Case No 446/1986

E SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

MUTUAL AND FEDERAL INSURANCE COMPANY LIMITED — Appellant

and

PIETER SWANEPOEL — Respondent

CORAM: RABIE ACJ, CORBETT, VILJOEN, VAN HEERDEN, JJA et STEYN AJA

HEARD: 12 NOVEMBER 1987

DELIVERED: 30 NOVEMBER 1987

JUDGMENT

/VAN HEERDEN JA ...

VAN HEERDEN JA:

As a result of a collision which took place between a motor vehicle driven by the respondent (the plaintiff in the court a quo) and a second vehicle the respondent sustained serious bodily injuries, rendering him a permanent quadruplegic. The second vehicle was insured by the appellant (the defendant in the court a quo) in terms of Act 56 of 1972 and the respondent proceeded to claim damages from the appellant in the Witwatersrand Local Division, alleging that the collision was due to the negligence of the driver of the insured vehicle. Apart from one aspect, the claim was eventually settled by the parties who in effect agreed that the total damages suffered by the respondent amounted to R750 000. The respondent contended, however, that the sum of R100 000 should be deducted from such damages. This sum represented the capitalised value of a pension accruing to the respondent. The appellant consequently unconditionally undertook to

pay to the respondent the sum of R650 000. It was furthermore agreed that an additional amount of R100 000 would be payable to the respondent should it be found that the pension was not deductible from the respondent's total damages. The matter accordingly went to trial on this issue only.

The salient facts relating to the pension were summarised as follows by the court a quo:

"(a) At the time of the collision plaintiff was performing his military service as a national serviceman in the Citizen Force in terms of the Defence Act.

(b) His disability was caused by military service as contemplated by Section 2 (a) (iii) of the Military Pensions Act no. 84 of 1976.

(c) As a result of the bodily injuries sustained by plaintiff and his ensuing disability he applied for and was awarded a pension.

(d) The degree of disability and the amount of the award was determined by the Director-General, Health and Welfare, in terms of Sections 6 and 7 of the Military Pensions Act no. 84 of 1976.

(e) The capitalised value of the pension so

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determined is R100 000.

(f) The plaintiff made no contributions to the fund, either by actual payment or by way of deductions from his monthly pay.

(g) The pension gratuity allowance and the cost of any medical treatment, the amount and extent of which is determined by the Director-General, is paid from monies appropriated by Parliament for this purpose in terms of Section 3 (1) of the Act.

(h) The plaintiff did not, in computing his damages and in particular his claim for loss of earnings or loss of earning capacity, rely upon his contract of service (if it can be termed that) with the Defence Force.

His claim is based on the premise that he would have taken up employment in the private sector upon completion of his two years' national service."

In terms of s 3 (1) of the Military Pensions Act 84 of 1976 (the "Act") the Minister of Health and Welfare may, with the concurrence of the Minister of Finance and out of moneys appropriated by Parliament for the purpose, pay inter alia pensions to members of the Citizen Force who suffer from a pensionable disability. S 4,

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read with s 1, provides that a member who suffers from a pensionable disability which has been determined at not less than 20% in terms of the Act shall be entitled to an annual pension which shall be calculated in accordance with formula A x B. In this formula A represents the amount which the Minister of Health and Welfare may, with the concurrence of the Minister of Finance, determine from time to time, and B represents the percentage at which the pensionable disability of a member has been determined. In terms of s 7 (1) and (5) the degree of such disability is to be determined by the Director-General of Health and Welfare by comparison, subject to the provisions of s 7 (6), of the physical and mental condition of the applicant for a pension with that of a normal and healthy person of the same age and sex, and by establishing as nearly as possible the percentage by which his physical and mental condition differ in accordance with the Schedule to the Act from that of such a

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normal and healthy person as a result of his disability. In so far as s 7 (6) is relevant for present purposes, it provides that the degree of disability which corresponds with a disability specified in the Schedule, shall be determined at the percentage of disability specified in the Schedule, and that the degree of the disability of a member shall be determined without regard to his earning capacity in any particular occupation.

