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G.P.-S.43575—1969-70—2,000

J 219

101/72

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

GRAHAM PERCY CASELY . N.O. *Appellant,*

versus

MINISTER OF DEFENCE *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Webber & Newdigate

Respondent's Attorney / *Prokureur vir Respondent* Dep. S.A. (Bmfntn.)

Appellant's Advocate / *Advokaat vir Appellant* A. Suzman Q.C. C. T Howie

Respondent's Advocate / *Advokaat vir Respondent* C.P. Joubert S.C. J.H. Heunis

Set down for hearing on
Op die rol geplaas vir verhoor op 22-9-72

2.3.5.9.11

Corams: Van Blerk, Trunkfft, Holmes, Trollip & Muller, JJ.A.

(T.F.D.) 9.45 a.m. —— 11.00 a.m.
11.15 a.m. —— 12.40 p.m.

C. A. V.

Appeal dismissed with costs, including the costs ~~consequent~~ relating to the employment of two counsel.

SUPREME COURT OF APPEAL
GEREGSHOF
BLOEMFONTEIN
15 -11- 1972

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA .

APPELLATE DIVISION .

In the matter between:

GRAHAM PERCY CASELY, N.O. ..... APPELLANT

AND

THE MINISTER OF DEFENCE ..... RESPONDENT

Coram : Van Blerk, Rumpff, Holmes, Trollip et Muller, JJ.A.

Heard : 22 September 1972. Delivered: 16 November 1972.

J U D G M E N T .

Trollip, J.A. :

This appeal raises two questions: (a) whether section 145 (1) (a) of the Defence Act, No. 44 of 1957, applies to the plaintiff's minor son, who, while a military trainee travelling in a military vehicle in connection with his training as such, was severely injured through the alleged negligence of the driver of the vehicle; and (b), if so - and this is the important and novel issue - whether section 37 of the War Pensions Act, No. 82 of 1967, which would then be applicable, precludes a claim against the State under the common law for

the .... /2

the particular damages claimed for such injuries.

Those questions have arisen in this way. The plaintiff, on behalf of his minor son, then aged 19 years, sued the Minister of Defence for R92,000. In the particulars and further particulars of his claim he alleged that, on 16 March 1971, his son was travelling as a passenger in a military vehicle driven by one van Deventer, "acting in the course of his duties and within the scope of his employment as a servant of the Defendant". At the time his son was a member of the Citizen Force of the South African Defence Force and was being so conveyed "during the course, scope and in connection with his military training as a member of the Citizen Force", and "in the course of business of the driver and the owner of the said motor vehicle", i.e., in the course of the business of the South African Defence Force. The particulars further alleged that on that date and at a particular place the vehicle overturned, due to van Deventer's negligent driving, in consequence of which the plaintiff's son was severely injured.

Those .... /3

Those injuries, it was alleged, were suffered by his son "within the scope, performance and/or execution of his military functions and training as a member of the Citizen Force". More particularly, the injuries he sustained were, firstly, a severed artery in the left arm, a cracked left shoulder blade, two compacted vertebrae in the spine, and a cracked bone in the left cheek - they caused temporary but not permanent loss of amenities and disability; and secondly, severe damage to the nervous system resulting in paralysis of the left arm, a drooping left eyelid, and an enlarged pupil of the left eye. The latter have caused not only temporary but also permanent, partial disability in certain respects, disfigurement, and loss of amenities. The amount claimed comprises (i) R20,000 for pain and suffering, (ii) R5,000 for shock, (iii) R35,000 for disfigurement, and (iv) R40,000 for loss of amenities. That totals R100,000. Of that amount, R8,000 represented the defendant's maximum liability under the provisions of the Motor Vehicle Insurance Act, No. 29 of 1942, and the balance, R92,000, his alleged liability under the

common .... /4

common law. Only the latter amount was ~~presently~~ now claimed, since the provisions of that Act have not yet been complied with.

The defendant excepted to the plaintiff's claim on the ground that section 145 of the Defence Act and section 37 of the War Pensions Act, both mentioned above, were applicable and barred such a claim. De Wet, A.J., in the Transvaal Provincial Division, upheld the exception and dismissed the plaintiff's claim with costs. The plaintiff has appealed against that decision.

In regard to the first question, section 145 (1) of the Defence Act, as amended, reads as follows:

"(1) The provisions of this section shall apply -

(a) to a member of -

(i) the South African Defence Force, other than a member of the Permanent Force; or

(ii) the Reserve,

who is suffering from disablement caused or aggravated

by .... /5

by his military service or training, irrespective of the date on which such disablement arose or was so aggravated, provided such disablement is not due to the member's own serious misconduct; and

(b) to a widow, child, parent or other dependant of such a member who dies as a result of a wound, injury, or disease which was caused or aggravated by his military service or training, irrespective of the date on which such wound or injury was received or such disease was contracted or was so aggravated."

