IN

WESTERN ,

CASE :/

In the matter between:

ANELE MVUMVU	First Applicant
LOUISE PEDRO	Second Applicant
JIANCA SMITH	Third Applicant
versus	
MINISTER OF TRANSPORT	First Respondent
THE ROAD ACCIDENT FUND	Second Respondent

JUDGEMENT : 28 JUNE 2010

BOZALEK J:

INTRODUCTION

[1] The applicants in this matter seek a declaration that s 18(1) and (2) of the Road Accident Fund Act [1] ("the Act") are inconsistent with the Constitution and invalid to the extent that they limit the claims against the second respondent, the Road Accident Fund ("the Fund"), of the classes of persons identified therein to a maximum act 56 of 1996. of R25 000.00. The order sought is opposed by the Fund and by the first respondent, the Minister of Transport ("the Minister").

[2] it is as well to set out the attitude of the respondents to the applicants' case. The Minister, although initially opposing the declaration of invalidity, now abides the decision of this Court on whether the impugned provisions ought to be declared invalid, subject to the precise breadth of the order. The Fund likewise abides the decision of the Court in this regard. Both respondents contend, however, that any declaration of invalidity should have no retrospective effect. Instead, they contend that any such declaration should be suspended in terms of s 172 of the

1 Act 56 of 1996.

Constitution[2] until 1 August 2008, the date on which the Amendment Act came into force. This would mean that the applicants, and other claimants in their position, would obtain no substantive relief from any declaration of invalidity.

THE PERSONAL CIRCUMSTANCES OF THE APPLICANTS

First Applicant

[3] The first applicant, Ms Mvumvu, was seriously injured on 14 February 2005 when the driver of the minibus taxi in which she was travelling lost control of the vehicle which then rolled. No other vehicles were involved in the accident and the driver was fatally injured. The applicant was seriously injured and hospitalised for two months. Her right foot had to be partially amputated. She is now permanently disabled and has been unable to retain employment because of her injuries. The first applicant lives in an informal settlement, *inter alia,* with the two children of her deceased sister and her own two children. The only income of the household is the disability grant which she receives and a child support grant.

[4] The Fund has admitted its liability to compensate the first applicant. However, it has pointed out that because she was a passenger in the taxi her claim is limited to a maximum of R25 000.00. As the Fund has already paid medical claims from the hospitals which treated the first applicant, which extended beyond its liability of R25 000.00, first applicant has no claim against the Fund for further compensation for the injuries which she suffered in the accident.

[5] At the hearing it was agreed that the first applicant alleges that she suffered her injuries whilst travelling in an unlicensed taxi and that she need not file an affidavit to this effect. She was therefore not conveyed "for reward", regard being had to the definition thereof in s 1. In the result, her claim is limited by the provisions of s 18(1)(b) of the Act.

Second Applicant

[6] In June 2007 the second applicant, Ms Pedro, was travelling in a minibus taxi. The driver lost control of the vehicle which crashed into rocks on the side of the road seriously injuring the second applicant. She was hospitalised for some three weeks as a result of the fracture of both of her arms and ankle. As a result of the injuries which she suffered, which involved *inter alia* the insertion of a screw in her right arm and a plate in her left arm, she has suffered a reduction in her ability to function effectively and cannot, for example, walk far because of her unstable leg. The second applicant was a passenger for "reward" and accordingly her claim is limited by the provisions of s 18(1)(a)(i).

2 Act 108 of **1996.**

Third Applicant

[7] In May 2007 the third applicant, Ms Smith, was travelling, in the course of her employment, as a passenger in a vehicle owned by her employer. The driver lost control of the vehicle which left the road and rolled. The driver was fatally injured and the third applicant suffered a minor head injury and severe injuries to her back, left shoulder and left knee. She remained in hospital for two months and underwent surgery. Section 18(2) of the Act limits the third applicant's claim to the difference between o maximum of R25 000.00 and any lesser amounts which she can claim under the Compensation for Occupational Injuries and Diseases Act [3]("COIDA"). In terms of COIDA more than R25 000.00 will be paid for her hospitalisation and other medical treatment with the result that she will have no claim at all against the Fund.