The Schedule prescribes various percentages of disability for specified injuries, i e, loss of upper and lower limbs or parts thereof, defective vision, defective hearing, facial disfigurement, other disabilities and a combination of certain disabilities. Thus a 100% disability is prescribed for the loss of both feet or hands, the total loss of sight, total deafness and wounds or injuries resulting in the member being permanently bedridden.

The court a quo was of the view that the true

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test whether benefits accruing to a plaintiff as a result of a delict fall to be deducted from the damages suffered by him "is simply whether it can be said that such payments are made to compensate the victim for the loss which he suffered as a result of the impairment of his capacity to earn." Having analysed a number of the provisions of the Act, the court concluded that the pension payable to the respondent was not intended to be a substitute for earnings, but "a gratuitous payment made from considerations of compassion and/or welfare". Accordingly the court awarded the respondent a further amount of R100 000 but granted the appellant leave to appeal to this court.

Counsel for the appellant submitted that the rule that so-called extraneous benefits should be disregarded in assessing recoverable damages is based upon two fundamental propositions, viz i) that there is a wrongdoer who ought not, on moral and public policy grounds, to benefit from the largess of another, and ii) that the

person who confers the benefit on the plaintiff is a third party. In casu, so it was further submitted, these propositions do not apply. This is so because the compensation is not to be paid by the wrongdoer but by the Motor Vehicle Insurance Fund whilst the pensionable allowance payable under the Act also flows from the State's coffers.

In this regard counsel for the appellant argued that the ratio of the collateral source rule appears from the following dictum of Lord Reid in Parry v Cleaver (1969) 1 All E R 555, 558:

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer."

I do not think that Lord Reid had in mind that charitable gifts to the victim of a wrong should be disregarded only if the actual wrongdoer is the person liable for the damages suffered by the victim. If, for instance,

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an employer is vicariously liable for a delict committed by his employee, such gifts should clearly not be deducted from the victim's damages. The same holds good if damages may be claimed from the wrongdoer's insurer or, for that matter, from any other person against whom an action for damages lies (cf Browning v War Office (1962) 3 All E R 1089, per Diplock LJ, at pp 1094-5).

Nor does the fact that the defendant is the very person who conferred a benefit upon the plaintiff necessarily prevent the benefit from being regarded as extraneous. It is trite law that insurance benefits are not to be set off against a plaintiff's damages. If, therefore, a plaintiff takes out an accident policy with company A, and is then injured under circumstances giving rise to an action for damages against that company as the third party insurer of the wrongdoer, any payment in terms of the policy will still be res inter alios acta as far as the claim for damages is concerned. This is so because

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the capacity in which company A becomes obliged to pay the insurance benefit is different from that in which it becomes liable for the damages suffered by the plaintiff.

In casu there is moreover the consideration that the State which is liable for the payment of the pension cannot be equated with the Motor Vehicle Insurance Fund, a body corporate established in terms of s 5 of Act 56 of 1972 to administer third party insurance through authorised insurers. In any event, it is the authorised insurer who is primarily liable for recoverable damages caused by the negligence of the owner or driver of an insured vehicle, and who is the real defendant in a matter such as the present.

The main submission of counsel for the appellant, as I understood it, was that in so far as the pension to which the respondent has become entitled is intended to compensate him for loss of earnings, the benefit must be deducted from his patrimonial loss, and that in

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so far as the pension serves to compensate the appellant for pain and suffering, disability etc, that component of the pension falls to be deducted from his general damages; the result being that the whole pension is deductible from the totality of the appellant's damages.

As regards compensation for loss of earnings or earning capacity, counsel for the appellant relied upon the decision in Dippenaar v Shield Insurance Company Ltd 1979 (2) SA 904 (A), for the propositions i) that all a defendant in a delictual action has to do is to make good the difference between the value of the plaintiff's estate after the commission of a delict and the value it would have had if the delict had not been committed, and ii) that the real question in determining whether a benefit is extraneous is whether it flows from the same source as the plaintiff's wages at the time of the commission of the delict.

