THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 311/08

ERASMUS FERREIRA & ACKERMANN	First Appellant
CHRIS FERREIRA	Second Appellant
HENDRIK ACKERMANN	Third Appellant

and

KERRY-LYNN FRANCIS	Respondent

Neutral citation: *Erasmus Ferreira & Ackermann v Francis* (311/08) [2009] ZASCA 54 (27 May 2009)

Coram: STREICHER, FARLAM, NUGENT, CLOETE & CACHALIA JJA

Heard: 17 MARCH 2009

Delivered: 27 MAY 2009

Summary: Section 1(1) of the Assessment of Damages Act 9 of 1969 which, in an action for damages arising from a person's death, prohibits insurance money, pensions or benefits from being taken into account in calculating loss of support, does not apply to a dependant's action against attorneys who negligently caused the loss of support claim to become prescribed. Where, however, a dependant received a collateral benefit from an insurance company in respect of the prescribed claim it was held that it was fair that the attorneys, who had caused the loss of support claim to become prescribed, should not be entitled to deduct that benefit from their overall liability to the dependant.

ORDER

On appeal from: High Court, Pretoria (Visser AJ sitting as court of first instance).

The following orders are made:

(i) The appeal is dismissed with costs.

(ii) The order of the court below is amended to include the agreed provision for interest so that it reads:

'Judgment is entered for the plaintiff against the defendants, jointly and severally, one paying the others to be absolved, in the amount of R850 000 (eight hundred and fifty thousand rand) with interest at the rate of 15.5% per annum calculated from the date 14 days after date of judgment with costs which costs are to include the costs attendant upon the employment of senior counsel.'

JUDGMENT

CACHALIA JA (STREICHER, FARLAM, NUGENT, CLOETE JJA concurring)

[1] This an appeal from the Pretoria High Court (Visser AJ) with its leave against a judgment ordering the appellants to pay the respondent an amount of R850 000 for damages arising from the professional negligence of the appellants. The high court decided the case on the basis of a stated case agreed to by the parties. It will be convenient to refer to the parties as they were referred to in the court below – the appellants were the defendants and the respondent was the plaintiff.

[2] The plaintiff was married to one Bruce Francis ('the deceased') who was killed in a motor vehicle collision on 9 October 1998 giving rise to a third party claim by the plaintiff for damages for loss of support against the Road Accident Fund ('the Fund') under the Road Accident Fund Act 56 of 1956. The plaintiff instructed the defendants, who are attorneys, to pursue her claim against the Fund. They accepted the instruction and lodged the claim but failed to issue summons timeously. The claim thus became prescribed and the plaintiff sued the defendants for professional negligence. Her claim against the defendants was for R850 000 – the amount that the parties agreed she would have been entitled to recover from the Fund for her loss of support had the defendants not caused her claim to become prescribed.

[3] The deceased was employed at Douglas Colliery Services Limited ('Douglas Colliery'). In terms of his employment contract with Douglas Colliery he was (and on his death his dependants were) entitled to benefits under an insurance policy known as a Commuting Journey Policy ('the CJP') issued by Rand Mutual Assurance Company Limited ('Rand Mutual'). It is common cause that, the plaintiff became entitled to payment of a pension of R695 525 from Rand Mutual in terms of the CJP arising from the death of the deceased, and that the pension is indeed being paid to her. (The figure comprises both the amounts which the plaintiff has received in the form of monthly pension payments, and the capitalised value of future payments.) Had the defendants pursued the plaintiff's claim against the Fund, the Fund would not have been entitled to bring this amount into account as it was 'for loss of support as a result of a person's death (and constituted) insurance money, pension or benefit' as envisaged in s 1(1) of the Assessment of Damages Act 9 of 1969 ('the Assessment Act'), which the Fund, in terms of the section, would have been precluded from deducting from its overall liability. However, in terms of the CJP the plaintiff would have been obliged to pay Rand Mutual out of the amount received from the Fund to the extent of the benefit payable by Rand Mutual in terms of the CJP.

