, had the application been received and processed by the RBZ.

In his judgment, the learned judge in the court *a quo* found that had the respondent performed its obligations and submitted the application to the Reserve Bank on behalf of the appellant, then the appellant would have been in the same position as the other growers whose claims had been properly submitted to the RBZ. He found that there was a class action pending on behalf of the other growers and that as a consequence he was not in a position to make a finding as to what the growers would have been entitled to receive from

the RBZ. The learned judge concluded that the position of the appellant was the same as the other growers who had yet to be paid by the RBZ and it would, in the circumstances, be inequitable to place the appellant in a better position than that occupied by growers with properly submitted claims.

On the question of prescription raised by the respondent, the learned judge was of the view that prescription on the debt would only start running once the listed growers' claims have been finalised. The court accordingly dismissed the claim with costs.

The appellant has noted an appeal to this Court on the grounds that the learned judge in the court *a quo* erred in the following respects:

- a) in finding that the appellant's claim for damages for breach of contract was premature;
- b) in finding that the quantum of plaintiff's claim could not be decided without the RBZ being joined as a party to the proceedings;
- c) in failing to hold that as soon as there was a breach of contract, a contractual claim for damages arose as a result of the loss of an expectation to receive payment from the RBZ and in failing to make an estimation of the value of such loss;
- d) in failing to estimate that the value of the loss was in fact the full amount of the claim.

The appellant has premised its claim on the publication of a list of beneficiaries under the scheme by the Reserve Bank, which list however excluded the appellant. Although it published such list, the RBZ has not made payments to all participants under the scheme for the year 2008/2009. Before the court *a quo* it was common cause that the Reserve Bank was yet to honour its obligations under the 2007/2008 growing season in

full and that the payments for the season 2008/2009 season had only been satisfied in respect of small scale growers whose individual claims did not exceed US\$1 000.

In my view the appeal is best resolved by considering the matter according to the issues raised in the grounds of appeal.

WHETHER THE APPELLANT'S CLAIM WAS PREMATURE

It is well settled that the governing principle behind the award of damages arising from a breach of contract is to place the plaintiff in the same position he would have been had the breach not occurred. If the bank had submitted the plaintiff's application to the RBZ the plaintiff would be one of the farmers whose names were published in the Herald as participants under the scheme. The court was advised that the RBZ has not paid the major portion of amounts due under the scheme and consequently affected farmers have instituted a class action against the RBZ for payment under the 2008 foreign currency scheme detailed in the Revised Operational Modalities of the RBZ.

In coming to the conclusion that the appellant had not proved its case, the court *a quo* remarked at p 6 of the judgment:

“.... It would be absurd and entirely anomalous for it to be put in a more favourable position than those growers whose applications were duly forwarded to the RBZ. At the present time the rights and entitlements of the listed growers as against the RBZ are the subject of the class action instituted by the ZTA. Until such time as that matter is finally determined or until the RBZ opts to voluntarily pay out the listed growers, whether fully or partially, it is not possible to quantify the measure of damages due to the plaintiff by reason of the defendant's breach of contract. In short, at the present time, the plaintiff holds what is essentially a contingent right to damages as against the defendant, dependent upon the eventual outcome of the claims lodged by the listed growers.”

In *casu*, when the breach occurred, that is on the 31 December 2008, due to the failure by the bank to meet the deadline in submitting the appellant's application, the

appellant's loss of the chance to participate in the scheme occurred and damages immediately became due and payable. It is at that stage, as argued by the appellant, that the complete cause of action arose and the period of prescription would have started running as from that date. In view of this, the appellant did not have to prove on a balance of probabilities that it could have received payment from the RBZ, as long as it has established that it was deprived of the chance to receive payment as a result of the respondent's breach.

There is no dispute that the appellant cannot benefit from the scheme. It cannot join in the suit launched against the RBZ and it is clear that it is not in the same situation as the farmers whose applications were duly processed and accepted by the RBZ. To place the appellant on the same footing as those farmers would result in prejudice being occasioned to the same. It has suffered damages by the failure to have its application placed before the RBZ and this Court accepts that it has been deprived of the chance to benefit under the scheme. Had the respondent performed its contractual obligations, the appellant would have been included in the list published by the RBZ. It would also have instituted a claim for payment under the scheme.

In the event that a court eventually makes a determination in favour of the farmers, the latter would have a judgment against which they can execute. However no-one can predict or speculate on the outcome of that suit. The appellant is not in the same position as those other farmers as its application was never submitted to the RBZ and consequently it does not have a claim against RBZ. To that extent, its position differs from that of the other farmers participating in the scheme.

The court also erred in its finding on prescription, as the debt became due and payable when the breach occurred. The claim against the RBZ is not the determining factor

as to when the appellant's claim became due and payable, and in my view the finding that the claim was premature was clearly made in error.

