

SOUTH AFRICA / JUDGMENT

## Santam Ltd. v Gerdes (515/96) [1998] ZASCA 90; 1999 (1) SA 693 (SCA); [1998] 4 All SA 440 (A) (29 September 1998) [1998] ZASCA 90

COURT

Supreme Court of Appeal

BEFORE

Nienaber, Howie, Schutz, Streicher, Ngoepe

CASE / FILE NUMBER

515/96

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 515/96

In the matter between:

SANTAM LIMITED

Appellant

and

CHRISTIANS GERDES

Respondent

CORAM: NIENABER, HOWIE, SCHUTZ, STRETCHER, JJA et NGOEPE, AJA

DATE OF HEARING: 28 August 1998DATE DELIVERED:29 September 1998

DATE DELIVERED:

JUDGMENT NGOEPE, AJA

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This case is about whether certain payments made in Germany to the respondent (plaintiff) following the death of her husband in South Africa, should be deducted from damages payable to her as loss of support in terms of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.

The plaintiff is resident in Germany. On 10 September 1990 her husband, Gerd Janssen Gerdes (the deceased), was knocked down by a motor vehicle in Durban on his way from work; he died as a result of the injuries sustained in the collision. The deceased was resident and domiciled in Germany. The appellant (defendant) is the appointed agent in terms of the abovementioned Act in relation to plaintiff's claim. At the time of the collision the deceased, employed as a master shipbuilder in Germany, had been

3 temporarily assigned by his employer to South Africa to assist with a specific boat building project which was to take about four months.

The plaintiff issued summons against the defendant in the Durban and Coastal Local Division for, inter alia, loss of support.

It was common cause at the commencement of the trial that plaintiff had, in the meantime, as a result of her husband's death, received payments in Germany from certain funds administered there. The payments were: DM 41 278,88 from what is known as the Seekasse, described as a pension insurance institution; and DM 671 535,17 from the Norddeutsche Metall-Berufsgenossenschaft ("the BG").

The BG fund is described in greater detail later in the judgment.

This amount was made up of a death grant of DM 6 400,90; periodical payments between September 1990 and June 1995 of DM 186 194,62; and DM 478 757,65, as a final settlement amount.

DM 186 194,62; and DM 478 757,65, as a final settlement amount.

The defendant accepted liability for such damages as the plaintiff might prove. In that regard the defendant raised two issues which the parties requested be resolved by the court (Shearer J) on the basis of a statement of agreed facts. The two issues are

formulated as follows:

"[a] Whether the quantum of the damages suffered by the plaintiff is to be assessed in accordance with German law or in terms of South African law. [b] Whether the payments received by the plaintiff in terms of German social security legislation as a result of her husband's death are to be brought into account to reduce the damages she has suffered."

With regard to the first question, defendant's contention was that German law should apply and not South African law. The Court a quo rejected this contention, and held that South African law applied. There is no appeal in that regard.

The second issue resolved itself into the question whether the payments made in Germany were exempted from deduction against plaintiff's loss in terms of the provisions of section 1 of the Assessment of Damages Act 9 of 1969 ("the Act"), which section reads 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."

6 Shearer J held that both the Seekasse and the BG payments were a "pension" as contemplated in section 1(1) of the Act and therefore not deductible. The appeal only concerns the BG payments.

There was no suggestion that the payments constituted a "benefit" but counsel for the defendant argued before us that the BG payments were also not "insurance money" or a "pension" within the meaning of the section.

Both counsel, in an endeavour to provide the context within which the relevant section of the Act should be understood and interpreted in relation to the payments in dispute, referred at some length to the history of the Act. I do not think it is necessary to go fully into that history here; a brief reference will suffice.

Prior to the coming into operation of the Act, the legal

position was that benefits such as the accelerated receipt of pensions or the proceeds of insurance policies, resulting from the deceased's death, were deductible from a dependant's damages for loss of support. This was a natural consequence of the common law principle that as regards maintenance, dependants should be placed in financially as good a position "as they would have been in if the deceased had not been killed." (*Legal Insurance Company Ltd v gal Insurance Company Ltd v*

*Botes* 1963(1) SA 608 (A) at 614 E-G; *Groenewald vSnyders*

*Groenewald vSnyders*

1966(3) SA 237 (A) at 246 C). The result was that a wrongdoer benefited from the action of a prudent victim who had taken steps to make provision for his dependants in the event of a mishap. This position was changed by the Act, to bring South Africa more in line with a number of other countries (*Boberg*, (1969) 86 SALJ 339- (1969) 86 SALJ 339-343).

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The broad objective of the Act is to ameliorate the position of dependants whose claims for loss of support against the wrongdoer would otherwise have been reduced. Counsel for both parties were in agreement that, but for the Act, payments in the nature of the BG payments would clearly have been deductible. The narrow question in this case is, therefore, whether the BG payments are covered by the provisions of the Act so as to exempt them from deductions from the award to be made to the plaintiff.

Unlike "benefit", the words "pension" and "insurance money" are not defined, conceivably because effective definition might have been difficult to achieve. Whatever the reason, on the primary principle of construction "pension" must be given its ordinary grammatical meaning.

To resolve the matter it is necessary first, I think, to examine

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the nature of the BG fund in order to be able to make a correct determination as to the nature of the payments made thereunder.

The main features of the fund were given as follows in the statement of agreed facts:

"[a] The deceased did not make any contribution to the fund from which these amounts were paid, nor was he as employee obliged or entitled to do so.