[4] So, had the defendants pursued the claim against the Fund on the plaintiff's behalf they would have recovered R850 000 in respect of the

plaintiff's loss of support from the Fund. She would have had to pay R695 525 to Rand Mutual, retaining a balance of R154 475 and would have continued to receive the CJP pension. She would thus, in effect, have received a total of R850 000 comprised of her monthly CJP pension to the value of R695 525 and the R154 475 that she would have retained out of her claim against the Fund.

[5] The defendants contended that the plaintiff was not obliged to indemnify Rand Mutual to any extent out of damages recovered from them. This meant that she suffered damages in an amount of R154 475 and not R850 000 as a result of their negligence. Should they be ordered to pay R850 000 to the plaintiff she would, they submitted, be R695 525 better off than she would have been had they not allowed her claim to become prescribed. The plaintiff on the other hand contended that in terms of the CJP she is obliged to indemnify Rand Mutual out of damages recovered from any third party to the extent of the benefit payable by Rand Mutual. In the alternative she contended that her claim against the defendants is a claim for loss of support as a result of the death of her husband and that in terms of s 1 of the Assessment Act the insurance money payable to her may not be taken into account in assessing her damages claimed from the defendants. Consequently the stated case posed the following questions for determination by the high court:

'The Court is asked to adjudicate upon the effect of the (p)laintiff's receipt of benefits in terms of the CJP upon the (d)efendants' liability to the (p)laintiff arising out of the prescription of her claim against the Fund. More in particular, the Court is asked to determine:

(a) Whether the defendants were 'third parties' as defined in Condition 8 of the CJP.

(b) If not, whether the plaintiff's claim against the defendants fell to be reduced by the amount which the plaintiff would have had to repay to Rand Mutual, and which she was no longer obliged to.'

In answering the second question the high court was asked to determine whether the provisions of s 1 of the Assessment Act applied to the plaintiff's claim against the defendants.

[6] It appeared to the parties that if either question was answered affirmatively the plaintiff would be entitled to the full amount of R850 000 without having to deduct the R695 525. On the other hand, if the second question was resolved in favour of the defendants, in other words that the Assessment Act did not apply to the plaintiff's claim, the parties were under the impression that the defendants' liability of R850 00 would be reduced by R695 525 to R154 475. The high court decided the first question against the plaintiff but the second in her favour. This meant that the defendants could not deduct the value of the pension from the computation of the plaintiff's damages and were thus liable to her for the full amount of R850 000. The defendants appealed against this finding.

[7] I turn to consider the first question – whether the defendants are 'third parties' as envisaged in Condition 8 of the CJP. It reads thus:

'Where the accident in respect of which a benefit is payable was caused under circumstances creating a legal liability in some person other than the Insured (hereinafter referred to as the Third Party) to pay damages to the Insured Person or to his dependants in respect thereof, the Insurer shall be entitled to be indemnified by the Insured Person or by his dependants, as the case may be, out of any damages recovered from the third party, to the extent of any benefit payable by the Insurer in terms of this policy . . .'

[8] The plaintiff contended in the high court, as she did before us, that the cause of the plaintiff's claim was the accident. As such, so the contention went, the court should give effect to the true intention of the parties by interpreting the condition so as to include the defendants within the ambit of the meaning of 'the Third Party'. The high court observed that the clear terms of the condition applied only to a claim that arose from an accident and because, the court reasoned, the legal liability of the defendants was caused not by the accident but by the prescription of the claim, the defendants were not third parties envisaged in the CJP. In my view the court's reasoning on this aspect cannot be faulted.

[9] I turn to the second issue namely whether the Assessment Act applied to the plaintiff's claim. Section 1 of the Assessment Act provides as follows:

'(1) When in any action, the cause of which arose after the commencement of this Act, damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.

(2) For the purposes of subsection (1) –

"benefit" means any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

"insurance money" includes a refund of premiums and any payment of interest on such premiums;

"pension" includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment.'