COULD THE CLAIM BY THE APPELLANT BE DECIDED WITHOUT HAVING THE RBZ JOINED AS A PARTY?

It is worth noting that on the evidence adduced by the plaintiff very few of the tobacco farmers have been paid under the 2008 scheme. Those claims that have been met are said to be under USD \$1000.00 in value. The learned judge in the court *a quo* correctly stated that the allocation and expenditure of public funds was a matter that stood on a different footing from any other form of expenditure or disbursement of moneys. He correctly stated that such expenditure had to be approved by Parliament and that in addition it was subject to executive control and restriction in the best interest of the community. See *Murray v McLean N.O.* 1969 (2) RLR 541 at 550-551. The learned judge, properly in my view, could not make a determination as to whether the restrictions placed on public funds under legislation could be invoked in the matter before him.

In the view of this Court it was not necessary to decide on the issue as it was not pertinent to the disposal of the dispute. The RBZ was not a party before the learned judge but that notwithstanding, the dispute was capable of resolution without recourse to those considerations. The evidence that was placed before the High Court was that a class action instituted by the by the Zimbabwe Tobacco Association (“ZTA”) had still to be determined. The learned judge consequently found that no detailed evidence was adduced as to the specific terms of the publication by the RBZ of the list in question. The court was not, on the evidence before it, able to determine whether the publication of the list amounted to an unequivocal acknowledgment of indebtedness on the part of the RBZ or a mere acknowledgment that the farmers listed thereon had submitted applications for consideration

to participate in the scheme. In this regard the learned judge stated as follows at p 4 of the cyclostyled judgment:

“...The wording of paragraph 28 of the RBZ’s Revised Operational Modalities appears, *prima facie*, to be couched as an undertaking to transfer the global US\$ amounts claimed to the growers respective banks. However, whether this constitutes a binding and enforceable contractual undertaking is an issue that cannot presently be adjudicated upon without full evidence and argument on the matter. Additionally and in any event, it would be incompetent to decide this point without the RBZ having been joined as a party to these proceedings.”

On appeal, the appellant has argued that it did not have to prove that it would receive, on a balance of probabilities, any payment from the RBZ. It contended that once it became apparent that the appellant had suffered some loss, the court would be obliged to assess the value of that loss on the best information it had available to it by making a value judgment.

The appellant instituted proceedings against the bank premised on a breach of the latter’s contractual obligation. The appellant did not make any allegations against the RBZ and there is no suggestion that the RBZ was in some way responsible for the failure to perform its obligations on the part of the bank. The involvement of the RBZ only becomes an issue where the RBZ has failed to meet its obligations under the scheme. It would also only be relevant to the resolution in terms of the import of the Revised Operational Modalities. However, the suit by the appellant is not concerned with the obligations of the RBZ but the breach of the bank’s obligations to the appellant. I do not find that the failure by the appellant to cite the RBZ necessarily made the resolution of the dispute difficult.

In my view the learned judge in the court *a quo* erred when he found that the suit could not be decided in the absence of the RBZ.

DID APPELLANT'S CLAIM ARISE FROM THE LOSS OF AN EXPECTATION TO RECEIVE PAYMENT?

The appellant seeks that the court quantify and assess the damages due to it arising from the loss of the chance to participate in the RBZ tobacco growers scheme. The appellant argues that it did not have to prove that it would, on a balance of probabilities, have received any payment from the RBZ. The appellant suggests that once it becomes apparent that it has sustained some loss, then the Court is obliged, by making a value judgment, based on the best information it has before it, to assess the value of that loss.

There exists no better example in the exercise of a value judgment by a court in a situation such as this than *Chaplin v Hicks* [1911] 2 K.B 786. I would with respect quote the remarks of VUGHAN WILLIAMS L.J at p 791 where he said:

“...Now, the moment it is admitted that the contract was in effect one which gave the plaintiff a right to present herself and to take her chance of getting a prize, and the moment the jury find that she did not have a reasonable opportunity of presenting herself on the particular day, we have a breach attended by neglect of the defendant to give her a later opportunity; and when we get a breach of that sort and a claim for loss sustained in consequence of the failure to give the plaintiff an opportunity of taking part in the completion, it is impossible to say that such a result and such damages were not within the contemplation of the parties as the possible direct outcome of the breach of contract. I cannot think these damages are too remote, and I need say no more on the question of remoteness.

...It was said that the plaintiff's chances of winning a prize turned on such a number of contingencies that it was impossible for anyone, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. In the present case I understand that there were fifty selected competitors, of whom the plaintiff was one, and twelve prizes, so that the average chance of competitor was about one in four.”

And later at p 792:

“...I do not agree with the contention that, if certainty is impossible of attainment, the damages for breach of contract are unassessable.”

The RBZ had created, under the retention scheme, the right of obtaining foreign currency at concessionary rates for tobacco farmers and the appellant’s right to be part of that class of person cannot be disputed. It was however denied the right to participate in the scheme by the respondent. The court has the unenviable task of deciding whether or not a value can be placed on the loss by the appellant of that chance.