LEGISLATIVE BACKGROUND

[8] The relevant provisions, s 18(1) and (2), were amended by the Road Accident Fund Amendment Act[4]("the Amendment Act") which came into effect on 1 August 2008, subsequent to the launch of the present application. However, the constitutional challenge remains alive because the present applicants, like all other persons similarly injured in motor vehicle accidents prior to 1 August 2008, remain bound by the provisions in their unamended form.

[9] Before the Amendment Act came into effect, s 17(1) of the Act provided that the Fund was:

"obliged to compensate any person (the third pdrtyj for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury of death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee".

[10] This comprehensive obligation to provide full delictual compensation was, however, not applicable to passengers in what may be termed "the offending vehicle", as a result of the provisions of s 18(1) and (2) which read as follows:

18. (1) The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or

3 Act 130 of 1993.

4 Act 19 of 2005.

on the motor vehicle concerned, shall, in connection with any one occurrence, be limited,

excluding the cost of recovering the said compensation,...

(a) to the sum of R25000 in respect of any bodily injury or death of any one such person who at

the time of the occurrence which caused that injury or death was being conveyed in or on the

motor vehicle concerned-

(i) for reward; or

(ii) in the course of the lawful business of the owner of that motor vehicle; or
(Hi) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom

subsection (2) does not opply, in the course of his or her employment; or

(iv) for the purposes of a lift club where that motor vehicle is a motor car; or
(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R25000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage.
(2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in respect of such injury or death-la) the liability of the Fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent, or the amount of R25000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act; and
(b) the Fund or such agent shall not be liable under the said Act for the amount of the

compensation to which any such third party is entitled thereunder....

[11] Section 18(1) thus imposes a limit of R25 000.00 on the liability of the Fund to compensate a third party who was a passenger in the offending vehicle. Section 18(2) deals with road accident victims who are entitled to compensation under COIDA. The sections as a whole would appear to affect six different categories of passenger claims, namely:

1. passengers for reward - in terms of s 18(l)(a)(i);

2. passengers conveyed in the course of the lawful business of the owner of that motor vehicle - in terms of s 18(1)(a)(ii);
3. passengers who were the employees of the driver or owner of the motor vehicle and who

were conveyed in the course of their employment but where there was no claim under COIDA-in terms of s 18(l)(a)(iii);
4. passengers being conveyed for the purposes of a lift club where the motor vehicle was a motor car - in terms of s (18)(l)(a)(iv);

5. passengers not falling within ss 18(1)(a) or 18(2), such as social passengers - in terms of s 18(1); and
6. passengers who were the employees of the driver or owner of the motor vehicle and who had a claim under COIDA-in terms of s 18(2).

[12] The Amendment Act effected certain fundamental changes to the system of compensation for road accident victims. In no particular order it limited claims for loss of earnings to R160 000.00 per year (s 17(4)(c) of the Act). It abolished the impugned provisions of the Act limiting the liability of the Fund to R25 000.00 in respect of certain claims, and it provided that the obligation of the Fund to compensate a third party for non-pecuniary loss would be limited to compensation for "a serious injury". The assessment of a serious injury is based on a prescribed method adopted after consultation with medical service providers.

[13] The memorandum on the objects of the Amendment Bill stated, *inter alia,* as follows:

"These *amendments are aimed at improving the governance of the Fund, providing for a more equitable, fair and transparent compensation system and whilst limiting the liability of the Fund.*

It is proposed in the Bill to put a monetary limit on claims for future loss of income or support. The Bill seeks to limit the liability of the Fund to compensate for general damages only for those seriously injured and provides guidelines for the assessment of injuries. This amendment will result in substantial savings needed to compensate all passengers.

The Bill furthermore seeks to repeal s 18(1) and 19(b) (ii) of the Act in terms of which the liability of the Fund for certain claims (e.g. claims in respect of persons who were conveyed for reward) are limited or excluded. It is believed to be unfair to have a specific limitation on such claims and that such claims should be treated the same as any other claim.

The Act will only apply to claims that arose after the commencement of the Act"

THE CONSTITUTIONALITY OF THE IMPUGNED PROVISIONS

[14] The applicants' case is that the impugned provisions are in breach of the Bill of Rights' guarantees of the right to equality[5], the right to dignity[6], the right to security of the person[7], the right to an effective remedy[8], the right to healthcare and social security[9]. The applicants were content, however, to argue their case purely on the right to equality and I will approach it on that basis.