[b]

The fund is wholly financed by compulsory contributions by employers. Employers may also make voluntary contributions to provide that they themselves be entitled to such benefits.

[c]

The fund is under-written by the BG, a public corporation administering and controlling the fund. The BG also investigates work-related accidents and imposes rules and regulations to avoid accidents at the workplace.

[d]

Any person, irrespective of sex, nationality or age, who is an employee in Germany is covered by the provisions of this or a similar fund, provided the accident is work-related, that is it was suffered at work or on the way to or from work.

[e]

As the deceased was on his way from work when he was killed, his death was work-related.

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[f] The amounts received by the plaintiff... are known as 'hinterbliebenenrenten' which is to be translated as 'survivor's pension'."

Further features of the "survivor's pension" appear on annexures A and B to the statement of agreed facts. For example, the "pension" amounts to 40% of the last gross earnings of the deceased if the surviving spouse is over 45; if the surviving spouse is in receipt of another income the "pension" amount will be reduced if the income exceeds a certain sum. Furthermore, upon application by the survivor, a lump sum ("Abfindung") can, under certain conditions, be paid instead of the "survivor's pension".

Counsel for appellant argued that by reason of the final lump sum payment the receipts from BG could not be pension payments. I disagree. The mere fact that the fund provides for such an option would not detract from its character as a pension fund. Practical

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consideration, such as the need to relieve the BG of some of its administrative work load, might have necessitated the creation of such an option. The second point raised by defendant's counsel was that there was no correlation between the "pension" and the rendering of services in that, were a workman to die on his first day of work, a large sum of money would still have to be paid. In this context he argued that the essential character of pension was that it was in return for, or pursuant to, past services rendered. His related argument was that in a pension scheme, an employee makes contributions - and I understood him to mean monetary contributions - whereas in the BG case, it is the employer who does so. In my view though, both points are adequately met when one considers, as counsel for plaintiff correctly pointed out, that there are a number of statutory pension schemes in which there is neither

12 the correlation contended for, nor any monetary contributions by the

intended beneficiary (the employee); for example, the pension

scheme under the Military Pensions Act 84 of 1976, or its

predecessors in earlier legislation (the War Special Pensions Act

35 of 1962 and the War Pensions Act 82 of 1967). Section 189 of

the Constitution of the Republic of South Africa Act 200 of 1993,

required that an Act of Parliament be passed to provide for the

payment of pensions to "persons who, in the establishment of a

democratic constitutional order, made sacrifices or served the public

interest; and the dependants of those persons." Pursuant to that, the

Special Pensions Act 69 of 1996, was passed. It is noteworthy that

Special Pensions Act 69 of 1996

the contribution required is not a monetary one. I do not think that it

can be seriously suggested that the legislature's intention was that

pensions paid under those schemes should fall outside the ambit of

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section 1(1) of the Act. Had the legislature required the kind of correlation contended for, or that an employee make monetary contributions, the legislature would have expressly so provided. At any rate, the argument that the employee under the BG fund makes no monetary contributions may be missing an important point: when an employee accepts the salary offered he will, most probably, take into account the fact that a monetary contribution is going to be made on his behalf by his employer. This point illustrates difficulties which may arise once one starts looking for contributions by an employee: for example, should the contribution be only of a direct nature or can it also be indirect; if so, how would one determine it? If the contribution has to be of a monetary nature, would mere token contribution be sufficient; if not, at what stage does it become sufficient?

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Another point raised for the defendant was that if the word "pension" were given its ordinary meaning the payments would not be pension. In this respect he referred to a passage in *Leyds v Commissioner for Inland Revenue*.<sup>1929 TPD 148</sup> at 153:

1929 TPD 148

"No doubt the word 'pension' usually implies a payment in respect of services rendered or work done."

He also referred to *S v Commissioner of Taxes*<sup>1959(3) SA 455</sup>

*S v Commissioner of Taxes*

(SR) at 458 F-G:

"Although pensions may take different forms the essential of a pension - to my mind - is that it is a money payment usually of periodic sums which the ex-employee receives not as an earning from existing service but after the termination thereof and in consideration or in respect of or as a reward for past service."

I accept that "pension" would ordinarily be understood to be as defined in those passages, inasmuch as I do not find anything wrong in those definitions. But I find nothing in them which

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supports a proposition that there should be the kind of correlation contended for, or that there should be a (monetary) contribution by an employee. Indeed, in *S v Commissioner for Taxes*,<sup>supra</sup> it is

S v Commissioner for Taxes,

recognised that "pensions may take different forms". I understand that to mean that pension schemes may vary in their terms; or that they may be differently structured. Far from supporting defendant's contentions, the above passages confirm that the BG payments constitute a "pension" in accordance with the ordinary meaning of that word. See also the following definition in The Oxford English Dictionary, (Second Edition):

"Pension: annuity or other periodical payment made by a person or body of persons, now esp. by a government, a company or an employer of labour in consideration of past services..."

I have come to the conclusion that, regard being had to the 16 objective of the Act, the nature of the BG scheme as well as the ordinary meaning of the word "pension", the BG payments made to the plaintiff in Germany constitute pension payments within the meaning of the Act and are therefore not liable to be deducted from plaintiffs damages.

As a result of this view it is not necessary to consider whether or not the payments in question constitute "insurance money".

The appeal is therefore dismissed with costs.

NGOEPE, AJA

NIENABER, JAHOWIE, JA SCHUTZ, JA STREICHER, JA

HOWIE, JA SCHUTZ, JA STREICHER, JA

Concur

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