In *Woods v Walters* 1921 A.D 303, 311 INNES CJ, stated that

“the plaintiff lost “the opportunity of the mealie crop which would have been a profitable item. She was put to the expense in having to live at a hotel and a tractor which had been specifically ordered had been thrown on her hands. In the result a careful investigation would have resulted in a substantial award.”

In a claim for damages arising out of breach of contract the plaintiff has to be placed in the same position he would have been in had the contract been properly performed. If the bank had submitted the application for the appellant to participate in the 2008 scheme the appellant would at best have a claim pending against the RBZ as are all the tobacco farmers who applied to participate in the scheme.

In the circumstances of this case, the inescapable conclusion is that the appellant’s claim arises from the loss of an expectation to receive payment under the retention scheme facilitated by the RBZ.

WAS THE VALUE OF LOSS THE FULL AMOUNT OF APPELLANT'S DAMAGES?

A plaintiff who sues for damages is required to prove his damages. A court will not presume damages in the absence of proof of such damages by a plaintiff. However, the principle that a plaintiff must prove his damages is not a strict rule, what is required of a plaintiff is to place before the court all the evidence that is reasonably available to him. Before this principle can come into effect it must be established that the plaintiff has suffered some damages and that all that has to be established is the quantum of those damages. This was stated by SELKE J in the following terms:

“But to make such *dicta* into inflexible rules applicable in every instance without regard to the circumstances of the parties in respect of the availability of the evidence, or to the precise nature of the claim, it seems to me, results not infrequently in injustice. There must be many types of claims due to breaches of contract which do not admit, for various reasons, of strict or detailed proof in terms of so much money. For example, loss of business, especially in relation to the future, cf. *Bower v Sparks, Young and Farmers' Meat Industries Ltd* 1936 NPD 1 at p 23.”¹

In the court *a quo*, the respondent conceded that the appellant had deposited a sufficient sum to enable the bank to submit the application to the RBZ for the consideration of allocation of foreign currency under the scheme. It was never suggested that the appellant had failed to establish that it had suffered loss or that the amount that had been deposited in local currency was insufficient to qualify for the sum being sought from the RBZ under the scheme.

This is not a case where an exact quantification of the damages allegedly suffered by the plaintiff is possible. In *casu*, there exists a real chance that if the bank had submitted the plaintiff's application to the RBZ before the expiry of the deadline, then in the event that the RBZ had paid to the claimants monies under the retention scheme the appellant

¹ See *Bowman v Stanford* 1950 (2) SA 210 (D) at 222-223

stood to be paid in United States dollars for the sum or part thereof deposited by it into the bank's account and which payment would have been forwarded to the RBZ under the scheme.

Recent authorities from the courts in South Africa suggest that there is need to differentiate between the *onus* imposed on a plaintiff regarding causation and quantum. In *De Klerk v Absa Bank Ltd & Ors* SALR 2003 (4) 315 SCHULTZ JA quoted with approval the remarks of STUART-SMITH LJ in *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1WLR 1602 (CA) to the following effect:

“In my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.”²

It is an accepted principle of our law that some types of damage are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. The principle is not a novel one and decided authorities have gone so far as to state that a court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. See *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964.

It is also accepted, in principle that, a court will come to a plaintiff's aid in case of uncertainty and make an estimate in his favour provided that he has led the best evidence available to him. See *Enslin v Meyer* 1960 (4) SA 520. Facts may also be proved

² At p1614C-E

not only by direct evidence but by inference and a man's intentions may be proved through the observations of others. In *Arendse v Maher* 1936 TPD 162 GREENBERG J made the following pertinent remarks:

“It remains, therefore, for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the Court should suffer. The means that I have at hand are extremely unsatisfactory, but I propose to rely to some extent on the figures appearing from the decision in Chisholm's case and to be guided by those figures.”

The existence of a contingency which is dependant upon the volition of a third person does not necessarily render the damages for breach of contract incapable of assessment. See *Chaplin v Hicks* (supra) at 793 per L J FLETCHER MOULTON. At p 795 he commented further:

“Then the learned counsel takes up a more hopeful position. He says that the damages are difficult to assess, because it is impossible to say that the plaintiff would have obtained any prize. This is the only point of importance left for our consideration. Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallenged case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been an actual loss resulting from the breach of contract, which it is difficult to estimate in money; it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs.”

And later at 769:

“Is there any such rule, if it existed as that where the result of a contract depends on the volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed would work great wrong...”

..... Where by contract a man has a right to belong to a limited class of competitors, he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him.”