The inquiry is, do the provisions of paragraph (a) of sub-section (1) apply to the plaintiff's son in his present alleged predicament? I think that they do, for the following reasons. At the relevant time he was a member of the Citizen Force and therefore of the South African Defence Force (see section 5 (b) of the Act). "Disablement" is not defined in the Act. Whatever its precise connotation may be, it obviously means, as in the case of death dealt with in

paragraph .... /6

paragraph (b) of the sub-section, a disablement "resulting from a wound, injury, or disease". And, according to the plaintiff's allegations, his son is suffering from such a disablement resulting from his injuries and which was not due to any misconduct on his part.

The only remaining inquiry, therefore, is whether, according to the allegations in plaintiff's claim, those injuries were "caused by his military training". For the plaintiff it was contended that he did not allege that they were so caused. Against that, defendant's counsel argued that, although there was no express allegation to that effect, plaintiff's averments amounted in substance to such an allegation. Counsel for the plaintiff emphasised the use of the words "caused by" in section 145 (1) and contrasted them with the corresponding wording used in previous Defence and War Pensions Acts, such as "received on and by reason of", "attributable to", and "arising out of and in the course of". But there is no significant or relevant difference in

meaning .... /7

meaning between those expressions and "caused by". They are all used to express the legislature's insistence upon the member's military service or training being connected with his wound, injury, or disease as cause and effect respectively. No matter what expression is used to postulate such a causal connection, it sometimes creates difficult problems of both law and fact (cf., for example, Mey v. S.A. Railways and Harbours 1937 C.P.D. 359 at p. 363/4, and Minister of Pensions v. Chennell (1946) 2 All E.R. 719). But because the relevant alleged facts in the present case are simple, undisputed at this stage, and fall within a small compass, and the law involved is clear, no such problems arise here.

Section 147 of the Act says:

> "Any member of the South African Defence Force may in connection with or for the purposes of his service, training or duty, be conveyed by any means whatever as may be ordered by his superior officer".

Such an order would therefore be a lawful command which would

have .... /8

have to be obeyed by the member, since disobeying it would be punishable as an offence under paragraph 19 of the Military Discipline Code (see section 104 (1), (5) (b) and the First Schedule of the Act). Consequently, if a member, while travelling on a conveyance in obedience to such an order, is injured through the conveyance being involved in an accident, his injury would undoubtedly be "caused by his military service or training". For his injury by the accident would then be the effect, and his military service or training, which obliged him to travel and be on the conveyance at the time, would then be the cause of that effect (cf. the dicta of Lord Atkinson in St. Helens Colliery Co. v. Hewitson 1924 A.C. 59 at p. 75 on the meaning of "arising out of and in the course of his employment," adopted in Leemhuis & Sons v. Havenga 1938 T.P.D. 524 at p. 525/6 and several other cases in our courts).

Now, it is true, the plaintiff did not expressly allege that his son's injuries were caused by his military

training .... /9

training. But, I think, that is the irresistible conclusion sustained by his averments. Thus, the plaintiff averred inter alia that his son was being conveyed in a military vehicle "in connection with his military training." He also averred that his injuries were sustained in "the scope, performance and/or execution of his military functions and training as a member of the Citizen Force". From those averments it can clearly be inferred or implied (which inference or implication must therefore be cognizable by a court even in exception proceedings) that his son was travelling on the vehicle in obedience to (i.e., "in the performance or execution of") some lawful order or command given by or originating from his superior officer in connection with or for the purposes of his military training. Indeed, I cannot see how, in travelling on the vehicle, he could be said to be performing or executing his military functions and training as a member of the Citizen Force, unless there had been such a command or order.

For those reasons I agree with de Wet, A.J.,

that .... /10

that section 145 (1) (a) of the Act applies to the plaintiff's son in his present predicament.

I now turn to the second question.

Section 145 (2) and (4) of the Act reads:

"(2) The provisions of the War Pensions Act, 1942 (Act No. 44 of 1942), shall mutatis mutandis apply to or in respect of a member whose disablement arose in the circumstances described in sub-section (1) (a).

(4) The provisions of the War Pensions Act, 1942, shall mutatis mutandis apply to or in respect of a widow, child, parent or other dependant of a member whose death occurred in the circumstances described in sub-section (1) (a)."

