REPUBLIC OF SOUTH AFRICA
IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NOS. 7/2001 and 8/2001

In the matter between

Sasol Synthetic Fuels (Pty) Ltd	First Appellant
Frans Fakude	Second Appellant
ABC Recruitment (Pty) Ltd	Third Appellant

and

Margaret Elizabeth Lambert	First Respondent
Dalishia Mercedes Lambert	Second Respondent
Denzil Daniël Lambert	Third Respondent
Michelle Luverne Issabell Lambert	Fourth Respondent

Before: Nienaber, Harms, Olivier, Schutz JJA and Froneman AJA

Heard: 16 November 2001

Delivered: 27 November 2001

Supposed clash between s 36(2) of Occupational Injuries and Diseases Act 130 of 1993 and s 1 of the Assessment of Damages Act 9 of 1969 – whether compensation must or must not be deducted from common law damages awarded against tortfeasor who is not the employer – s 36(2) the successor of s 8(1) of the Workmen's Compensation Act 30 of 1941 – clash between s 8(1) of 1941 Act and 1969 Act resolved by application of presumption against unexpressed repeal and principle *generalia specialibus non derogant* – compensation paid must be deducted – s 36(2) of 1993 Act merely substantially re-enacts s 8(1) of the 1941 Act.

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J U D G M E N T

SCHUTZ JA

[1] The issue is whether payments made in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("the 1993 Act") to a widow and dependent children in consequence of the death in a workplace accident of their husband or father, have to be deducted from their delictual claims for damages against two defendants. The contention of the plaintiffs is that the amounts of compensation which they have received constitute "pensions", so that they are not deductible from any award of common law damages, this because of the operation of the Assessment of Damages Act 9 of 1969 ("the 1969 Act"). In other words their common law claims for damages for loss of support are not to be reduced by the amounts of employees's compensation received. The opposed contention of the defendants is that in terms of the express provisions of s 36(2) of the 1993 Act (quoted below), compensation received by them must be deducted. The facts constituting the background to this issue were agreed in the form of a stated case for its purpose only.

[2] The plaintiffs are Mrs Lambert, the widow of the late Mr Lambert, and their three school-going children. Mr Lambert was working as a welder at

the plant of the first appellant, Sasol Synthetic Fuels (Pty) Ltd ("Sasol"), at Secunda on 6 March 1994 when he suffered burns that led to his death on 3 April 1994. Sasol was cited as the first defendant in the delictual claims based on negligence brought by the plaintiffs in the Transvaal Provincial Division. The second defendant (now second appellant) was Mr Frans Fakude, a process controller in the employ of Sasol. On the day of the accident he negligently allowed gas to escape, thus causing the fire which fatally injured Lambert. At the time Fakude was acting as Sasol's employee and within the course and scope of his duties. Accordingly Sasol is vicariously liable with Fakude in delict.

[3] Lambert's employer was not Sasol but a labour broker, ABC Recruitment (Pty) Ltd ("ABC"), the third appellant, which was joined as a third party by the two defendants. The basis of the joinder was a contractual indemnification of the defendants by ABC against claims of the sort brought by the plaintiffs. ABC has made common cause with the defendants in contending for the deduction of the compensation received. (It should be noticed that ABC is a "third party" in the procedural sense – under Uniform Rule 13 – whereas the two defendants are "third parties" in a quite different sense – in the sense of s 36(1) of the 1993 Act – as being persons other than the employer, who are allegedly liable in delict for the damage suffered by the employee's dependants.)

[4] Roux J, *a quo*, determined the stated case in favour of the plaintiffs, holding that because of the form in which the compensation was received it consisted of "pensions" such as were not to be deducted, because of the terms of the 1969 Act, which forbids the deduction of pension monies from damages awarded to dependants. He later granted leave to appeal to this Court.