In *Goedhals v Graaff-Reinet Municipality* 1955 (3) S.A 482, HALL J, at 487C-E said;

“The general principle upon which damages are to be assessed was laid in *Victoria Falls and Transvaal and Power Co. Ltd v Consolidated Langlaate Mines Ltd* 1915 A.D. at p 22, where it is stated that, so far as possible, the person injured must be placed in the same position as he would have been if the contract had been performed. On this principle it appears to me that the question which the trial court would have to decide in order to assess damages in this case is what would the opportunity of finding water be worth to the plaintiff under the circumstances of the case.”

Similar remarks were issued by MASON J in *Trichardt v Van der Linde* 1916

T.P.D 149 at 152-3 to the following effect:

“Now, it is quite clear, in this case, that there was a breach of the contract. It is quite clear that the object of the contract was that the horse should be raced and win prizes. It is quite clear that the breach defeated the very object of the contract, and the loss of the chance is the actual and necessary result of the breach. Now, the matter was considered in the case of *Watson v Ambergate Railway Co* (15 Jur. 448). There, the two judges differ as to whether the value of a chance should be estimated for the purpose of damages, and Mayne on damages (6th Ed. P 60), in commenting on the decision, accepted the view of the judge who thought that a chance was not such an element of damages as could be estimated and allowed for in a Court of Justice. But, all these authorities were considered in the case of *Chaplin v Hicks* (1911, 2 K.B.D. 786), and there it was held that-I think it was in a beauty competition-the loss of such a chance was an element of damage which the jury were entitled to estimate the value of, and the jury in that case awarded BP 100.00 damages, which was upheld on appeal. In that case, the Court said there was no question that the loss of the chance was the necessary result of the breach of the contract, and that though it might be difficult to estimate what the value of a chance may be, it was the duty of the jury to endeavour to do so, and if they awarded some reasonable sum, the Court would not interfere.”

This Court accepts that no detailed evidence was placed before the court *a quo* on the legal implication attaching to the publication of the list of participating farmers by the RBZ. The scheme, from the evidence before the court *a quo*, was introduced at the instance of the RBZ to encourage farmers to grow tobacco as a way of boosting the foreign currency earnings of the country as a whole. It was a scheme under which the country was the major beneficiary, in that following upon the sale of the tobacco crop the farmer would be

paid in the local currency with the foreign currency being retained by the RBZ. The scheme however, presented an avenue through which farmers could then obtain a benefit to access foreign currency in cash and kind, the latter through the access to scarce farming inputs. Thus, at the end of it all, the benefit would accrue to the country and the individual farmer.

It is correct that the appellant suffered damages but on the facts presented to the court *a quo* it is almost an impossible task for a court to make an assessment of the monetary damages due to the appellant. In *Ebrahim v Pittman N.O.* 1995 (1) ZLR 176H at 187C-D BARTLETT J quoted with approval the remarks of BERMAN J in *Aarons Whale Rock Trust v Murray & Roberts Ltd & Anor* 1992 (1) SA 652(C) at 655H-656F to the following effect:

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss...”

The appellant has urged this Court to make the assessment as the evidence presented before the trial court was the best evidence available to the appellant. The issue, however, is whether the learned judge in the court *a quo* had sufficient evidence before him to enable him to arrive at a quantification of the amount of damages that the appellant had suffered due to the failure of the respondent to transmit the application to the RBZ. In my view, the appellant presented to the court the best evidence it had available, and the value of the loss constituted the damages suffered.

DISPOSITION

The respondent conceded in the court *a quo* that the deposit of Z\$250 000 made by the appellant into the account was sufficient to enable the respondent to submit the appellant's application. The question before the court however is what sum constitutes the value of the appellant's loss. Whether or not the appellant would have obtained payment from the RBZ of the amount of foreign currency it required from the Zimbabwe dollar equivalent paid to the respondent is not the issue, as what it sued for was the loss of the chance. It is also not certain that even if the application had been submitted to the RBZ in time the latter would have paid any foreign currency to the participating growers nor is the extent of the payment capable of exact calculation. Nevertheless the failure by the respondent to file the application with the RBZ left the appellant in the invidious position of having no basis to approach the RBZ for payment under the scheme. The result is that the appellant is unable to make any meaningful suggestion on the quantum of damages that this court should award in these circumstances. That notwithstanding, this court should strive the best it can to assess damages in this matter. I would respectfully associate myself with the remarks of HOLMES JA in *Anthony and Anor v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B-C to the following effect:

"I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss".

I also wish to associate myself with the sage words of SCHUTZ JA in *De Klerk v ABSA Bank Ltd & Ors* 2003(4) SA 315, at 335F-H wherein he stated:

"The second consideration is this. If, as may be found to be the case, an unlawful negligent (or, a fortiori, a fraudulent) misstatement has resulted in the plaintiff being placed in the invidious position of having to ask the Court to assess, with all the difficulties inherent in the exercise, the value of his lost opportunity of investing

elsewhere, the Court should not be too astute to entertain dire and pessimistic speculations emanating from the defendants that the plaintiff may even be worse off if he had not been culpably misled into making the investment that he did.”