It was common cause that, by reason of section 12 (1) of the Interpretation Act, No. 33 of 1957, section 145 (2) and (4) must now be taken to refer to the present War Pensions Act, No. 82 of 1967, which repealed and re-enacted with modifications the 1942 Act. The 1942 and present Acts relate to pensions

for .... /11

for volunteers who attested for and were on military service during the second World War. Indeed, the 1942 Act was passed at the height of that War.

Section 37 of the present War Pensions Act reads as follows (with my numbering):

> "(1) No action at law shall lie against the State to recover any damages in respect of the disablement or death of a volunteer, where provision is made in this Act for compensation in respect of such death or disablement, and (2) no liability for compensation as aforesaid shall arise on the part of the State save under the provisions of this Act."

Counsel for the plaintiff, relying on the words "compensation as aforesaid", contended that the second prohibition does not enlarge the ambit of the first one but is co-terminous with it. I do not agree. The fallacy in the argument lies in limiting "compensation as aforesaid" to the compensation provided in the Act in respect of such

death .... /12

death or disablement". The second prohibition would then read most curiously: no liability for the compensation provided in the Act in respect of such death or disablement shall arise on the part of the State save under the provisions of this Act. That would be tantamount to unnecessarily stating the obvious. That difficulty is avoided by construing "as aforesaid" as merely referring back to the words "in respect of such death or disablement". "Compensation (vergoeding)" is then not confined to compensation payable under the Act, but means any compensation in its ordinary connotation, including amends for loss or damage payable under the common law (i.e., damages) or under statute law (e.g., compensation under the Motor Vehicle Insurance Act, 1942) in respect of such death or disablement. The second prohibition is therefore a general, blanket provision absolving the State from all liability for any such compensation in respect of the death or disablement of a volunteer, save for the liability provided for in the Act. That, in my view, is the correct

interpretation .... /13

interpretation of the second prohibition. It is thus more comprehensive than the first, specific prohibition, for it operates even where the Act, although comprehensive, may make no provision for compensation in respect of a particular kind of disablement. Now I am not unmindful that the second prohibition, so interpreted, overlaps the first, specific prohibition. But legislative tautology of that kind is not unknown where the legislature thinks it is necessary, for emphasis, clarity, certainty, or some other purpose, to make specific provision for a particular situation which is, in any event, covered by a general provision (see Sekretaris van Binnelandse Inkomste v. Lourens Erasmus Bpk. 1966 (4) S.A. 434 (A.D.) ~~434~~ at pp. 441/2). Here the problem most likely to arise and confront volunteers or their dependants would have been whether to sue the State for delictual damages at common law or to claim the compensation provided by the Act in respect of disablement or death, or to do both, and probably the legislature therefore deemed it advisable to

remove .... /14

remove that problem decisively by emphasising and making it quite clear and certain that section 37 ousted the former action and substituted the latter compensation therefor.

If any ambiguity or uncertainty exists about which is the correct construction of the section, it is permissible to refer to the section as originally enacted in the 1942 Act. (See R. v. von Zell (2) 1953 (4) S.A. 552 (A.D.) at p. 558, and the authorities there cited.) It was then section 43, and read:

> "No action at law shall lie by a volunteer or any dependant of a volunteer against the State to recover any damages in respect of such disablement of a volunteer as is attributable to military service performed outside the Union or as arises out of and in the course of the discharge of military service performed in the Union or the death of a volunteer in any of the circumstances mentioned in sub-section (1) of section seventeen.

No liability for compensation on the part of the State

in ..... /15

in respect of any such disablement or death shall arise save under the provisions of this Act". (My italics.)

The italicised sentence quite clearly and unambiguously has the meaning I have propounded above. When a new section in the same form as the present section 37 was substituted by section 39 of Act No. 58 of 1946, the only real alteration in that sentence was to substitute "as aforesaid" for "in respect of any such disablement or death" in order to avoid having to repeat the latter words. It was thus not intended thereby to effect any change of meaning. That confirms the above construction of the present section 37.

In conjunction with the submission just dealt with and other arguments advanced (they are about to be considered), plaintiff's counsel urged that section 37 clearly purported to curtail the common law rights of volunteers or their dependants to sue the State for compensation or damages,

that ..../16

that such curtailment must be expressed in clear and unambiguous language to be effective, and that, if there is any ambiguity, the section must be given a restrictive interpretation. That is, I think, the wrong approach. It was founded on the well-known presumption against the alteration of the existing law and the taking away of existing rights, as exemplified by the case quoted by plaintiff's counsel, Rose's Car Hire (Pty.) Ltd. v. Grant 1948 (2) S.A. 466 (A.D.) at p. 471/2. But here that presumption is rebutted by the manifest object and plain intention of the legislature in enacting the War Pensions statutes in 1942 and 1967. That object was to confer benefits, i.e., pensions, allowances, etc., on volunteers disabled by their military service or the dependants of volunteers killed or dying on military service, the vast majority of whom would otherwise not have been entitled to receive any compensation therefor at all. And the intention was that those benefits would exhaust and be in substitution for whatever rights any volunteer or dependant might otherwise have had to claim