[10] The defendants contended in the high court, as they do now, that the Assessment Act in its terms applies only to actions in which damages are assessed for loss of support, which the plaintiff's action against the Fund is. And, so they contended, because the plaintiff's action against the defendants is not one for loss of support, but for loss of her claim against the Fund, the Assessment Act did not apply to her claim against them.

[11] The high court rejected this contention. In so doing, it reasoned that even though the plaintiff's cause of action against the Fund differed from its action against the defendants, her claim, that is, her right of action against them was essentially the same – they both related to damages for loss of support as a result of the death of the deceased. I do not agree with the High Court's reasoning on this aspect.

[12] Claims for loss of support on the one hand and for professional negligence on the other differ. In the former case what is being compensated is the loss of support; in the case of the latter it is the lost opportunity for recovering that loss. The claims are conceptually different. Section 1(1) of the Assessment Act applies only to actions in which damages are to be assessed for loss of support as a result of a person's death. In the present action damages are not to be assessed for loss of support. The damages that are to

be assessed are the damages suffered by the plaintiff as a result of the negligence of the defendants in having allowed her claim for loss of support against the Fund to become prescribed. The fact that the quantum of damages suffered by the plaintiff may be the same as the amount of her loss of support and the fact that such damages have to be determined by reference to her loss of support do not make the present action an action in which 'damages are assessed for loss of support'.

[13] In light of the fact that the plaintiff is not in terms of the CJP obliged to indemnify Rand Mutual out of damages recovered from the defendants and the fact that the value of the benefit payable by Rand Mutual is not to be excluded from the computation of the damages suffered by the plaintiff as a result of the defendants' negligence, the defendants submitted that the damages suffered by the plaintiff arising from their negligence amounted only to R154 475 and not R850 000 as claimed by her.

[14] However, it does not follow that because s 1(1) of the Assessment Act does not apply the plaintiff's claim against the defendants falls to be reduced by the amount which the plaintiff would have had to repay to Rand Mutual. The question arises whether, at common law, the benefit payable to the plaintiff in terms of the CJP should not be disregarded when determining the damages suffered by the plaintiff as a result of the defendants' negligence. Because of the conclusion the high court had arrived at it was not necessary to pursue this inquiry and during their oral submissions before this court neither party dealt with this question satisfactorily.

[15] So the parties were invited to make further written submissions. In particular they were requested to deal with whether the benefit payable by Rand Mutual was collateral to the plaintiff's right of action according to the principle *res inter alios acta*, *aliis neque nocet*, *neque prodest* ('a thing done, or a transaction entered into, between certain parties cannot advantage or injure those who are not parties to the act or transaction') and had to be disregarded in computing the plaintiff's damages. The parties were also asked to deal with the question whether Rand Mutual should have been joined in the

proceedings before the high court. Since then Rand Mutual has indicated that it waived its right to be joined as a party and that it considers itself bound by this court's decision. So the answer to this question fell away. It remains to deal with the question whether the pension benefit that Rand Mutual paid to the plaintiff was a collateral benefit which had to be disregarded in computing the damages suffered by her as a result of the defendants' negligence.

[16] As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict advantageous consequences have to be taken into account. But it has been recognised that there are exceptions to this general rule. Various attempts to formulate a legal principle as to which benefits should be taken into account have been made. In *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 at 41E-42E Olivier JA referred to these attempts and concluded:

'Boberg (*The Law of Delict* vol 1 at 479) succinctly states:

"The existence of the collateral source rule can therefore not be doubted; to what benefit it applies is determined casuistically; where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit."

It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country (*Santam Versekeringsmaatskappy Bpk v Byleveldt* (*supra* at 150F) and in England (*Parry v Cleaver* [1969] 1 All ER 555 (HL) (1970) AC 1) at 14 and 31 it is acknowledged that policy considerations of fairness ultimately play a determinative role.'