Mindful of the caveat in the above authorities with which I wholeheartedly agree not to be too pessimistic as to the appellant’s chances in benefiting from the retention scheme it therefore remains for this court to assess the damages due to the appellant. The object of damages for breach of contract in our law is to compensate the aggrieved party for his actual pecuniary loss, and it is an accepted principle of the law of damages that if he can prove none he is not entitled to any damages. So that one may appreciate how this branch of the law has evolved over the years it becomes necessary to examine persuasive decisions of the courts in South Africa courts over a period of almost a century. The first seminal case on the issue is *Steenkamp v Juriaanse* 1907 TS 980, wherein INNES C.J at p 986 said:

“We should adopt the principle that where a plaintiff claims *damnum*, whether on contract or on tort, if no *damnum* be proved he should not as a general rule, save in certain excepted cases which do not arise here, be entitled to judgment. To my mind when a plaintiff comes into Court simply to claim damages, and no damage is proved, he ought not to obtain a nominal judgment. There is Roman-Dutch authority to support the ruling of the late High Court, and I think we should decide to follow it.”

In *Wheeldon v Moldenhauer* 1910 E.D.L 97 by KOTZE J.P made remarks to the following effect:

“... But there are many cases where a person has been injured by another’s breach of contract, and where it is impossible to prove specific damage. In such cases it would be unjust to say that it is left to the caprice of the person who has undertaken to do or not to do something, to fulfil his obligation or not as he pleases, and in this way the creditor would be entirely without any remedy, and would be prevented from enjoying the benefits which he had stipulated for himself in the contract. In my opinion this is not in accordance with the law. I am still of that opinion, and I find several decisions of the Supreme Court of this colony which recognise a plaintiff’s right to nominal damages for breach of contract.”³

³ At p 100

A broader examination of case authority would tend to show however, that the courts in South Africa differed fundamentally on the principle of the need to award nominal damages and the guiding principles as to when such damages were available to a plaintiff. One school of thought appeared to have favoured the award of nominal damages as a matter of course where an injury had been established but the plaintiff had failed to establish damages. The other school of thought was that damages should not be awarded in the absence of proof of damages. In the latter case, nominal damages were awarded where the plaintiff sought to establish a right or claimed specific performance and damages were claimed in the alternative. In the absence of proof of damages, the court would award nominal damages. An instructive example of the court's approach in the latter case is *Farmers' Co-operative Society (Reg) v Berry* 1912 A.D. 343, wherein INNES J said at p352:

“... The present suit is not in the main for damages, but for an order for specific performance as a test of the defendant's right to disregard the regulations of the society. The claim for damages is only in the alternative. It does not seem to me, therefore, to fall within the authority of the cases quoted; and if it should appear that the defendant cannot specifically perform his contract, then, in the absence of exact proof of loss, this is certainly a case where nominal damages might properly be given.”

In *Solomon v The Alfred Lodge* 1917 CPD 177 KOTZE J stated at page 188:

“... But there are many cases where it may be evident that a person has sustained loss through another's breach of contract, and where it is impossible to prove specific damage. In such cases it would be unjust to say that it is left to the caprice of the party, who has undertaken to do or not to do something, to fulfil or break his contract as he pleases, and leave the other party entirely without remedy. Where, therefore, from the evidence or the nature of the case, it is plain that some damage, though its amount cannot be definitely ascertained and proved, has been sustained through the breach of contract, the plaintiff will be awarded a small or trifling *sum-exiguam summam*-as Voet 45, 1, 12 terms it, or, as we would call it, nominal damages. Now, the present case appears to me to fall within this rule.”

It is interesting to note that in the *Solomon* case (supra) KOTZE J awarded the appellant an amount of one shilling as nominal damages on a claim for damages wherein the

plaintiff had been expelled from an unregistered benefit club. The loss to the plaintiff was the benefit that membership in the club entitled her to. It was considered that a trifling sum by way of compensation would be appropriate in the circumstances of the case. The award for nominal damages in that case was obviously made given the case where no actual monetary loss was occasioned to the plaintiff as a result of the breach of contract on the part of the defendant.

In *Turtle v Koenig* 1923 CPD 367, the plaintiff sued for damages arising out of the cancellation of a written agreement of sale in respect of the defendant's interest in a hotel. The defendant breached the contract and sold his rights therein to a third party. The plaintiff sued for damages arising from the breach. SUTTON AJA had occasion to consider the question of damages in the absence of proof of such damages by a plaintiff. He stated the following at p 371:

“Now there has been a great deal of argument on the question as to whether the Court is entitled to grant damages in a case where there has been a proof of a technical breach of contract. This action is purely one for damages; it is not one for specific performance or a declaration of rights; it is purely an action for damages and to my mind the case I should follow is that of *Steenkamp v Juriaanse* (1907, T.S. 980). The two judges who decided that case were ROSE-INNES C.J. and SOLOMON J., and it seems to me it is a case which is likely to be upheld by the Appellate Division. In that case the Court laid down that when an action is brought solely for damages and not to establish any right which has been violated by the defendant, the plaintiff must prove that he has actually sustained damage and that in the absence of such proof he will not be entitled to judgment for nominal damages. The matter was fully gone into in that case.”⁴