[15] Section 9 of the Constitution provides:
"9. *Equality*
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or *categories of persons, disadvantaged by unfair discrimination may be taken.*
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[16] In *Harksen v Lane N.O. and Others*[10] the Constitutional Court set out the proper approach to the issues raised when an attack is made on a provision in reliance on the equality clause in Constitution. Goldstone J held that the stages of enquiry were the following:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then

5 9 of the Bill of Rights.
6 10 of the Bill of Rights.
7 12 of the Bill of Rights.
8 38 of the Bill of Rights.
9 27 of the Bill of Rights.
10 1398 (1) SA 300 (CC).

there is a violation of s 8(1)[11]*. Even it does bear a rational connection, it might nevertheless amount to discrimination.*

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(iii) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the -fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(iii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? if It has been found to have been on a specified ground, then unfairness will be presumed. If on on *unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution]."

[17] It is clear that the Act distinguishes between two broad categories of people and treats them differently. On the one hand, pedestrians and the occupiers (including passengers) of an "innocent" vehicle who have unlimited claims for compensation and, on the other hand, passengers in an "offending" vehicle, whose claims are capped by s 18.

11 Section 8(1) of the Interim Constitution was materially the same as the current section 9**(1).** It provided: *"Every per* ;on *shall have the right to equality before the law and to equal protection of the law'.*

[18] The question which arises is whether this differentiation bears a rational connection to a legitimate government purpose. Two explanations are offered on behalf of the Minister for the differentiation between the two classes. Firstly, it is stated the funding of the Fund is not designed to compensate all victims for all losses they might suffer as a result of motor vehicle accidents. Were it otherwise, the Fund would long since have been bankrupt. The Minister's representative goes on to say that:
"The parameters within which compensation is to be paid have been developed in a manner that is intended to distribute as fairly and equitably the limited funds that are made available to the Fund in accordance with a range of criteria and considerations that areregarded as most appropriate at the time. These considerations and criteria change from time to time."

However, as counsel for the applicants pointed out, this constitutes no explanation for differentiating between classes of innocent road accident victims, nor for explaining why the claims of some victims are singled out for very limited compensation whilst others receive full compensation.

[19] Secondly, the Minister's representative states that the decision as to what limitations ought to apply was a *"complex policy choice, apparently resolved along the following lines. A pedestrian, or occupant of another vehicle, has no choice in choosing the driver or owner of the offending vehicle. The same is not necessarily so in respect of a passenger in an offending vehicle".* However, what is put up as the apparent justification for the unequal treatment appears to be unsupported by fact or logic. In the first place, it is artificial to suggest that a person in a taxi queue "chooses" the driver of the taxi which he/she will board. The passenger seldom has knowledge of the competence of the driver or the roadworthiness of the vehicle. Similarly, employees have little or any say regarding the identity or competence of the drivers of employers' vehicles. In any event, even if one does attribute such a "choice" to a passenger, this still provides no explanation of what rational government purpose is served by treating such a passenger differently from other people who are also innocent victims of road accidents.

[20] As previously mentioned, not only did the Department of Transport acknowledge the unfairness of the existing system in its Explanatory Memorandum to the Bill, but the Fund's Chief Executive Officer and deponent to its answering affidavit, Mr. Jacob Modise, explicitly acknowledged this. In a letter to the attorney's magazine, De *Rebus* in January/ February 2008 he stated that the amendments to the Act were informed by *"the recognition that in its effects*

the present dispensation perpetuates disparities between rich and poor, rural and urban, employed and unemployed", and that one of *"the most urgent of the reforms needed"* was *"doing away with the untenable R25 000.00 limitation on the claims of passengers of negligent drivers*

[21] In my view the differentiation legislated by the impugned provisions falls at the first hurdle stipulated in *Harksen v Lane* (supra), in that it bears no rational connection to a legitimate government purpose. It is, therefore, in violation of s 9(1) of the Constitution. However, even if I am incorrect in this conclusion, I consider that the impugned provisions do not clear the second hurdle, since the differentiation amounts to unfair discrimination.