[5] At the time of the deceased's fatal injury s 36 of the 1993 Act read:

> "36.(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the 'third party') being liable for damages in respect of such injury or disease –
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> (a) *the employee* [which includes a dependant of a deceased employee] *may claim compensation in terms of this Act and may also institute action for damages* in a court of law against the third party; and
>
> (b) the commissioner or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.
>
> (2) In awarding damages in an action referred to in subsection (1)(a) *the court shall have regard to the amount* to which the employee is entitled in terms of this Act.
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> (3) In an action referred to in subsection (1)(b) the amount recoverable shall not exceed the amount of damages, if any, which in

the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section *compensation includes* the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, *in the case of a pension*, the capitalized value as determined by the commissioner of the *pension*, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such *pension* in terms of section 52 or 60, and periodical payments or allowances, as the case may be." (Emphasis supplied.)

Post–1993 amendments to s 36 are confined to the replacement of the commissioner with the Director-General and an alteration of the wording of s 36(2) – see sections 37 and 13 of Act 61 of 1997.

[6] Compensation payable under this Act in some cases takes the form of a pension, as is prescribed in the definitions of "compensation" and "pension" in s 1, and in sections 49, 52, 54, 55 and 60 and the fourth schedule of the Act.

[7] The relevant parts of the 1969Act reads:

"1. Insurance moneys, pensions and certain benefits not to be taken into account in the assessment of damages for loss of support. – (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." (Emphasis supplied.)

[8] More narrowly then, the issue in the appeal is raised by the supposed clash, where "compensation" does take the form of a "pension", between the requirement that "the court shall have regard to the amount" of compensation paid, contained in s 36(2) of the 1993 Act, and the exclusion from deduction of a "pension" in "any action", contained in s 1(1) of the 1969Act. In other words the clash is said to arise because one Act requires that a pension be deducted from damages whereas the other Act forbids the deduction. Although there is this conflict if one has regard only to the word "pension", that opposition evanesces if one applies the appropriate rules of statutory construction and has regard to the different purposes and functions of the two Acts. In order to do so it is necessary to go further back in history.

[9] The immediate predecessor of the 1993 Act was the Workmen's Compensation Act 30 of 1941 ("the 1941 Act"), which had a broadly similar purpose and structure to the 1993 Act. It was, as the Constitutional Court said

of the later Act, "important social legislation which has a significant impact on the sensitive and intricate relationship among employers, employees and society at large" – per Yacoob J in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999(2) SA 1 (CC) at 9B. On the one hand it relieved a workman injured at his workplace (or his dependants if he died) of the need to prove fault, but at the same time it limited the compensation receivable and exempted the employer from liability for common law damages. However, in s 8(1) (the forerunner of s 36 of the 1993 Act) it provided that where a person other than his employer was liable for his injury at common law (the "third party" of today) he could both claim compensation from the commissioner and sue that other for damages. The second proviso to s 8(1)(a) provided that when a court awarded damages it ". . *shall,* in estimating the damages, *have regard to the amount* which that person will be liable to pay to the commissioner or the employer concerned under the provisions of paragraph (b)" (emphasis supplied), which latter corresponds to s 36(1)(b) of the 1993 Act.

[10] It will be observed that the phrase "shall . . . have regard to" is identical to the one used in s 36(2) of the 1993 Act. As used in the 1941 Act it has been the subject of a long line of decisions, among them *Maasberg v Springs Mines Ltd* 1944 TPD 1 at 10, 12, *Klaas v Union and South West Africa Insurance Co Ltd* 1981(4) SA 562(A) at 580F-581D and *Senator Versekeringsmaatskappy Bpk v Bezuidenhout* 1987(2) SA 361(A) at 366G-367B. Several points emerge from these decisions. The first is that the phrase "shall . … have regard to" is to be interpreted to mean that compensation "shall be deducted from" damages. The second is that in a case where a "third party" is involved the workman may be entitled, in the form of compensation plus damages, to the amount of his full common law

damages, but no more. The third is that the "third party" may be liable to the workman and the employer or commissioner taken together for the full amount of common law damages, but no more.

