

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE <u>6/12/13</u> SIGNATURE <u>[Signature]</u>	

CASE NO: 1414/2013

In the matter between:

MASHUDU PORTIA KAPA

And

ROAD ACCIDENT FUND

PLAINTIFF

DEFENDANT

JUDGMENT

MULLER J

[1] The plaintiff instituted action against the Road Accident Fund for damages for injuries sustained arising out of a motor vehicle collision 23 October 2011.¹ The RAF has admitted liability on 13 February 2017 to compensate the plaintiff 100% of her proven damages.

[2] It is common cause that the plaintiff receives a disability grant from the state. The court was requested to determine whether the disability grant should be deducted from the total loss of earnings of the plaintiff or whether it is *res inter alios acta* and not deductible. The parties are in agreement that the plaintiff's net loss of earnings is R918 748.00, if the disability grant is disregarded or in the event that the disability grant is deducted from the loss of earnings, R525 975.00.

[3] The plaintiff, on the one hand, contends that a disability grant should be ignored and not deducted from the loss of earnings. Counsel relied upon the case of *Moropane v RAF*.²

[4] The defendant, on the other, contends that that the amount received in respect of the disability grant should be deducted. It relies for that proposition on the case of *Mullins v RAF*.³

[5] In South African law a plaintiff, generally, cannot recover more than his/her actual loss.⁴ An event which causes damage sometimes results in the receipt of a benefit despite loss being incurred. In deciding what amount would compensate the plaintiff fully two competing principles must be considered.⁵ The one is that a plaintiff should not receive double compensation.⁶ The other one is that the wrongdoer (or his/her insurer) should not be relieved from liability on account of some fortuitous event such as the generosity of a third

¹ Hereinafter referred to as "the RAF". The RAF is established in terms of the Road Accident Fund Act 56 of 1996. (Hereinafter referred to as the "RAF Act.")

² Unreported decision North Gauteng High Court Case no 39680/2012 dated 27 Augustus 2018.

³ Case No 3650/2014 [2016] ZAEPEHC 32 (4 August 2016).

⁴ Not losing sight that the fullest possible compensation of the loss suffered should be realized.

⁵ The collateral-source rule.

⁶ *Zysset v Santam Ltd* 1996 (1) SA 273 (C) 278A-D.

party.⁷ In weighing up these principles equitable considerations such as fairness, reasonableness, public policy and justice should be taken into account and may play a determinative role.⁸ The courts dealt casuistically with collateral source issues in the absence of an acceptable test to determine which benefits are collateral and which are deductible.⁹

[6] In *Coughlan NO v Road Accident Fund*¹⁰ the Constitutional Court did not consider what the effect is on a claim for loss of earnings if the plaintiff is the recipient of a disability grant from the state. It held, with reference to the nature and purpose of foster care grants, that those grants which arose from the constitutional obligation of the state to provide for children in need of care are different from compensation. It was held that foster care grants are not paid to the children and is furthermore not predicated on the death of a parent.¹¹ I interpose momentarily, to point out that, in my respectful view, the judgment is not authority to hold that disability grants should be regarded as similar to foster care grants. Different considerations apply to disability grants.

[7] However, to determine whether payment of a disability grant amounts to double compensation, a similar approach adopted by the Constitutional Court in *Coughlan NO* will be followed:¹²

(a) What is the constitutional obligation of the state in terms of section 27 of the Constitution;

⁷ *Zysset v Santam Ltd* supra: 278F.

⁸ Neethling J and Potgieter JM Neethling-Potgieter-Visser *Law of Delict* 6th ed LexisNexis Durban (2010) 231-232; *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) 151.

⁹ *Standard General Insurance Co Ltd v Dugmore* 1997 (1) SA 33 (A) 42 A-B; Steynberg L and Millard D "Distinguishing between Private Law and Social-Security Law in Deducting Social Grants from Claims for Loss of Support" 2011 *Potchefstroom Electronic Law Journal* 261-263.

¹⁰ 2015 ZACC 10 par 34.

¹¹ Par 58.

¹² Par 33. (With the necessary adjustment).

(b) The nature and purpose of disability grants *vis-a-vis* that of compensation for loss of earnings;

(c) Whether there is any causal link between a disability grant and compensation for loss of earnings.

[8] It is acknowledged in section 27(1)(c) of the Constitution that the state has an obligation to make social security available to everyone and if they are unable to support themselves and their dependents appropriate social assistance must be provided. The Constitution is not prescriptive as how the state should make grants available within the available recourses. It was left to Parliament to decide. The Social Assistance Act 13 of 2004 provides for the provision and administration of social assistance and the qualification requirements for such assistance.¹³ The eligibility of a person to apply for a disability grant is set out in section 9 of the Social Assistance Act which reads as follows:

"A person is subject to section 5 eligible for a disability grant if he or she –

(a)...