In Dippenaar's case it was common cause that

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the plaintiff, who had been injured in a collision caused by the negligence of a driver of a vehicle which was insured by the defendant, was entitled to claim damages from the defendant. The plaintiff was a civil servant who throughout the years that he had been employed as such had contributed towards a pension fund for State employees. Had the plaintiff not been injured he would have remained in the civil service for a further period of seven years, but the collision rendered him totally unemployable. In formulating his claim for damages the plaintiff assessed his loss of earnings on the basis of the income which he would have earned during the aforesaid period. The only dispute between the parties was whether the value of the plaintiff's retirement benefits, received and receivable from the State Pension Fund, should be deducted from his capitalised loss of earnings.

In holding for the defendant Rumpff CJ said (at p 920):

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> "When the capacity to earn is sought to be proved by the plaintiff by means of a contract of employment, the monetary value of the contract can only be assessed when one looks at the contract as a whole. In this regard it seems clear that, if in terms of such contract there is a compulsory deduction from salary plus a contribution by the employer in order to pay the employee money as sick leave or as a pension, it is the intention of the parties that that money shall be paid when it is due, in terms of the contract. In fact the 'income' of the employee is in terms of the contract not confined to his salary (in its ordinary connotation) but includes also sick pay or pension when such pay or pension is due. If a monetary value is sought to be put on the earning capacity based on this contract, every benefit received under the contract, such as a pension, must therefore be considered, as was done by the trial Court in the present case. If the plaintiff were to be allowed to say that, although the pension is included in the monetary value of the contract as at the date of the delict, the defendant must nevertheless pay him as though he had lost this benefit, the result would be so startling that one wonders why the problem had caused such conflicting views."

In my view this passage relates to the a case in which a plaintiff assesses his loss of earnings on the basis that but for his injuries, he would have

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continued to earn income in terms of an existing contract of employment. In such a case benefits due under or arising from that very contract fall to be deducted from the loss of earnings. The passage is therefore not authority for the wider proposition that merely because at the time of the delict a plaintiff was in receipt of wages, a benefit flowing from the relationship of employment accrues to the benefit of the defendant.

In the present case the respondent did not assess his loss of earnings on the basis of what he would have earned had he remained "employed" by the Defence Force. His claim was in fact based on the premise that he would have been employed in the private sector upon completion of his national service. As the court a quo correctly pointed out, the period served as a national serviceman and the conditions and terms of his service were completely irrelevant to his claim for loss of earnings. The actual decision in Dippenaar's case is

consequently no authority for holding that any part of the respondent's pension must be deducted from his loss of earnings or the total damages suffered by him.

Counsel for the appellant, however, placed particular reliance on the following dictum of Rumpff CJ (at p 917):

> "It is correctly argued that, in a case of personal injury as a result of a delict, the Court must calculate, on the one hand, the present monetary value of all that the plaintiff would have brought into his estate had he not been injured, and, on the other hand, the total present monetary value of all that the plaintiff would be able to bring into his estate whilst incapacitated by his injury."

It is in the first place clear that the Chief Justice did not intend to formulate an inflexible rule. This appears from a later passage in his judgment where he states (at p 918) that the notion of "capacity to earn" excludes receipts and benefits from benevolence or ordinary contracts of insurance, and that that is the real

reason why such receipts and benefits are generally excluded. In the second place it should be emphasised that the dictum relates only to Aquilian, or patrimonial, loss. For it is only in regard to such loss that a comparison can be made between the monetary value of a plaintiff's estate before the commission of a delict and its value as a result of the delict. In particular, freedom from pain and the enjoyment of the pleasures of life do not have a monetary value which form part of the universitas of a human being. Payment of general damages therefore does not fill a gap in the estate of the victim of the tort, but affords him "the comfort which is assumed to flow from being put in the possession of a sum of money" (Hoffa, N O v S A Mutual Fire and General Insurance Co Ltd 1965 (2) SA 944 (C) 954).