UNFAIR DISCRIMINATION

[22] The applicants asserted, and it was not disputed by the respondents, that persons affected by the provisions of s 18 are overwhelmingly poor and black and that, generally, poor people do not have their own means of transport and are obliged to make use of public transport. They assert too, again without being challenged, that poverty is racially distributed in South Africa. The vast majority of poor people are black, in disproportion to the number of black people in the country as a whole. It follows then that a measure which impacts disproportionately on poor people therefore also impacts disproportionately on black people.[12] Race is one of the grounds specified in s 9(3) upon which the State may not unfairly discriminate and thus the unfairness of the discrimination is, in terms of s 9(5), presumed unless it is established that such discrimination is fair. No viable attempt has been made by the respondents to suggest that the differentiation or discrimination is fair.

[23] It is also contended on behalf of the applicants that the differentiation occurs on a further specified ground, namely social origin, in that the impugned provisions discriminate against road accident victims who travel in their employer's motor vehicle in the course of their employment. This, it is submitted, discriminates against working class people. The allegation was not

12 See *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner. Western Cape* 2004 (4) SA 444 (C) at 448 G.

disputed by the respondents.

[24] In the result, the conclusion is unavoidable that discrimination on the ground of race, if not social origin as well, has been established and, these being specified grounds, unfairness must be presumed.

A JUSTIFIABLE LIMITATION OF RIGHTS?

[25] The discrimination having been found unfair, a determination must be made as to whether the provisions can be justified under the limitations clause. The Minister's representative asserted in this regard that, to the extent that the impugned provisions do limit the constitutional rights upon which the applicants rely, such limitations are reasonable and justifiable as contemplated by s 36 of Constitution. However, no explanation was proffered as to how such discrimination could be justified in an open and democratic society based on human dignity, equality and freedom. Nor were any facts alleged in support of any such claim.

[26] The closest that the Minister comes to this is in the assertion that it is difficult to conceive of any scheme, except one offering full compensation to all victims, which will not be subject to attack on the grounds of unfair discrimination. This assertion is, however, belied by the fact that, if the intention is to limit the financial cost of the scheme, it must clearly be possible to achieve this by treating all road accident victims on an equal basis and limiting all claims. Furthermore, to the extent that it may well be necessary to distinguish between classes of claimants, this can obviously be done on a basis which is not racially discriminatory. In fact, this appears to be what the Minister has attempted to do with the introduction of the Amendment Act which restricts the claims which road accident victims may make and which, although treating different classes of victims in a different manner depending of the nature of injuries which they have suffered, presumably does not do so on an unfairly discriminatory basis.

[27] Under the circumstances, the only conclusion which can be reached is that the impugned

provisions discriminate unfairly and are in breach of the Constitutional guarantee of equality.

REMEDY

The Scope of any Declaration of Invalidity

[28] Notwithstanding that the applicants were representative of only three of the six classes of person hit by the impugned provisions, an order of invalidity was sought against sections 18(1) and (2) as a whole. This was opposed by the respondents, who point out that there was and is no need for the applicants to challenge the constitutionality of s 18(1) (a) (ii), (iii) and (iv). They call attention to the fact, furthermore, that the applicants have no standing to challenge the remaining provisions of the sections given that they approach the court in their own interests and not on any other basis.

[29] In *Lawyers for Human Rights v Minister of Home Affairs*[13]*,* Yacoob J stated that it was ordinarily *"not in the public interest for proceedings to be brought in the abstract although this was not an invariable principle".* Given the potentially far-reaching financial implications of any declaration of invalidity, I consider it appropriate to limit any order to those provisions directly impugned i.e. ss 18(l)(a)(i), (l)(b) and 18(2).

[30] The applicants sought an order which would allow claimants whose claims against the Fund had clearly been resolved or prescribed, but who were actively pursuing their common law remedies against negligent drivers or vehicle owners, to reinstitute action against the Fund and nonetheless claim the balance of full compensation. This category of claimants, however, was not taken into account in the applicant's actuarial projections. In any event, there is no good reason why the Fund should, as it were, be placed in double jeopardy in such cases.

[31] The real point of dispute in this matter is what remedy, if any, the applicants must be afforded. They seek an unsuspended declaration of invalidity coupled with wording such as that which was used in *Engelbrecht v Road Accident Fund*[14] to the following effect:
"Such declaration of invalidity will apply to and govern all claims instituted or to be instituted under the Road Accident Fund 56 of 1996, which at the dote of *this order have neither*

13 2004 (4) SA 125 (CC) para 18.
14 2007 (6) SA 96 (CC) at para 47(3)(ii).

prescribed nor been finally determined by judgments at first instance or on appeal or by settlement duly concluded."