compensation .... /17

compensation therefor from the State. That being the object of the legislation, I need only refer to the apposite dicta of Viscount Simon in the House of Lords in Adams v. Naylor (1946) 2 All E.R. 241. That case dealt with the Personal Injuries (Emergency Provisions) Act, 1939, which provided for compensation to be paid on certain terms and conditions for "war injuries" (which was defined) sustained by civilians during the last war. Section 3 provided in effect that no compensation or damages were otherwise payable for "war injuries". In proceedings to recover damages at common law for injuries caused by an explosion of a land mine laid on one of the English beaches due to the alleged negligence of an army engineer, Scott, L.J., in the Court of Appeal, expressed the view that the definition of "war injuries" and section 3 should be restrictively interpreted, since they purported to take away a civilian's right of action in such a case. Viscount Simon, however, said at p. 243 G-H :...

"I .... /18

" I think .... that this view fails to take sufficiently into consideration that the primary object of the Act is not to take away rights of compensation but to make provision for compensation under a scheme which would cover large numbers of civilians who would otherwise not be compensated at all. The list of those covered by the scheme is not the same as the list of those excluded from taking ordinary proceedings, but the primary object of the Act is to give rights rather than to take them away."

Secondly, in regard to the abovementioned intention of the legislature, I say that it is plain for this reason. Our legislators, in passing the 1942 Act with "the blast of war blowing in their ears", must have intended that the State, at such a time, should not be exposed to civil litigation at the instance of volunteers or their dependants claiming delictual damages, in addition to or in preference to the statutory compensation obtainable administratively

under .... /19

under the Act, for negligence alleged to have been committed by a member of the Defence Force during active military service.

Indeed, not only is the abovementioned presumption inapplicable to the 1942 Act, for the above reasons, but the converse, I think, applies. By making such elaborate and comprehensive provisions in the Act for compensation for the death or disablement of volunteers caused by their military service, the legislature, it can be inferred, must have intended that the common law remedies should thereby be excluded - expressio unius est exclusio alterius - unless the contrary intention clearly appears.

What I have said above about the 1942 Act applies equally, of course, to the 1967 Act, for the latter, with the same object and intention, merely re-enacted the substance of the 1942 Act in regard to the last war's volunteers and is rendered applicable by section 145 (2) and (4) of the Defence Act, 1957, to members of the Defence Force in regard to their present and future military service and training in peace and war.

To .... /20

To advert again to the specific provisions of section 37 of the 1967 Act. Plaintiff's counsel contended that the damages claimed by him, being for pain and suffering, shock, disfigurement, and loss of amenities, are not damages or compensation "in respect of the disablement" of his son, within the meaning of that expression in that section. "Disablement (ongeskiktheid)" is not defined in the Act. But its meaning emerges from other provisions therein. Section 4 lays down the conditions entitling a volunteer to get the statutory compensation. He is inter alia entitled to it "if he is found on due consideration .... to be suffering from a disability ... which was .... caused by military service .... and which has resulted in disablement." And section 5 says: "A volunteer's degree of pensionable disablement shall be determined by comparison with the physical and mental standard of a normally healthy person of the same ~~age and sex~~, and shall be calculated as a percentage loss of physical or mental capacity in accordance with Schedule 1".

Ordinarily .... /21

Ordinarily the kind of incident or event of military service that causes a volunteer's disability and disablement is a wound, injury, or disease (cf. section 145 (1) of the Defence Act, 1957, dealt with earlier in this judgment). Consequently "disablement" in section 37 generally means the loss of physical or mental capacity of the volunteer resulting from a wound, injury, or disease caused by his military service. Now the words "in respect of" can, depending upon its context and the object and intention of the particular statute, have a wide or narrow connotation (see Sekretaris van Binnelandse Inkomste v. Raubenheimer 1969 (4) S.A. 314 (A.D.) at p. 320). In the wide connotation it can be synonomous with "in connection with", "arising out of", "with reference to", "in relation to", and "touching and concerning" (ibid., and Montesse Township and Investment Corporation Ltd. v. Gouws, N.O. and Another 1965 (4) S.A. 373 (A.D.) at p. 384 B-C). Having regard to the object of the Act, the intention of the legislature, and the reasons just previously canvassed, I think that "in respect of the disablement" must be interpreted widely and

not .... /22

not restrictively. So interpreted, the expression "damages (or compensation) in respect of the disablement of a volunteer" also includes damages or compensation for any wound, injury, or disease giving rise to his disablement. Hence the plaintiff's claim for pain and suffering etc. is an "action at law .. against the State to recover .... damages in respect of the disablement" of his son within the meaning of those words in section 37, as applied by section 145 (2) of the Defence Act, 1957.