(b) is owing to a physical or mental disability unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance."

[9] The RAF Act is silent on whether a disability grant, in particular, should be included or excluded from compensation.¹⁴ It does not follow, merely, from such silence that social grants which are available in terms of the Social Assistance Act should simply to be ignored, even if it leads to double compensation.¹⁵

[10] The nature and purpose of a disability grant is clearly intended to give financial assistance to anyone who as a result of physical or mental disability irrespective of the reason is unfit to obtain the means to provide for his/her maintenance. I do not understand

¹³ s 3 of the Social Assistance Act 13 of 2004.

¹⁴ s 18(2) and (3) of the RAF Act.

¹⁵ Double dipping may be discounted *in casu*.

this to mean that a person is only eligible if he/she is totally disabled. All that is required is that the disability should be of such a degree that it renders a person unable to maintain him/herself by means of employment. Put differently, a person who is meaningfully employed but his/her remuneration as a result of his/her disability is so meagre that he/she is unable to maintain himself/herself should qualify.

[11] *In casu* the disability grant is paid to the plaintiff as a direct result of her disability which was caused by the injuries she sustained in the motor vehicle collision. The plaintiff is regarded as unemployable and damages are claimed for loss of earnings due to injuries sustained the result of which is a total loss of income.¹⁶ The physical injuries which she sustained rendered her totally unfit for employment and unable to maintain herself. It comes as no surprise that she qualified for a disability grant.

[12] The grant is not paid to the plaintiff a result of the generosity, benevolence or charity of the state, but as financial assistance by the state due to the injuries sustained which caused a loss of income, but also in terms of the constitutional obligation to render social security to everyone in need of such assistance. That, is of course, what her claim for compensation is all about.¹⁷ Thus, there is very close causal link between the reason for the disability grant and the claim for loss of income.¹⁸ There is no doubt in my mind that the payment of the disability grant leads to double compensation.

[13] In addition, it must be taken into consideration that the public carries a heavy financial burden towards the state. The ongoing financial woes of the RAF is notorious and well known. The funds utilised by the RAF and the funds allocated for social grants originates

¹⁶ It was recorded in a joint minute of the industrial psychologists: "We agree in our opinion that Ms Kapa has been compromised by the accident, and that she may be suited to sedentary and light work but she is unlikely to be able to secure and sustain sedentary employment". It continues: "The likelihood that she would be able to secure any form of employment in the open labour market in her compromised state is NIL"

¹⁷ *Van Wyk v Santam Bpk* 1998 (4) SA 731(C) 737B; *RAF v Lechner* (711/2010) [2011] ZASCA 240 (1 December 2011) par 12-14. *Mullins v RAF* *supra* par 35.

¹⁸ *Standard General Insurance Co Ltd v Dugmore* *supra* 441-J.

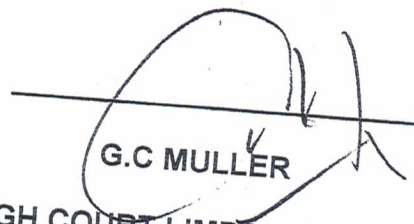
from public by means fuel levies on the one side, and taxes, on the other. Public policy, fairness and justice demands that overcompensating motor vehicle accident victims from public funds should be avoided.¹⁹ Fairness and justice demands that the disability grant be deducted from the award to be made.

[14] Finally, I respectfully disagree, for the reasons set out above, with the judgment in *Moropane v RAF* which held that a disability grant paid by the state should be ignored and not be deducted.

[15] The RAF is successful with regard to the separated issue and is entitled to its costs.

ORDER

- (1) It is declared that the amounts of the state disability grant paid to the plaintiff be deducted from her total loss of income.
- (2) The defendant is ordered to pay the plaintiff the amount of R 525 975.00 in respect of the claim for loss of income.
- (3) The plaintiff is ordered to pay the costs of the defendant in respect of the separated issue.


G.C MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

¹⁹ *Van Wyk v Santam Bpk supra* 738.H-J.

APPEARANCES

- | | |
|-------------------------------|-------------------|
| 1. For the Plaintiff | : Adv T Pillay |
| 2. For the Defendant | : Adv T.I Ngwana |
| 3. Date of hearing | :03 December 2018 |
| 4. Date of judgment delivered | :07 December 2018 |