[32] On the other hand, the respondents submit that any declaration of invalidity should be suspended until 1 August 2008, the date on which the Amendment Act came into force. The nett effect of such a suspension would be that the impugned provisions would continue to apply to all motor vehicle accident claims which arose before such date and thus the position of the applicants, and all persons with similar unsettled or unresolved claims, will effectively be the same as if the applicants had obtained no relief at all.

[33] The arguments about remedy dealt largely with the financial implications for the Fund and the State of an unsuspended order. It was contended on behalf of the respondents that any such order would be disastrous for the Fund, producing additional liability of several billion rand in a situation where the Fund's financial position remains precarious. The respondents based their financial calculations on the assumption that this matter is unlikely to be concluded in the Constitutional Court before the middle of 20ll, an assumption which appears realistic. Relying on certain dicta of the Constitutional Court in *Tsotseti v Mutual & Federal Insurance Co* Ltd[15], it was further contended that in the present circumstances, the Court should exercise its discretion in favour of suspending the declaration of invalidity until 1 August 2008.

[34] The applicants firstly disavow any relief having retrospective effect by limiting the order sought to claims which have not prescribed or which have been resolved by the time that any declaration of invalidity may be confirmed by the Constitutional Court. A suspension order is resisted by the applicants on various grounds. It is firstly submitted that neither of the conditions for a suspension order exist and, furthermore, that an order in the present circumstances would not align with the purpose of such an order in terms of s 172(1)(b)(ii) of the Constitution. As far as the financial conseauences of an unsuspended declaration of invalidity are concerned, it is submitted that there is no evidence that the government is unable or unwilling to meet any cash

15 1997 (1) SA 585 (CC).

shortfall such an order might cause the Fund. In any event, it is argued that a decision not to suspend any declaration would not create any material cash flow problem for the Fund.

[35] The evidence of the Fund's CEO, as set out in a supplementary affidavit filed by agreement shortly before the hearing, is that by the financial year end at 31 March 2010 the Fund's accumulated deficit was R41 billion; that it is facing a severe cash crisis and that it is only just barely able to cover its payment obligations on a day to day basis.

[36] The Fund has no independent asset base.or capacity to generate income. It is entirely dependent for its funding upon payments from the National Treasury, which are largely funded by a levy on fuel. Such funds as it will require in order to meet any increased liability will simply have to be provided by National Treasury. Although the Fund's primary source of revenue is the fuel levy, in the past where this has been inadequate to meet the claims of the Fund it has been the practice of the government to make appropriations to the Fund for it to meet its obligations. A distinction must also be drawn between two aspects of the Fund's operation: its cash flow requirements and its "liability". The Fund is not a commercial insurer but a statutory compensation fund funded, and in practice guaranteed, by the State through levies and appropriations. Unlike an insurer, it is not obliged to hold assets or reinsurance policies which either cover or provide a guarantee of cover in respect of its future liabilities. Rather it operates on a cash flow basis, its operations requiring that each year its expenditure, including compensation paid and all other costs, should exceed its income.

[37] The applicants' papers establish that the National Treasury has accepted that it is government's responsibility to ensure that the Fund's cash flow requirements are met. Under the present system it chooses to do so not by placing funds to cover the future liability under the management of the Fund, but rather by meeting its cash flow needs as and when they arise. The government has met past shortfalls and it is not suggested that it cannot or will not meet any shortfalls which may arise under the present circumstances.

[38] Section 172 of the Constitution provides as follows:

"(l) When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including -
(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[39] The starting point for the enquiry into an appropriate remedy was explained as follows by Moseneke DCJ in *Steenkamp N.O. v Provincial Tender Board, Eastern* Cape[16]:

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated."

[40] In opposing any suspension order, the applicants point out that the ultimate authority, Parliament, has already corrected the defect or inequality in issue through the Amendment Act which is presently in operation. Furthermore, add the applicants, the respondents expressly state that they seek nothing less than the suspension of any declaration of invalidity until 1 August 2008. Neither do the Minister or the Fund profess any interest in any measures which would bring relief to those persons who remain affected by the impugned provisions.