Plaintiff's counsel argued, however, that according to the first prohibition in section 37, an action at common law is only ousted "where provision is made in the Act for compensation in respect of .... such disablement", and as compensation is therein provided only for the disablement (i.e. incapacity) of a volunteer and not for pain and suffering, shock, disfigurement, and loss of amenities, the plaintiff's claim for damages for the latter is not ousted.

Firstly, I shall assume, without deciding,

that .... /23

that compensation for the disablement of plaintiff's son is provided for in the Act. (It is unadvisable to make any definite finding on that aspect, since one or other of the boards mentioned in the Act may be seized of that problem in the future.) That compensation would then be "in respect of the disablement" of plaintiff's son, i.e., for all aspects of his disablement, including pain and suffering etc. for the injury giving rise to it, for reasons already given. That argument cannot therefore prevail. I am fortified in that conclusion by this further consideration. Under the common law a person or his dependant is only accorded a single, indivisible cause of action for recovering damages for all his loss or damage for the wrongful act causing his disablement or death (see Oslo Land Co. Ltd. v. Union Government 1938 A.D. 584 and Schnellen v. Rondalia Assurance Corporation of S.A. 1969 (1) S.A. 517 (W) at p. 520 D-H). Even though, as plaintiff's counsel maintained, the claim at common law for non-economic loss for pain, suffering, shock, disfigurement, and loss of

amenities .... /24

amenities is anomalous and regarded as a kind of solatium (see Government of Republic of S.A. v. Ngubane 1972 (2) S.A. 601 (A.D.) at pp. 606/7), it nevertheless still is an indivisible part of that single cause of action of the disabled person. Now the whole of the common law action by dependants in respect of a volunteer's death is clearly ousted by section 37. The same, I think, was intended to apply to the volunteer's common law action in respect of his disablement, for the section does not differentiate between the two actions in this respect. Moreover, in the absence of clearer language to that effect, it is unlikely that the legislature intended to sever the otherwise indivisible latter action into common law and statutory portions, as the argument for plaintiff envisages.

Secondly, even if the Act makes no provision for compensation for the particular kind of disablement of the plaintiff's son, the State is absolved from all liability for compensating him for his injuries giving rise to such disablement because of the second prohibition in section 37, for reasons already given.

Section

An .... /25

Section 35 of the Act is not inconsistent with those conclusions. It says, in so far as it is relevant here, that "any benefit or compensation paid or payable under this Act .... shall be abated to such extent or by such amount as the Minister may determine in respect of any benefit or compensation paid or payable (whether in the Republic or abroad) under any other law or under the common law in respect .....

of .... /26

of the same fact."

That section clearly does not create any liability to pay any benefit or compensation which otherwise does not exist. Consequently, if, as I think, section 37 negatives the State's liability under the common law to compensate the volunteer or his dependants in respect of his disablement or death, section 35 does not save or revive that liability. The section seems to apply to any benefit or compensation paid or payable by a third party whose liability therefor is unaffected by section 37.

It only remains to say that the decision of our courts referred to in the argument for plaintiff relating to other legislation are not applicable or persuasive here, since the statutes involved differ in object, intention, and relevant wording from the War Pension statutes.

To sum up: according to the allegations in plaintiff's particulars of claim his minor son was a member of the South African Defence Force who is suffering from disablement caused by his military training and not due to any misconduct on his part; section 145 (1) (a) of the Defence Act,

1957, therefore applies to his son in that predicament; section 145 (2) thereof consequently renders the provisions of the War Pensions Act, 1967, applicable mutatis mutandis to any compensation payable for such disablement; and plaintiff's claim on his son's behalf against the State under the common law for delictual damages for pain, suffering, disfigurement, and loss of amenities for his injuries that resulted in such disablement is barred by section 37 of the latter Act.

In my view, therefore, the Court a quo correctly upheld the exception to the plaintiff's claim. The appeal is therefore dismissed with costs, including those relating to the employment of two counsel.

W.G. Trollip, J.A.

van Blerk, J.A.)
Rumpff, J.A.)
Holmes, J.A.) concur.
Muller, J.A.)