And later on at p 371-372:

“It seems to me too that the case of *Wheeldon v Moldenhauer* (1910, E.D.L. 97) is not inconsistent with the case of *Steenkamp v Juriaanse*. It is true that there are cases in our Courts dealing with the question of nominal damages which are not very helpful or harmonious, but the modern tendency is it seems to me not in favour of granting nominal damages as that term is understood in England. The whole tendency of our recent decisions is not in favour of adopting the English rule of granting some damages because there has been breach of contract.

⁴ At p 371

In the early days there were some cases in our Courts where normal damages were granted in the absence of any proof of damages, but the modern authority is against such decisions.

According to the decision in *Wheeldon v Moldernhauer* (supra) where it is clear that some damages have been sustained but the Court cannot say how much; where no definite amount has been proved; then the Court is entitled to grant some damages called nominal damages. That is not what the English Courts intended by nominal damages. In the case of *Wheeldon v Moldenhauer*, KOTZE, J.P. held that as the plaintiff had not proved what amount of damage he had suffered, but had proved that he had sustained some damage, which, however, could not be properly fixed, he was under the principles of the Roman Dutch Law as followed in South Africa, entitled to nominal damages.”

The position appears now settled in South Africa that the court cannot award damages to a plaintiff who has failed to prove damages where the claim was purely for damages and no other form of relief. This approach finds confirmation in the case of *Hersman v Shapiro & Co* 1926 T.P.D 267. At p 379 STRATFORD J has this to say:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.”

And yet the court seems to have been inconsistent in its approach as exemplified by the dictum in *Versfeld v South African Citrus Farms Ltd* 1930 A.D 452 at 459 by STRATORD J,A. as follows:

“... On appeal Mr Buchanan relied upon a principle in the assessment of damages exemplified in the case of *Turkstra Limited v Richards* (1926 T.P.D.276) and thus stated:

“When there is a finding or an admission that damage has been caused in a monetary amount, the court must do its best to assess the amount on such evidence as is

available, and you cannot non-suit a plaintiff because, in the nature of things, the damage cannot be computed in exact figures.”

In *Du Plessis v Singer* 1931 CPD 105 GARDINER JP stated at p 108:

“But even if cancellation was not justified, and the plaintiff must be held bound by the lease, he would, in my opinion, be entitled to claim damages for not getting occupation of part of the leased premises, and his remedy is not confined to a remission of part of the rent-see Pothier, Contract de Louage (sec. 67), Voet (19.2.26). Here, in fact, he is not claiming a declaration that the lease is cancelled, but is claiming damages for not getting possession. If he gave prima facie proof that he did not get possession of part of the premises, and if he showed that he sustained damages thereby, absolution should not have been granted. On the evidence it is not possible to arrive at any exact estimate of the damages he suffered, but that he did sustain some damages, was I think, established. At the least, therefore, he should have had nominal damages.”

On a reading of the various South African cases one discerns a distinct impression that the courts have accepted that the principle of nominal damages is available to a plaintiff in certain circumstances and that it is not necessarily available to a plaintiff who has proved a technical breach of contract and is unable to prove damages. It is a concept derived from the English law although its application did not follow the English law, and thus in the later cases there appears to be an attempt on the part of the courts to adhere to the English law in applying the principle on the awarding of nominal damages.

There has been much debate within the courts as to when a plaintiff should be awarded nominal damages, and it is not exactly clear, despite the debate both from the courts and jurisprudential authors as to whether or not nominal damages should be awarded to a plaintiff who has proved breach of contractual obligations and has suffered loss, but has not proved the extent of the damage suffered. In their book *Law of Damages* the learned authors Visser and Potgieter state thus:

“Despite opposition, nominal damages were also awarded for breach of contract. Cases where a small amount of damages was awarded should not really be cited as support for the concept of nominal damages. In some instances it was held that the court may not award nominal damages unless an action is instituted to vindicate a right which will have some value in future or unless breach of contract was intentionally committed. The availability of an action for nominal damages upon breach of contract has been confirmed by the Appellate Division but several authors express doubt whether this is still the position. They state that since 1935 there has been almost no reported cases of nominal damages and that a plaintiff who has not proved his damage is not entitled to any compensation. It is probably correct to argue that nominal damages have no place in our law, but until the Appellate Division finally confirms this view, it cannot be concluded that nominal damages have disappeared.”⁵

Christie, in his book *The Law of Contract in South Africa*⁶ appears to favour a different approach to the question of damages wherein the plaintiff has failed to establish any damages. This is what he has to say:

“The question whether, when damages cannot be proved, nominal damages may be awarded, has caused some difficulty, but the present law can be stated with reasonable certainty. Early cases in the Cape and Transvaal adopted, not expressly but quite clearly, the English practice of awarding purely nominal damages (10c or so) sometimes as a peg on which to hang costs, sometimes with each party paying his own costs, and sometimes with costs to the defendant, without distinguishing between the cases where the plaintiff has suffered no loss, cases where it is clear he has suffered some loss but it is impossible to say how much and cases where the plaintiff’s concern is to establish a right.