It is not clear to me whether in the view of Rumpff CJ all benefits conferred upon a victim of a wrong to compensate him for his pecuniary loss, and which do not

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partake of the nature of benevolence or insurance benefits, must be set off against the victim's patrimonial loss. On the assumption that that was indeed the approach of Rumpff CJ, I now turn to the question whether the pension accruing to the plaintiff is to be regarded as compensation for such loss, and more particularly, loss of earning capacity. I have already pointed out that s 7 (6) (f) of the Act enjoins the Director-General of Health and Welfare not to have regard to the earning capacity of an injured member in any particular occupation when determining his degree of disability. Counsel for the appellant submitted that the subsection does not preclude the Director-General from having regard to earning capacity generally, but merely excludes consideration of such capacity in regard to a "particular occupation". The submission is without substance since the concept of earning capacity does not exist in vacuo, but is always related to a particular person and a particular sphere of human

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endeavour. S 7 (6) (f) consequently affords a strong indication that the Legislature did not intend a pension under the Act to compensate an injured member for loss of earning capacity as such. That this was indeed not the Legislature's intention, is borne out by the Schedule to the Act. Thus, the percentage of disablement ascribed to the loss of all phalanges of three fingers of the right hand is 30% irrespective of the use the member intended to make of the hand in any occupation. It is hardly necessary to say that such a loss may not at all affect the earning capacity of, say, a lawyer, whilst it would spell an end to the career of a concert pianist. Again, the loss of an eye, resulting in a 50% disability, may in many occupations have no effect on a member's earning capacity. And as regards the loss of both testicles (50%) or one testicle (20%), it is indeed difficult to conceive of a situation in which the disability would preclude the injured member from pursuing any legitimate remunerative

calling.

I am therefore of the opinion that a pension under the Act cannot be viewed as compensation for loss of earnings or earning capacity. It is rather in the nature of a solatium for the totality of the consequences of the disablement, and particularly those that cannot readily be measured in monetary terms.

The final question is whether the pension awarded to the respondent, or part thereof, should not be deducted from the respondent's non-pecuniary loss. In this regard it should be borne in mind that a claim for such loss is not an Aquilian action (Government of the Republic of South Africa v Ngubane 1972 (2) SA 601 (A) 606), and that, as has often been stated, an award of money cannot really compensate a plaintiff for pain and suffering, loss of amenities, disfigurement, etc. There is indeed no norm for determining in monetary terms the extent of such general damages. As was

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said by Windeyer J in Papanayioutou v Heath (1970) A L R 105, 112 (quoted by Luntz, Assessment of Damages, 2nd ed, p 158, n 6):

> "What is a reasonable sum for general damages for personal injuries cannot be measured and tested as a reasonable price can be, by the experience of the market-place."

It follows that there may be even amongst lawyers a marked difference in their assessment of the monetary value to be placed on loss of a non-pecuniary nature. It is for this reason that a court of appeal will not interfere with an award of general damages made by a trial court merely because it is considered to be too high or too low. And in making such an award a court does not have regard only to the interests of the plaintiff, it also bears in mind that too heavy a financial burden should not be placed upon the defendant. In consequence it cannot be said that a plaintiff is over-compensated if, when assessing his general damages, no regard is had to an extraneous benefit conferred upon him for the purpose of ameliorating

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pain and suffering, loss of amenities, disability, etc.

I am accordingly of the view that in so far as the pension accruing to the respondent serves to compensate him for the intangible consequences of his disability, it should not be deducted from his non-pecuniary loss. And since it is impossible to determine to what extent a pension conferred under the Act is intended to or serves to compensate a member for pecuniary loss, and more specifically loss of earnings, the court a quo correctly held that the respondent's pension should not be set off against the totality of the damages sustained by him.

The appeal is dismissed with costs.

H.J.O. VAN HEERDEN JA

RABIE ACJ
CORBETT JA
VILJOEN JA
STEYN AJA

CONCUR