[41] It is further contended on behalf of the applicants that in any event a suspension order would not be appropriate. Dealing with such orders, Bishop[17] gives as the primary reasons therefor, firstly, *"the most common and obvious use for a suspension order is when an*

16 2007 (3) SA 121 (CC) para 29.
17 Bishop **Remedies** in Woolman and Others (eds) Constitutional Law of South Africa (2 ed) 9 -121.

immediate order of invalidity will create a lacuna in the law that would create uncertainty, administrative confusion or potential hardship" and, secondly, *"where multiple legislative cures to the constitutional defect exist. This rationale is based on the separation of powers doctrine. It is for the legislature, not the judiciary, to make policy decisions where the Final Constitution does not require a particular outcome".* These circumstances do not pertain to the present matter since the enactment of the Amendment Act and the respondents' declared attitude make it clear that the government contemplates no further legislative steps. There is, thus, no *lacuna.* Notwithstanding these considerations, given the wide discretion which must be exercised, bounded only by justice and equity, in my view the Court must, nonetheless, have regard to the consequences of suspending, or not, the declaration of invalidity.

[42] There are powerful considerations weighing against an immediate declaration of invalidity, notwithstanding that its effect will be limited by time and by the numbers of third party claims likely to be affected thereby. The parties placed actuarial evidence before the Court projecting the likely financial implications for the Fund in the event that the order was not suspended. On behalf of the applicants, Mr. Munro prepared a detailed analysis showing the impact of the removal of the R25 000.00 cap, projecting that it would reach its peak in 2013 and decline thereafter. He also calculated the likely "savings" to the Fund caused by the limitations placed on compensation by the Amendment Act. It would appear that these have already commenced and will reach their peak in 2012/2013. On his projection, such savings, when fully realised by 2012/2013, will be some R3.19 billion to R3.56 billion annually in 31 March 2009 terms. This sum is roughly of the same order as the total capital value of additional payments which by estimation will be brought about by an unsuspended order of invalidity, namely R4.0 billion - R4.14 billion, in 31 March 2009 terms.

[43] Obviously both the projected savings and the increase in the Fund's liability resulting from an unsuspended declaration of invalidity, incorporate an appreciable margin of error and can be debated at length. What is clear is that the effect of such a declaration will be to require the Fund to assume liability, in due course, of several billion rands for compensation which it would

otherwise not have borne.

[44] On behalf of the respondents, it was argued that this would mean that money which would otherwise have been utilised by government for other purposes such as education, housing or healthcare would be redirected simply for the benefit of a relatively small class of claimants. Not only would this be unfair but it would amount to this Court infringing the doctrine of the separation of powers by impinging upon those powers properly exercised by the other branches of government. The argument relating to a re-allocation of State resources may be oversimplified, however, since the financial history of the Fund indicates that its deficits are generally met by increases in the fuel levy. In this sense they are ultimately made good by a direct tax on motorists and the likely effect of an unsuspended declaration of invalidity will be to require the State to increase the fuel levy in order to meet the Fund's increased liability. Even this step, however, can be seen as amounting to the government's hand being forced in regard to what tax or levies it should impose on the population or a portion thereof.

[45] The applicants seek to reduce the impact of the greatly increased Fund liability, should there be no suspension of the order, by reference to savings which the Fund will make as a result of the provisions of the Amendment Act. However, such savings are illusory inasmuch as the reduction in the Fund's liability would have been taken into account by it and the Minister when the Amendment Act was put into operation.

[46] The consequence, however, of denying the applicants, and those in the same position as them, some form of effective relief are similarly far reaching, not only in financial terms but from the perspective of a constitutional state, one of whose founding values is a right to the equal protection and benefit of the law. The capped claims under the impugned provision are not the only hang-over from the Act. Over the next 5 years or so, a much greater volume of claims by persons with uncapped claims will be processed and, where appropriate, met by the Fund. The injustice of unequal treatment for a small minority of road accident victims, based on racial discrimination or on their social origin, will thus continue for some years to come. In my view this

will be an unjust and unacceptable outcome, the effect of which will be, in many cases, to deny to those most in need thereof, adequate compensation for injuries and loss sustained as a result of motor vehicle accidents.

