THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 711/10

In the matter between:

THE ROAD ACCIDENT FUND **Appellant**

and

MAGDALENA LECHNER **Respondent**

Neutral citation: *Road Accident Fund v Lechner* (711/2010) [2011] ZASCA 240 (1 December 2011).

Coram: Cloete, Cachalia and Leach JJA

Heard: **21 November 2011**

Delivered: **1 December 2011**

Summary: German citizen injured in motor vehicle accident in South Africa – Reimbursed for medical expenses by statutory insurer in Germany – Benefits received as *quid pro quo* for contributions – Benefits to be treated as non-deductible collateral benefits by Road Accident Fund.

ORDER

On appeal from: Western Cape High Court, Cape Town (Klopper AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

CACHALIA JA (Cloete and Leach JJA concurring):

[1] This appeal concerns the deductibility of collateral benefits from an award of delictual damages.

[2] Magadalena Lechner, the respondent, a German citizen and resident claimed an amount of more than R40 million from the Road Accident Fund (the Fund), the appellant, in the Western Cape High Court (Klopper AJ) arising from injuries she sustained in a motor vehicle accident in 1992, while visiting South Africa. She was awarded a substantial amount as damages of which approximately R4 million was for medical and related expenses that her statutory health insurance provider in Germany had paid to her service providers on her behalf. Her insurer is known in Germany as the Kaufmännische Krankenkasse Hannover, which Ms Lechner has been a member of since 1963. Its associated long-term nursing care insurance body is the Pflegekasse bei der KKH. It would be convenient to refer to them both as the KKH.

[3] The Fund contended in the high court, as it does before us, that the amount for medical expenses was a social security benefit and should be excluded from Ms Lechner's total claim. This was essentially because the KKH, which settled Ms Lechner's medical costs, is an integral part of the German social security system that functions in terms of the Social Code (Sozialgesetzbuch or SGB). The high court, however, accepted the submission made on behalf of Ms Lechner that the nature of the benefits paid by the KKH was a form of indemnity insurance, which was not deductible from her claim. The Fund appeals against this finding with leave of the high court.

[4] Ms Lechner initiated these proceedings after concluding an agreement with the KKH in 1997 in terms of which she agreed repay to it the cost of her medical expenses in the event of her being successful in recouping this amount from the Fund. The evidence established that this obligation was imposed by legislation, ie by s 116(7) of Book X of the SGB. In the court below the Fund submitted that the agreement was invalid because it contravened both German and South African law. That contention was not persisted with in this court and nothing further need be said about it.

[5] As the dispute turns primarily on the characterisation of the benefit that the KKH paid on Ms Lechner's behalf, it is here that I must begin. In this regard the high court was entirely dependent on the expert evidence of two witnesses: Ms Claudia Petri-Kramer, for Ms Lechner, and Mr Michael Kleinekorte, for the Fund. Ms Petri-Kramer testified in German through an interpreter. Mr Kleinekorte testified in English but struggled to do so because English is not his first language. Their evidence is not always easy to follow. In addition the parties relied on various documents.

[6] The evidence establishes that the KKH, like other statutory medical insurers, is a self-governing body recognised under German law and predates the SGB. It functions independently of government but is subject to its oversight.

It has its own constitution and governing board. Importantly, it is self-funded from the contributions of its members, and until the end of 2008 determined its members' contributions. It is, however, an integral part of the SGB, which covers four areas of insurance, namely health, labour related accident and sickness, unemployment and pensions. There are between 180 and 190 medical insurers in the country.

[7] In her evidence Ms Petri-Kramer explained that medical insurance in Germany is either private or statutory. Private health insurance is available only to those whose financial means gives them the freedom to contract. They are described as 'versicherungsfrei', and in 1992, at the time of Ms Lechner's accident, such persons had the choice of statutory or private medical insurance – or, until 1996, none at all. Private insurance, with which we are familiar in this country, is based on the relationship between premiums and insured risk. However, those who are 'versicherungspflichtig' are obliged by law to have statutory medical insurance. They are wage and salary earners with incomes below a certain threshold level.

[8] This was Ms Lechner's position until 1988, when her salary reached this level. She then had a choice whether or not to remain a member of the KKH, which is one of the recognised medical insurance bodies in the SGB, and thus enjoyed the same benefits as she had earlier. By law these benefits may only be funded from the contributions of members (based on their income) and their employers. The extent of the benefit, however, bears no relationship to the risk insured. Family members of the insured also enjoy these benefits, but no contributions are levied from them. This is aptly described in the SGB as 'solidarity financing' and covers 20 million non-contributing members. Where the existing contributions are insufficient to meet the funding needs, additional contributions are levied, and in addition, the state may provide a subsidy. It would appear that statutory medical insurers compete with each other for business and until 1998, had different rates of contribution and even benefits. Since 1999 the

rates of contribution are regulated, but competition between the statutory insurers continues. The system covers 87 per cent of the population.