In a dissenting judgment Marais JA said that there can be little doubt that the exclusion of benefits flowing from the benevolence of third parties or from insurance policies which a plaintiff had himself taken out and paid for is a result intuitively sensed by virtually all to be 'fair'. As to the reason why benefits in other classes of cases have not been excluded he suspected 'that the intuitively sensed 'fairness' of ignoring benefits flowing from the benevolence of third parties or from insurance policies which a plaintiff himself

had taken out and paid for, is either entirely absent in the other classes of case, or not so keenly sensed.'[1]

[17] In light of the aforegoing I agree with Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) at p 215-216 that '[q]uestions regarding collateral benefits are normative in nature; they have to be approached and solved in terms of policy principles and equity' and that in doing so 'there should always be a weighing-up of the interests of the plaintiff, the defendant, the source of the benefit as well as the community in establishing how benefits resulting from a damage-causing event should be treated'.

[18] The defendants submitted that it would be unfair to allow the plaintiff to receive double compensation and thereby to be enriched in the amount of R695 525, which will occur if the defendants are not able to deduct this amount from their overall liability of R850 000. On the other hand there would seem to be no reason why the defendants should be allowed to benefit from an insurance policy which had to be disregarded in respect of the loss of support claim which they allowed to become prescribed. Should the amount that the plaintiff receives from Rand Mutual be disregarded she may well consider herself morally obliged to indemnify Rand Mutual to the extent of the benefit payable by it in terms of the CJP as she would have been obliged to do had her claim against the Fund not become prescribed. I see no reason why she should be deprived of that moral choice by withholding the means for her to do so. An order that R850 000 be paid to her will therefore also be in the best interests of Rand Mutual, which according to Mr Mullins who appeared on behalf of the defendants, is 'lurking behind (her) claim'. If it is, there is nothing opprobrious in its conduct. It is out of pocket in the amount of R695 525 and is entitled to try to recover this amount.

[19] But even if the plaintiff does not repay Rand Mutual and thereby profits from the outcome of this litigation, I do not think it unfair that the defendants compensate her for the full extent of her loss of R850 000, for this is what she

[1] At 48E-G.

would have been entitled to receive from the Fund had the defendants not negligently caused her claim against the Fund to become prescribed. The defendants therefore cannot complain – they are no worse off than the Fund would have been had they fulfilled their mandate to diligently pursue her claim against the Fund.

[20] For these reasons the appeal must fail. The parties agreed in the stated case that if the plaintiff's claim succeeded she would be entitled to interest at the rate of 15.5% per annum calculated from a date 14 days after the date of judgment.[2] The high court appears to have inadvertently omitted to reflect this agreement in its order. The following orders are made:

(i) The appeal is dismissed with costs.

(ii) The order of the court below is amended to include the agreed provision for interest so that it reads:

'Judgment is entered for the plaintiff against the defendants, jointly and severally, the one paying the others to be absolved, in the amount of R850 000 (eight hundred and fifty thousand rand) with interest at the rate of 15.5% per annum calculated from the date 14 days after date of judgment with costs which costs are to include the costs attendant upon the employment of senior counsel.'

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JUDGE OF APPEAL

[2] The reason for the 14 day delay is inexplicable. The pleader may have had in mind s 1(A) inserted into s 21 of the Compulsory Motor Vehicle Insurance Act 56 of 1972 by s 8 of Act 69 of 1978 but that provision has long since ceased to be applicable to motor accident claims and would in any event not have been applicable to the plaintiff's claim here. She would have been entitled to interest at the prescribed rate, from the date on which the judgment debt became due and payable in terms of s 2(1) of the Prescribed Rate of Interest Act 55 of 1975 but he did not ask for it.

APPEARANCES:

For Appellant:	J F Mullins SC
	Instructed by: Savage Jooste & Adams Inc; Pretoria Webbers; Bloemfontein
For Respondent:	J G Bergenthuin SC
	Instructed by: Van Zyl Le Roux & Hurter Inc; Pretoria Molefi Thoabala Attorneys; Bloemfontein