This practice was defended by KOTZE CJ in *Stow, Jooste & Mathews v Chester & Gibb* (1890) 3 SAL 127, but it did not long go unchallenged. In *Weber v Africander GM Co* (1899) 16 CLJ 128 (SAL), Gregorowski CJ said:

“It is true that in England nominal damages are sometimes awarded where there has been a breach of contract without damage, but our law requires a definite *damnum* to give rise to an action for damages. The case where a right which may be valuable in future is denied is denied is the only case where *damnum* would be assumed in consequence of an unlawful act.”

This distinction between an unsuccessful attempt to prove loss, where the plaintiff should fail, and the establishing by an award of nominal damages which may become valuable in the future became accepted law in the Transvaal in a line of cases of the former type. Referring to some of these cases in *Farmers’ Co-op Society (Reg) v Berry* 1912 AD 343 352 Innes CJ gave them the Appellate Division’s approval:

⁵ At pp 158-159

⁶ 3 ed

“But the rule laid down in these cases was in terms stated to be subject to certain exceptions, and it was a rule applicable to claims for *damnum* alone. The present suit is one not in the main for damages, but for an order for specific performance as a test of the defendant’s right to disregard the regulations of the society. The claim for damages is only in the alternative. It does not seem to me, therefore, to fall within the authority of the cases quoted; and if it should appear that the defendant cannot specifically perform his contract, then, in the absence of exact proof of loss, this is certainly a case where nominal damages might properly be given.”

Cases of the second type, like *Berry’s* case, where nominal damages may appropriately be given to establish a right, are rare because a plaintiff seeking such relief will more frequently ask for a declaration of rights, but *Berry’s* case makes it clear that he is not obliged to adopt that course.

Since *Berry’s* case it can be accepted that the early Cape and Transvaal cases referred to at the beginning of the previous paragraph are no longer good law, and our courts are entitled to award nominal damages in the English sense of 10c or so only for the purpose of establishing the plaintiff’s rights.

But nominal damages in the different sense of a token payment of ordinary damages (R20 or so) may be awarded when the plaintiff proves breach causing him loss but is unable to prove the amount of the loss or that it is substantial. *Kotze* JP developed this principle in a series of cases in the Cape and Eastern Districts, which have been followed in those divisions. Founding on *Voet* 45 1 12, he said in *Wheeldon v Moldenhauser* 1910 EDL 97 101:

“Here we have a distinct authority for the view that, where there has been a breach of contract, and the plaintiff is unable or finds it difficult to prove what loss he has sustained, or the extent of that loss, it does not follow that he must fail in his claim, for the Court may award him merely a trifling sum (*exiguam summam*), that is, nominal damages. This will certainly be true where it is clear that some damage, however slight or unascertainable, has been sustained by the plaintiff.”

The last sentence of this passage is most important, for in cases to which those words apply damages of the order of R20 have frequently been awarded,⁷ but where the plaintiff has failed to prove that he has suffered any loss at all, no damages have been awarded.⁸ Thus understood there is no conflict between these Cape and Eastern District cases and the Transvaal cases approved in *Berry’s* case.”⁹

The seminal case on the entitlement of a plaintiff to be awarded damages for the loss of a chance is *Chaplin v Hicks* (supra) and the appellant’s contention that the

⁷ See *Solomon v The Alfred Lodge* (supra); *Emslie v African Merchants Ltd* 1908 EDC 82, 95; *Kelly v Kelly* 1913 EDL 153,164

⁸ See *McCallum v Cornelius and Hollis* 1910 NPD 52,62; *Turtle v Koenig* 1923 CPD 367, 372

⁹ At pp 604-606

respondent had failed to prove damages and in the circumstances was only entitled to nominal damages was rejected by the court. LORD FLETCHER MOULTON said:¹⁰

“Mr McCardie does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy. The learned counsel admitted that it was very difficult to formulate his proposition, but he ultimately said that where the volition of another comes between the competitor and what he hopes to get under the contract, no damages can, as matter of law, be given. I can find no authority for that proposition; in fact the decision in *Richardson v Mellish*¹¹ is obviously in the teeth of it. I do not rely, however, on that or any other authority; I would rather consider what is the right of a plaintiff as regards damages for breach of contract, and regarding it as a matter of broad principle, I do not think that any such distinction as that suggested by Mr McCardie can be drawn.

.....