[47] It is relevant, furthermore, that the inequality inherent in the impugned provisions must have been known to the Minister and the Fund for several years before they chose to remedy it. The report of the Satchwell Commission was tabled in Parliament on 20 January 2003 and recommended, amongst other measures, the repeal of the discriminatory capped claim provisions. When, in 1996, the Act was enacted the R25 000.00 capping provision contained in its predecessor were repeated. The Amendment Act was assented to on 23 December 2005, although those sections which are material to the present action only commenced with effect from 1 August 2008. As long ago as 1994 the capping provisions were challenged in *Tsotetsi's* [18]case, albeit unsuccessfully, and thus the Minister and the Fund are unlikely to have been taken by surprise by the equality challenge raised in the present matter.

[48] The challenge launched in *Tsotsetsi* was against equivalent provisions in earlier legislation, but related to causes of action which arose prior to the interim Constitution coming into force. Counsel for the respondents placed considerable reliance on the following dicta from the judgement of O'Regan J[19]:

"Nor are fhere *special and peculiar reasons which would require that an order having retroactive effect be made in this case. Indeed the converse may be true. The statute challenged by the applicant contains one of the major social benefit programmes established by the State. Were the Court to declare the provisions unconstitutional and sever them . from the Schedule with retrospective effect, the financial implications would be considerable. From the expert reports provided to us, the additional costs imposed upon the government would, in the case of a retrospective order, impose an additional annual cost on the Fund of R200 million, as well as an additional non-recurring liability of R440 million. In 1993/4, the Fund had expenses of*

18 Supra.
19 Cited at paras 9 and 10.

R855 million and in 1994/5, the Fund's expenses just exceeded RI billion. In both years, the Fund's income was in the region of RI billion. The amount that would have to be paid by the fund if the Court were to make a retrospective order, therefore, would have a grave impact on the financial status of the Fund. The Court would not lightly make an order the effect of which would be to grossly distort the financial affairs of a welfare programme.

It may well be, as the respondent argued, that the interests of justice and good government would best be met in such a case by an order in terms of the proviso to s 98(5) of the Constitution which would suspend the order of invalidity for a period of time in order to give the Legislature an opportunity to attend to the matter. It is true that the applicant was seriously injured in a motor vehicle accident and that the provisions of the Schedule deprive him of full compensation for *those injuries (although it appears that the applicant has received a significant payment from the Workmen's Compensation Commissioner). But the effect of declaring the impugned provisions invalid would have such an inordinate effect on the financial structure of the Fund that it may be that those interests of justice would be outweighed. That may well have been the case even if the accident had occurred after the Constitution came into operation. In the circumstances, I am not persuaded that this is a case in which public policy would require, not merely that a retrospective order be made, but* an *order which would result in the Constitution operating retroactively. In the circumstances, it must be held that the referral in terms of s 102(1) by the Transvaal Provincial Division was not valid on the grounds that the issue referred to this Court cannot be decisive of the case before that Court."*

[49] Although O'Regan J's remarks concerning the merits of the challenge must be given their due weight, they were *obiter* inasmuch as that issue was, for various reasons, not squarely before the Court. Furthermore, as the applicants' counsel pointed out, there are differences between the circumstances of the present matter and those in *Tsotsetsi.* The question in the present matter, as opposed to the circumstances in *Tsotsetsi,* is whether, given that the impugned provisions must be held to have been invalid when the applicants' causes of action arose, there are special circumstances which require a departure from the ordinary rules of objective invalidity i.e. that the impugned law became invalid from the moment when the Constitution came into effect. Had there been a ruling adverse to the government in *Tsotsetsi,* it would in all probability have been afforded an opportunity by the Court to legislatively correct the situation. By contrast, in the present matter the respondents are content with the legislative steps taken thus far. Furthermore, different financial scenarios apply in each case.

[50] Apart from the far-reaching financial consequences of a declaration of invalidity with immediate effect, further arguments made in favour of a suspended order centre around the undesirability of the Court taking a decision which will disturb what was described as the considered compromise arrived at by Parliament in the form of the Amendment Act. In support of this argument, reliance was placed on the following statements by the Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others*[20]*:*

"Courts are not institutionally equipped to make the wide-ranging tactual and political enquiries necessary ... for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in Soobramoney:

'The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.'"

The Court went on to say:

"Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

[51] The full Court in that matter was faced with the argument that the doctrine of separation of powers demanded that even if it should find that government policies fell short of what the Constitution required, the only competent order that it could make was to issue a declaration of rights to that effect, leaving the Government free to pay heed to the declaration and to adapt its policy insofar as that might be necessary to bring it into conformity with the Court's judgment. In

20 (2) 2002 (5) SA 721 (CC) paras 37 - 38.

response the full Court stated as follow:

"This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that Courts cannot or should not make orders that have an impact on policy.

The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the State to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is a/so no *merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the Mpumalanga*[21] *case, this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months.* A/so, *in the* case *of August*[22] *the Court , in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.*[23]

21 *Premier. Mpumalanga. and Another v Executive Committee. Association of State-Aided Schools. Eastern Transvaal 1999* (2) SA 91 (CC) (1999 (2) BCLR 151).

22 *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) (1999 (4) BCLR 363).

23 *Minister of Health v Treatment Action Campaign* (supra) at paras 98 - 99.

as would any other victim of a motor vehicle accident whose claim arose before 1 August 2008.

[54] Should this Court suspend any order until 1 August 2008, as urged by the respondents, the result will be a ringing but empty declaration of invalidity. In *Fose v Minister of Safety and Security*[24] Ackermann J held:

"Given *the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to* ensure *that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies will breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."-*

[55] In my view, in the circumstances of this matter, a declaration of invalidity of the impugned provisions, based as it is on the fundamental right to eguality before the law, requires that effective and not merely declaratory relief be granted. However, should the declaration not be suspended without any further qualification, the effect will be to create a relatively small and, by comparison privileged class of claimants able to claim full compensation from the Fund for their injuries and losses. A further effect will be to burden the Fund, or rather its guarantor, the government, with billions of rands of additional liability for which no provision has been made at the very time that it is moving towards a more egalitarian system of compensation. Such an outcome also strikes me as inequitable as well as being fiscally undesirable.

[56] During argument it was put to counsel that an appropriate remedy might be to, in effect, extend the reach of the Amendment Act to the applicants and others in their position. Although

24 1997 (3) SA786 (CC) at para 69.

the suggestion found favour with neither the applicants nor the respondents, I consider that such an outcome would be far preferable to both a suspended, and thus empty, declaration of invalidity on the one hand, and an unqualified and immediate declaration, on the other. Such a dispensation will reflect, to a large measure, the legislative choice already made by Parliament as to how to deal with such claims and will avoid the creation of a relatively small class of claimants privileged over others who were in the same position, but whose claims have been finalised. Although such an order will inevitably mean increased liability for the Fund, such increased liability will be substantially less than if the Fund's liability for such claims was unlimited. An order in the terms which I envisage will thus avoid the judicial imposition of what is, by any standards, hugely increased and unforeseen liability on the part of the Fund and its guarantor, the State.

[57] Accordingly, for the reasons given, I consider that it would be just and equitable that there be no suspension of the declaration of invalidity but that it be qualified, as described above, to bring it into alignment with the provisions of the Amendment Act.

COSTS

[58] The applicants seek an order for their costs in this matter whilst the respondents contend that it would be appropriate for each party to pay their own costs. In *Biowatch Trust v Registrar, Genetic Resources and Others*[25] the Constitutional Court stated:

"...particularly powerful reasons must exist for a Court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings Prought against it." No such reasons have been suggested in this matter and in the circumstances a costs order must follow.

[59] In the result the following order is made:

25 2009 (6) SA 232 (CC) at para 24.

(1) It is declared that sections 18(1)(a)(i) and 18(1)(b) of the Road Accident Fund Act 56 of 1996, as they stood prior to 1 August 2008, were inconsistent with the Constitution and invalid.

(2) It is declared that section 18(2) of the Road Accident Fund Act 56 of 1996, as it stood prior to 1 August 2008, was inconsistent with the Constitution and invalid.
(3) Such declarations of invalidity will apply to and govern all claims instituted or to be instituted under the Road Accident Fund Act 56 of 1996, which at the date of this order:
(a) have not prescribed; and
(b) have not been finally determined by judgments at first instance or on appeal; and
(c) have not been finally determined by settlement duly concluded.

(4) All such claims referred to in para 3 above shall qualify for no greater compensation than that which would accrue under the provisions of the Road Accident Fund Amendment Act, 19 of 2005, as it stood on 1 August 2008.

(5) This order is referred to the Constitutional Court for confirmation of the order of constitutional invalidity.
(6) The respondents are ordered, jointly and severally, to pay the costs of this application, including the costs of the expert witness Munro.
BOZALEK, J
JUDGE OF THE HIGH COURT