[9] To return to Ms Lechner's position: As I have mentioned, in 1988, after her salary had reached the threshold, she elected to remain a voluntary member of the KKH, and continued to pay her contributions. For the first six weeks after the accident until 15 February 1993, she was on sick pay and no contributions were payable to the KKH. For the next 72 weeks until June 2004, whilst she received unemployment pay, she became a compulsory member and the state paid her contributions. (She was entitled to have those contributions paid because she had paid unemployment insurance.) From June 1994 until 19 March 1995 when she was declared permanently disabled, she again became a voluntary member of the KKH and paid contributions. After 19 March 1995 and until the law was amended on 1 April 2002, she remained a voluntary member and had to pay contributions although these were to an extent subsidised by an extra payment from her pension provider. But the important point is that as the law then stood she had an option not to remain a voluntary member of the KKH, yet she elected to do so.

[10] So, it is beyond dispute that the benefits Ms Lechner received from the KKH were in return for contributions made by her or on her behalf to the KKH. At the time of her accident in 1992, according to the evidence, had she not paid her contributions her benefits would have ceased. The position after certain statutory changes were introduced in 1 April 1997 is that benefits were suspended if the contributions ceased. In either case the benefits were received as a *quid pro quo* for the contributions to the KKH. None of the benefits she received fell into the category of so-called 'versicherungsfremde leistungen' (non-insurance benefits) funded by a state subsidy from general tax revenue.

[11] Mr Duminy, who appeared for Ms Lechner, submitted that entitlement to benefits is not a function of state largesse, but is dependent upon members'

contributions, without which the benefit ceases. The benefits are therefore a *quid pro quo* for Ms Lechner's contributions and are *res inter alios acta* as far as the Fund is concerned. Mr Potgieter for the Fund, on the other hand, placed his emphasis on the absence of any correlation between contribution and risk, which is the central feature of private health care insurance. The contributions do not buy benefits, but secure membership the benefits of which accrue to all members – whether paying or non-paying, compulsory or voluntary – on the basis of need and not the extent of the contribution. The benefits are therefore more akin to social security benefits, which are generally deductible. As I have mentioned, the high court upheld Mr Duminy's and not Mr Potgieter's submission.

[12] The approach to the deductibility of benefits has been restated on several occasions in this court and can now be considered settled. Benefits resulting from the damage causing event are generally deducted. Collateral benefits such as those deriving from private insurance contracts or the benevolence of third parties are not. There is no clear jurisprudential basis for deciding what benefits are collateral; the inquiry mainly involves considerations of public policy and equity. In this regard a court will weigh two conflicting considerations: the plaintiff should not receive double compensation and the wrongdoer or his insurer should not be able to avoid the full extent of his liability. What a court considers just and equitable will inevitably depend on the circumstances of each case.[1]

[13] In England benefits from social security schemes are clearly an exception to the general rule that collateral benefits are to be deducted. Thus in *McGregor on Damages*[2] it is stated that in relation to medical and allied expenses 'collateral benefits throughout do not operate so as to reduce the damages, with one clear exception of social security benefits both monetary and non-monetary'. The policy consideration underlying this approach is to avoid double compensation, as was explained in the well-known English case *Hodgson v Trapp*.[3] There, the

[1] *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA) paras 16 and 17; *Road Accident Fund v Timis* (29/09) ZASCA 30 paras 6-9.
[2] 8 ed (2009) at 1429.
[3] *Hodgson v Trapp* [1988] 3 All ER 870 (HL) at 874*a*.

court had to consider whether a deduction had to be made for certain 'attendance and mobility allowances' payable under the Social Security Act 35 of 1975, from the damages awarded to the plaintiff for personal injuries sustained in a motor vehicle accident. In deciding that the allowances were to be deducted, Lord Bridge elucidated his decision thus:[4]

'In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer . . . There could hardly be a clearer case than that of the attendance allowance payable under s 35 of the 1975 Act where the statutory benefit and the special damages claimed for cost of care are designed to meet the identical expenses. To allow double recovery in such a case at the expense of both taxpayers and insurers seems to me to be incapable of justification on any rational ground.'

[14] Although a similar case to *Hodgson* has not arisen in South Africa, this court in *Bane v D'Ambrosini* [5] appears to have accepted, at least implicitly, that benefits from social insurance or national health schemes similar to those in a 'European context' would be deductible in this country. This follows from the fact that Hurt AJA distinguished such schemes from privately run medical schemes regulated by the Medical Schemes Act 131 of 1998 in this country.[6] In two cases, South African courts had to consider the deductibility of 'social-security benefits' received in foreign countries.