But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is sometimes a matter of great difficulty.”

This case was approved and applied by ASWORTH J in *Hall v Meyrick* [1957] 2 Q.B 455 at 472 whereat it was stated:

“Any assessment of damages in a case of this sort is bound to appear somewhat arbitrary, but I have endeavoured to find a figure which fairly represents the plaintiff’s loss after giving due allowance for all the uncertainties. The sum for which I give judgment in favour of the plaintiff is 1,250 pounds.”

The courts both in this country and in South Africa have recognised the principle of prospective loss in restricted instances. One such instance relates to the loss of a chance. It can be said that the issue relating to a claim for damages following upon the loss of a chance appears to be on a different footing and that following upon the dictum in *Chaplin v Hicks* (supra) the approach of the courts has been consistent. The loss of a chance is however

¹⁰ At pp793-794

¹¹ (1824) 2 Bing. 229

described as a form of prospective loss which has been recognised within the English Jurisdiction and that of South Africa. So far as I am aware the present case is the second case within this jurisdiction where the court is being asked to make an award of damages so that a plaintiff who has suffered damage does not walk away empty handed due to a failure to prove damage that is quantifiable. The first case decided within this jurisdiction is *A.G. Hendrie & Co Ltd v McGarry* 1938 SR 209 in which HUDSON J stated at p 218:

“Bearing in mind in the present case that the plaintiff’s agency was revocable, that the hotel was not a readily saleable property and that Gammon might have leased or purchased another hotel, I have come to the conclusion that in this case too the damages must be assessed at a figure considerably lower than the amount of the commission. Exact computation of damages is not possible in the circumstances of the case, but there has been a deliberate breach of contract and the damages must be substantial, and not merely nominal, in spite of the impossibility of exact assessment: *Chaplin v Hicks* (1911, 2 K.B. 786). After giving consideration to all the factors involved in the case I have come to the conclusion that the damages should be assessed at 75 pounds.”

It is accepted that in assessing damages the court must as one of the aspects, have regard to the events that have occurred from the damage causing event to the date of the action in order to reach a more realistic assessment of the damage.¹² This principle is based on the existence of uncertainty about the arising and impact of a factor which in its nature is relevant to the assessment of loss. A court therefore has no better method than to place a value on that factor according to the Court’s prognosis. As certainty arises, the need to speculate about probabilities and to evaluate expectations dwindles, and the actual facts form the basis for calculations.¹³

In addition, the court is obliged to take into account any relevant conditions that would necessarily affect the assessment of damages. In the court *a quo* it was common cause that although the RBZ had not paid the major growers, it had paid out small claims not

¹² See *General Accident Ins Co Sa Ltd v Summers etc* 1987 (3) SA 577 (A) at 615;

¹³ *Glass v Santam Ins Ltd* 1992 (1) SA 901, 902

exceeding USD 1000. The appellant appointed the respondent as its agent in the facilitation and implementation of its application under the scheme. When it lodged its application with the respondent and paid the local currency stipulated it acquired a benefit to participate and at the conclusion of the season receive a value in foreign currency. It thus acquired an advantage to which a value could be attached. It is therefore the duty of the court to estimate the pecuniary value of that advantage.

The court must remain alive to the possibility that the RBZ may be able to satisfy a trial court that it had no obligation to meet the claims of the tobacco growers who participated in the scheme, or that in the event that a court found in favour of the farmers, the RBZ would seek statutory protection to avoid payment under the scheme. The fact that payment was made to farmers with smaller claims would point to a lack of capacity to pay as opposed to reluctance to pay. Finally, the court has to consider that even though the applicant funded its account with the required local currency, it was not transmitted to the RBZ but remained in the account and that the respondent offered to pay it back.

In view of the fact that the appellant did not pay to the RBZ, not through its fault, I intend to discount the sum claimed by fifty percent, resulting in the sum of USD 30 972.40. In addition, in view of the seeming difficulties of the RBZ to pay, as exhibited by the delay in payment, I intend to further discount the sum. An additional discount of fifty percent on the discounted sum would appear to me to meet the justice of the case. Such discount would allow an award of USD15 486,20. The appellant did not claim interest and the order that I will issue will not specify interest.

The above method of computing the damages due to the appellant is admittedly arbitrary but I cannot think of any better way of assessing damages in this case. Although the appellant did not succeed in the claim for the sum of USD61 944.81 that it was seeking from the respondent, it has established not only the liability but an award in a specified sum. In the event, the appeal must succeed.

In the result it is ordered as follows:-

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and substituted with the following:
 - 2.1 Judgment be and is hereby granted against the defendant in favour of the plaintiff in the sum of USD 15 486.20 together with interest thereon at the prescribed rate with effect from the date of this judgment.
 - 2.2 The defendant is hereby ordered to pay the costs of suit.

GARWE JA: I agree

OMERJEE AJA: I agree

Wintertons, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners