CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/95

ELIAS TSOTETSI

versus

MUTUAL AND FEDERAL INSURANCE COMPANY LTD

Heard on: 29 August 1995, 16 May 1996

Decided on: 12 September 1996

JUDGMENT

O'REGAN J:

[1] On 25 February 1991, the applicant, Mr Elias Tsotetsi was allegedly rendered a quadriplegic as a result of injuries sustained in a motor vehicle accident. According to the applicant, the accident occurred solely as a result of the negligence of the driver of the vehicle in which he was a passenger which was being driven in the course of business of the owner of the vehicle. On 5 April 1994, the applicant launched an action for damages of R1 143 600 in the Transvaal Provincial Division of the Supreme Court against the Mutual and Federal Insurance Company Ltd, the respondent, which is an appointed agent in terms of the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 (the Act).

[2] In its plea, the respondent relied upon article 46(a)(ii) of the schedule to the Act ("the schedule") which stipulates that the entitlement to damages of a passenger in a vehicle being conveyed in the course of business of the owner of the vehicle is limited to a maximum payment of R25 000. In addition, the respondent relied upon article 47(a) of the schedule which provides that where a third party injured in a motor vehicle accident is a worker entitled to compensation at the time in terms of the Workmen's Compensation Act, 30 of 1941 (subsequently replaced by the Compensation for Occupational Injuries and Diseases Act, 130 of 1993), the worker's entitlement to damages is limited to the difference between R25 000 and the amount paid by the Workmen's Compensation Commissioner.

[3] In a replication, the applicant challenged the constitutional validity of articles 46(a)(ii) and 47(a) of the schedule, and sought that the question of their validity be referred to this court in terms of section 102(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 (the Constitution). On the 13 February 1995, Curlewis DJP referred the question of the validity of the challenged provisions to this court.

[4] The first question that arises for decision is whether the referral was competent. Section 102(1) stipulates three conditions precedent for a valid referral: the issue referred must be one which falls within the exclusive jurisdiction of this court, the issue must be one which may be decisive for the case and the referring judge

must consider the referral to be in the interests of justice. Implicit within the requirement that the matter be in the interests of justice is a consideration of whether there are reasonable prospects of success upon referral (*S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at paragraph 59). In this case, the challenged provisions clearly fall within this court's exclusive jurisdiction.

[5] It does not seem however that it can be said that the issue referred may be decisive of the case before the referring court. In *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 (CC) at para 9 Didcott J, speaking on behalf of a unanimous court, held that this requirement will be met once the ruling sought from the Constitutional Court "may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled" (see also *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at paragraph 10).

[6] In this case, the accident occurred and summons was issued before the Constitution came into force. In *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paragraph 19, this court held that the Constitution cannot ordinarily be construed as interfering with rights that vested before it came into force. In that case, the court was concerned with a suit for defamation in respect of a series of newspaper articles published during 1993

and the defendants sought to raise a defence based on section 15 of the Constitution. Kentridge AJ held that "the commission of the delict and the liability to pay damages cannot be separated. The right to damages accrues at the moment the defamation is published" (at paragraph 17). In the case currently before us, the accident in which the applicant was injured occurred before the Constitution came into force, and the liability of the respondent to pay damages was fixed at the time of the accident. The applicant seeks to argue that the limitation upon the amount of damages the respondent is required to pay imposed by the schedule is unconstitutional. The effect of the decision in *Du Plessis v De Klerk* is that the respondent's obligation to pay damages, fixed as it was at the time of the accident, could not subsequently have been expanded by the Constitution which came into effect only after the accident happened. Accordingly, the applicant is not entitled to rely on the provisions of the Constitution to challenge the validity of articles 46(a)(ii) and 47(a) of the schedule. (See also *Key v Attorney-General, Cape of Good Hope Provincial Division and Another* 1996 (6) BCLR 788 (CC) at paragraph 6.)

[7] In his judgment in *Du Plessis v De Klerk*, Kentridge AJ left open the question of whether there may be cases in which the enforcement of previously acquired rights would be so unjust that it could not be countenanced (at paragraph 20 of his judgment; see also the judgments of Mahomed DP at paragraphs 69 - 70; and Kriegler J at paragraph 117). Mr Trengove SC, for the applicant, argued that not

only may there be cases where the enforcement of rights vested prior to the 27 April 1994 would not be countenanced by this court, but that this was such a case. He argued that several factors rendered this case different from *Du Plessis v De Klerk*. First, that it is not a matter between private litigants, but a matter between a private plaintiff and a defendant acting as an agent of a state institution, the Multilateral Motor Vehicle Accidents Fund. Secondly, it is a case, he argued, concerned with statutory provisions which give rise to a gross violation of equality. Finally, he argued, justice could be achieved by making any order applicable only to outstanding claims.

[8] In my view, this line of argument cannot succeed. It is unnecessary in this case to decide the question to which I have referred in paragraph 7 which was expressly left open in *Du Plessis v De Klerk*. Even if it is accepted that there may be exceptional circumstances where the general rule of non-retroactivity may not apply, it cannot be said that this is such a case. Such a case could only arise first, if it was clear that the challenged provision or conduct was a gross violation of the provisions of the Bill of Rights, and secondly, if there were special and peculiar reasons which would suggest that an order with retroactive effect should be made in a particular case. No such circumstances exist in this case. Even if the applicant were to persuade this court that the impugned provisions of the schedule do constitute a breach of the equality clause, it cannot be said that those provisions constitute such a gross breach of that clause that a special exception

to the general rule concerning the retrospective application of the Constitution should be made.

[9] Nor are there 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 R855 million and in 1994/5, the Fund's expenses just exceeded R1 billion. In both years, the Fund's income was in the region of R1 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.

[10] 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 section 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 section 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.

[11] Mr Trengove argued that this was an appropriate case for the court to grant direct access to the applicant. Mr Gauntlett SC, for the respondent, did not support that application. Section 100(2) of the Constitution provides that:

"The rules of the Constitutional Court may make provision for direct access to the

> Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction."

Rule 17(1) provides that:

> "The Court shall allow direct access in terms of section 100(2) of the Constitution in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

In several cases, this court has confirmed that it has a discretion to allow direct access and that it will not allow direct access to it in the absence of exceptional circumstances. (See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paragraph 11; *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paragraphs 15 - 17; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paragraph 10; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at paragraph 29; *Luitingh v Minister of Defence* at paragraph 15; *Besserglik v Minister of Trade, Industry and Tourism and Others* 1996 (6) BCLR 745 (CC) at paragraph 6; *Brink v Kitshoff NO* at paragraph 18.)

[12] The court has been willing to exercise its discretion to permit direct access in

several cases: where it was satisfied that there was a pressing need for a particular issue to be determined in order to avoid substantial dislocation in the criminal justice process (*S v Zuma* at paragraph 11); or to prevent significant delays and disruption in the procedures relating to the liquidation of companies (*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* at paragraph 10); where a litigant had no other avenue for relief available (*Besserglik v Minister of Trade, Industry and Tourism and Others* at paragraph 6); where there was a compelling national interest in the determination of an issue in the light of a pending election (*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* at paragraphs 15 - 17) and where parties consented to direct access and there was a real prospect that the order made by the court will in fact be decisive for the case (*Brink v Kitshoff NO* at paragraph 18). The grant of direct access remains a discretionary power of the court which will be exercised in exceptional circumstances only and in the light of the facts of each particular application.

[13] I have not been persuaded that exceptional circumstances exist in this case: in the light of the conclusions to which I have come concerning the inapplicability of the Constitution to the applicant's claim against the Fund, there is no possibility at all that the applicant will be assisted by any order this court may make; the respondent is opposed to the order; there is no allegation of any disruption in the business of the Fund sufficient to warrant the grant of direct access; nor has it

been shown that an appropriately qualified litigant would have difficulty in approaching this court for relief; nor are there any other particular circumstances suggested by the applicant which would warrant the grant of direct access in this case. In the circumstances, it is not an appropriate case in which to grant direct access.

[14] Neither the applicant nor the respondent sought a costs order and none is made.

Order

[15] The matter is remitted to the Transvaal Provincial Division.

C.M.E. O'REGAN
JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, Ngoepe AJ and Sachs J concur in the judgment of O'Regan J.

For the applicant:	WH Trengove SC and I Smith instructed by Raphael Smith Attorneys
For the respondent:	JJ Gauntlett SC and DA Preis instructed by Attorneys Mendel Cohen & Partners Inc.