



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Erasmus Ferreira & Ackermann & others v Kerry-Lynn Francis

The Supreme Court of Appeal ('the SCA') today held that s 1(1) of the Assessment of Damages Act 9 of 1969 ('the Assessment Act') 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. It held, however, that where a widow received a collateral benefit from an insurance company in respect of her claim for loss of support under the Assessment Act, it was fair that the attorneys, who negligently caused her claim to become prescribed and had thus themselves become liable to her, not be entitled to deduct the benefit from their overall liability to the widow.

The facts of the case briefly, were these: The widow, Kerry-Lynn Francis's husband, Bruce ('the deceased'), was killed in a motor vehicle accident on 9 October 1998. The Road Accident Fund, as the third party, was liable for her claim for loss of support. She instructed the defendants, who are attorneys, to pursue the claim against the Fund. They accepted the instruction but failed to issue summons within the prescribed time limits. This meant that she was not able to enforce her claim against the Fund. She thus sued the defendants for professional negligence claiming from them R850 000 – the amount she would have been entitled to claim from the Fund.

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 cover under an insurance policy

known as a Commuting Journey Policy ('the CJP') issued by Rand Mutual Assurance Company Limited ('Rand Mutual'). Mrs Francis became entitled to payment of a pension of R695 525 from Rand Mutual in terms of the CJP arising from the death of her husband. The pension was paid to her. Had the defendants pursued Mrs Francis'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 Assessment Act, which the Fund would have been precluded from deducting from its overall liability. However, in terms of the CJP Mrs Francis 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.

So, had the defendants pursued the claim against the Fund on Mrs Francis'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.

The defendants contended that the Assessment Act did not apply to Mrs Francis's claim against them as it had applied to her claim against the Fund. This was, so they contended, because the Assessment Act applied only to claims for loss of support, not to claims against attorneys for professional negligence. Thus, they submitted, the defendants are liable to Mrs Francis only for R154 475, and not the full amount of R850 000, as Rand Mutual had paid her the pension of R695 525. On the other hand, they submitted, should Mrs Francis's contention that the Assessment Act applied be upheld the consequence would be that she would be double compensated to the extent of R695 525 because she would now not be obliged to repay Rand Mutual as the claim against the Fund had become prescribed.

Although the SCA agreed with the defendants' contention that the Assessment Act did not apply to Mrs Francis's claim against them as it did against the Fund, the court disagreed that this meant that the defendants could deduct the R695 525 from their overall liability to her, which the Fund was precluded from doing. This was because, so it reasoned, the common law recognized the amount as a collateral benefit, which would be unfair for the defendants to deduct when the Fund would have been debarred from doing so. Furthermore, said the SCA, the defendants had no cause to complain – had they not negligently failed to pursue the claim against the Fund the latter would have had been liable to Mrs Francis for the full amount of R850 000. The fact that she may profit from the litigation (if she does not repay Rand Mutual) does not detract from this fact. The defendants are therefore no worse off than the Fund would have been.

The SCA accordingly dismissed the defendants' appeal and ordered it to pay the costs.