[11] As in the case of the 1993 Act, "compensation" in the 1941 Act may take the form of a pension: see eg the definitions of "compensation" and "pension" in s 2 and sections 39, 40 and 49.

[12] Against that background it seems clear that when s 36 was enacted in 1993 the intention was to maintain in its successor the interpretation that the courts had placed on s 8 – see *Ex* parte *Minister of Justice: In re R v Bolon* 1941 AD 345 at 359. Mr Pienaar, for the plaintiffs, has sought to persuade us to the contrary, to persuade us that s 36 has set off on a new and opposite course. Thus he contends that it is intended that a workman or his dependants may recover overall more than common law damages, and that the "third party" may well be liable overall for more than common law damages. These contentions are not only startling in themselves, but they run counter to what has in the past been held to be the purpose of s 8 of the 1941 Act – all this without a word in the 1993 statute, aping its predecessor as it does, that such a departure is intended.

[13] In order to arrive at the desired conclusion Mr Pienaar has advanced further arguments: The first was that the phrase "shall be taken into account" is to be given the meaning that a discretion is given to the court. To do what, one may ask? And how is a discretion to be accommodated whilst Mr Pienaar contends at the same time for the applicability of the 1969 Act, with its imperative "no . . . pension . . . *shall* be taken into account"? Secondly, Mr Pienaar argues for an interpretation of s 36(2) that will reconcile it with the 1969 Act. Section 36(2) should be read so that it only applies when the

workman lives, so that compensation is deductible from damages when the workman is merely injured but not when he is killed. Words to that effect should be read into the section. In my opinion there is absolutely no warrant for such an intrusive and purposeless interpretation, purposeless that is, unless for the purpose of awarding the plaintiffs double compensation.

[14] My conclusion so far is that on a proper construction of s 36(2) of the 1993 Act, seen against the background of the 1941 Act and the cases decided before 1993, compensation has to be deducted from damages also where it takes the form of a pension and where the workman is deceased.

[15] Does the 1969 Act affect this conclusion? In my opinion that statute has nothing to do with the matter. That is so because of the rule of statutory construction referred to by Watermeyer CJ in *Kent NO v South African Railways and Another* 1946 AD 398 at 405, that statutes:

> "must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one."

An ordinance of 1903 had conferred powers of expropriation for railway purposes on the executive of the Transvaal Colony. A later ordinance of 1905 dedicated certain land, which included the old Wanderers Ground, for ever "for purposes of or incidental to the recreation and amusement of the inhabitants" of Johannesburg. The expropriation of the Wanderers Ground

for the purpose of extending Park station was challenged on the basis of the 1905 dedication. The challenge failed because there was no express *pro tanto* repeal of the 1903 ordinance and no intention to repeal it could be implied. The principle in the *Kent* case was applied again in *R v Voss* : *R v Weller* 1961(2) SA 743(A) at 749 A-C.

[16] Translating this principle to the case before us, again in 1969 there was no express *pro tanto* repeal of s 8(1) of the 1941 Act, and there were no indications, even less compelling indications, of an implied intention to interfere with the structure set up by the 1941 Act.

[17] A closely related principle, *generalia specialibus non derogant* (general words (rules) do not derogate from special ones), leads to the same result. The matter is put thus in *R v Gwantshu* 1931 EDL 29 at 31:

> "'When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim' *per* Lord HOBHOUSE delivering the judgment of the Privy Council in *Barker v Edger* ([1898] A.C. at p. 754). 'Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly . . . altered . . . merely by force of such general words, without any indication of a particular intention to do so.' In such cases it is presumed to have only general cases in view and not particular cases which have been already otherwise provided for by the special Act. Having already given its attention to the particular subject and

> provided for it the Legislature is reasonably presumed not to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language . . . (Maxwell, *Interpretation of Statutes*, 7th ed. 153)."