[15] The first was *Zysset v Santam Ltd*[7] where the Cape Provincial Division had to consider whether Swiss citizens, who had been injured in a motor vehicle accident in South Africa, had to deduct financial benefits received from two Swiss social insurance schemes for their injuries. In terms of the schemes premiums

---

[4] Ibid at 876*f-h*.
[5] *Bane v D'Ambrosini* 2010 (2) SA 539 (SCA).
[6] Ibid para 19.
[7] *Zysset v Santam Ltd* 1996 (1) SA 273 (C).

were paid and benefits received. The benefits, like those in the present case, were unrelated to the premiums. The schemes in issue were compulsory: the first covered all persons. Failure to pay premiums did not disentitle anyone to benefits under the scheme. The second scheme covered only persons in employment. Premiums paid by them were calculated as a percentage of the employee's salary. The two schemes had the object of covering the entire population.[8] The plaintiffs had sued the defendant as insurer for damages under the Compulsory Motor Vehicle Insurance Act 56 of 1972 after agreeing with the bodies administering the schemes that in the event of them being paid in full, they would reimburse the schemes for the compensation paid to them – much like the German legislative requirement which gave rise to the agreement in the instant case.

[16] The court said that just as the source of the funds of compulsory motor insurance scheme is, through a fuel levy, the motor-vehicle-using-public, the Swiss schemes are similarly dependent upon the greater section of the public for funds from which claims have to be made. Then, following the approach in *Hodgson*, the learned judge said that in the 'absence of any rational ground, moral or otherwise' for permitting the plaintiffs to be doubly compensated the benefits from the schemes would fall to be deducted from the total claim. More so because the source of the funds from which payments are made to victims of motor vehicle accidents both in South Africa and in Switzerland is the general public.[9] However, because the plaintiffs were required to repay the Swiss schemes, there would have been no double compensation. The benefits were accordingly held not to be deductible.[10]

[17] The second case, *Road Accident Fund v Cloete NO*,[11] concerned the Belgian state-administered social insurance scheme, which also had compulsory components. Cleaver J found that *Zysset* had been wrongly decided on whether

[8]Ibid p 279C-G.
[9] Ibid 280E-J.
[10]Ibid 281J-282B.
[11]Unreported CPD Case no 6576/2006 (4 February 2008).

a deductible benefit could be made non-deductible by reason of an undertaking to repay the social insurer. In the learned judge's view, 'an undertaking to repay should not be elevated to an exception to the general rule that payments received from Belgian schemes should be deducted from the damages award in this country'.[12]

[18] In my view the benefits in issue in this case differ from those in *Zysset* and *Cloete NO*, fundamentally because both those schemes were compulsory state-administered schemes. The scheme in this case, though part of the SGB, operates independently from the state. Counsel for the Fund nevertheless pressed the point that because contributions to the KKH are levied on both employed and self-employed members under the SGB, they are akin to special or additional levies on the taxable income of the working population and on the payroll of employers affiliated to this system. As such, it was contended, they cannot be compared to premiums on a private insurance policy as they bear no relationship to the risk insured. Accordingly, so it was contended, the benefits ought to be deducted from Ms Lechner's total claim.

[19] I accept that the premiums paid by Ms Lechner bore no direct relationship to the risk insured. In this sense the scheme to which she belonged differed from the usual private medical schemes. But it is beyond dispute that she enjoyed benefits as a voluntary member at the time of her accident. The fact that she later at times became a compulsory member after her accident, which was forced upon her because of the injuries she sustained in the accident, cannot in my view change the situation. Crucially, as I have mentioned, she received her benefits in return for her contributions. Had she ceased paying contributions, her benefits would also have ceased, or later been suspended. In my view this is sufficient to render the benefits received from the KKH *res inter alios acta* as far as the Fund is concerned.

---

[12]Ibid para 23. This court overruled *Cloete NO* in *Road Accident Fund v Cloete NO* [2010] 2 All SA 161 (SCA), but not on this question. It held that the question did not arise.

[20] Moreover, as Mr Potgieter accepted on behalf of the Fund, there is no question of Ms Lechner receiving double compensation by virtue of the German legislation referred to earlier. Instead he submitted that the ultimate question in this matter is whether the Ms Lechner's expenses are to be paid for by the South African or German taxpayer. He further submitted that it would be contrary to public policy for this country's taxpayers to reimburse the KKH for expenses incurred in the execution of its statutory mandate.

[21] In my view, Mr Potgieter misstated the position. By virtue of the provisons of the SGB referred to in para 4 above, Ms Lechner is obliged to repay the KKH. So she will not receive more than she was entitled to receive. The South African taxpayers will pay no more than they would have had to pay because Ms Lechner is obliged by the German legislation to repay the KKH – it is not as though the Fund has to pay the KKH as well as Ms Lechner. The KKH (not the German fiscus), which is out of pocket, will be reimbursed; and the KKH needs the reimbursement in order to continue to fund claims by its members.[13] This outcome is, in my view, neither unfair nor troublesome from a public policy perspective. The appeal must therefore fail.

[22] The following order is made:
The appeal is dismissed with costs.

_____

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

For Appellant:	T D Potgieter SC (with him E van der Horst)
	Instructed by:

[13] Cf *Erasmus Ferreira and Ackermann v Francis* 2010 (2) SA 228 (SCA) para 18.

DLA Cliffe Dekker Hofmeyer, Cape Town
E G Cooper Majiedt, Bloemfontein

For Respondent: W R E Duminy SC (with him J A van der Merwe)
Instructed by:
Scheibert & Associates, Cape Town
Lovius Block Attorneys, Bloemfontein