See also *Khumalo v Director-General of Co-operation and Development and Others* 1991(1) SA 158(A) at 164C-165D and *Consolidated Employers Medical Aid Society and Others v Leveton* 1999(2) SA 32 (SCA) at 40H-41B.

[18] Section 8 of the 1941 Act was clearly a special provision, contained in a special act. The Act, as I have stated, was a social measure, bringing benefits to workers in some respects but also curtailing their rights in other respects. Not only was compensation calculated according to tariffs, but under s 7 (corresponding to s 35 of the 1993 Act) the workman was deprived of his common law right of action against his employer. Section 8 specially dealt with the interrelationship of compensation and damages where the common law remained mainly undisturbed – in respect of the liability of a "third party." The 1969 Act, on the other hand, was a general act. It was not concerned with workmen as such, but with the generality of cases in which dependants had suffered loss due to the death of a breadwinner. It dealt with pensions in a general way, however wide the meaning of "pensions" under that Act might be capable of being. This is a classic case of generalities not detracting from what was specifically dealt with elsewhere. The application of the old rule *generalia non derogant* leads to the conclusion, sensible in the result, that s 8 of the 1941 Act, when contrasted with the 1969 Act, dealt with different subject matters, so that no question of a clash between them arose.

[19] That being so it is unnecessary to deal with an alternative argument advanced on behalf of the appellants, that even if the 1969 Act partially repealed the 1941 Act, the effect of the later 1993 Act was to re-instate the 1941 position – *lex posterior derogat priori* (a later statute abrogates an earlier one). The argument would clearly be correct if there had been an implied repeal in 1969, because the later Act explicitly and specially deals with the question whether compensation, without qualification of its form, should be deducted from damages.

[20] For all of these reasons I consider that the question of law should be

answered in favour of the appellants – compensation paid under s 36, even if it be in the form of a pension, must be deducted from any award of common law damages made in favour of the plaintiffs.

[21] It follows that I differ from Roux J both as to his conclusion and his reasons. The learned judge relied upon three features of the 1969 Act that he regarded as important. First, that the 1969 Act is of general application. Second, that no provision of the 1993 Act excludes its operation. Third, the wide definition of the word "pension", extending beyond the ordinary dictionary meaning. As to the first, it is true that the 1969 Act is of general application, but it is that very generality when set against the specific provisions of the 1941 Act, that leads to the conclusion which I have sought to explain, that the 1969 Act was not intended to affect s 8 of the 1941 Act. As to the second reason, as I believe I have demonstrated, the fact that the 1993 Act does not in terms exclude the operation of the 1969 Act is irrelevant. As to the third reason, it is true that the word "pension" has a wide meaning, but that is nowhere near enough to found an implied repeal of s 8. Moreover, the fact that the ordinary dictionary meaning is extended by the statutory definition does not, because of the terms of that extension, affect the matter. The learned judge was further of the view that the cases dealing with the effect of s 8 (I have mentioned only three of them above – there are more) were decided as they were, either because they were decided before the 1969 Act came into force, or after 1969 only because the courts concerned had not had the 1969 Act brought to their attention. In other words, the cases after 1969 were wrongly decided. I beg to differ, again for the reason that the generalities contained in the 1969 Act did not affect the special provisions of s 8.

[22] Sasol has asked that two counsel be allowed. In the end the case is a `relatively straightforward one, but the appellants have already lost in one court and the principle involved is of undoubted importance. I would allow two counsel.

[23] In the result the appeal is allowed with costs, including the costs of two counsel in the case of Sasol. The orders made by the court *a quo* are set

aside and replaced with the following:

1. It is declared that in terms of s 36(2) of Act 130 of 1993, the compensation received by the first to fourth plaintiffs in terms of that Act falls to be deducted from any damages awarded to such plaintiffs.

2. The first to fourth plaintiffs are ordered to pay the costs of the trial to date, jointly and severally.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
NIENABER JA
HARMS JA
OLIVIER JA
FRONEMAN AJA