REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 649 / 02

In the matter between

ROAD ACCIDENT FUND **APPELLANT**

and

BENNET LEFU MAKWETLANE **RESPONDENT**

Coram : HOWIE P, MARAIS JA, JONES, SOUTHWOOD and PONNAN AJJA

Date of hearing : 20 MAY 2004

Date of delivery : 17 FEBRUARY 2005

SUMMARY

Motor vehicle accidents – compensation – claim for in terms of the Road Accident Fund Act 56 of 1996 – validity of reg 2(1)(c)- Regulation not *ultra vires*.

J U D G M E N T

PONNAN AJA

[1] Is regulation 2(1)(c) ('the regulation') promulgated by the Minister of Transport[1] pursuant to the power vested in him by section 26 of the Road Accident Fund Act 56 of 1996 ('the Act') *ultra vires*? That question, which was answered in the affirmative by the court below,[2] is the crisp issue which now confronts this court on appeal.

[2] The regulation provides: 'In the case of any claim for compensation referred to in section 17(1)(b) of the Act, the Fund, shall not be liable to compensate any third party unless … the third party submitted, if reasonably possible, within 14 days after being in a position to do so an affidavit to the police in which particulars of the occurrence concerned were fully set out'. In *Road Accident Fund v Thugwana* 2004 (3) SA 169 (SCA) this court recently had occasion to consider whether the regulation was *ultra vires*, as also an ancillary issue, namely, whether the regulation is peremptory. On each issue it reached a conclusion contrary to that reached by the court a quo in this matter. In so doing it held that this matter had been wrongly decided by the court a quo and specifically overruled it. That without more, one would think necessarily puts an end to this appeal. For the reasons that follow, in my view, it does not.

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[1] GNR 609 in *Government Gazette* 17939 of 25 April 1997. Although promulgated on 25 April 1997, the regulations were to operate with effect from 1 May 1997, the same date as the commencement of the Act.

[2] The judgment of the court *a quo* is reported sub nom *Makwetlane v Road Accident Fund* 2003 (3) SA 439 (W).

[3] The respondent ('the plaintiff') sued the appellant ('the RAF') in the Johannesburg Magistrates' Court for loss or damage suffered by him on 6 May 1999, at Main Road, Freedom Park, Johannesburg, when, according to him, a motor vehicle collided with him whilst he was a pedestrian. The cause of the collision, so alleged the plaintiff, was the negligent driving of the motor vehicle in question of which the identity of neither the owner nor the driver thereof has been established.

[4] The RAF pleaded that the plaintiff had failed to comply with the regulation. It accordingly denied that it was liable to compensate the plaintiff in terms of section 17(1) of the Act and sought the dismissal of the plaintiff's claim. That and three other points, all of which were described as special pleas, were considered *in limine* by the trial court. Having successfully negotiated the other three, the plaintiff failed to establish compliance by him with the regulation, resulting in the dismissal of his action.

[5] The court *a quo* reversed that finding of the trial court on appeal and substituted in its stead an order dismissing the RAF's special plea with costs. In so doing, it held that the regulation was *ultra vires*. Leave having been granted by it, the matter now serves before this court on appeal.

[6] The proper approach to an enquiry such as the present is to consider *inter alia* the context of the regulation, the overall purpose of the statute, the legislative history and to subject the regulation in question to constitutional scrutiny.

[7] The Act here under consideration is the latest in a long series of enactments dating back to 1942.[3] The present Act, like its predecessors, is designed to compensate persons who are injured, or the dependants of persons who are killed in consequence of the negligent driving of motor vehicles. The Act must be given a liberal interpretation as it, again like its predecessors, is intended ' ... to give the greatest possible protection, by way of insurance, to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle' (*Aetna Insurance Company v Minister of Justice* 1960 (3) SA 273 (A) at 285 E-F).[4]

[8] There is no indication either expressly or otherwise in the present Act of an intention or general object that is any different to that of its predecessors. The Act provides for the establishment of a fund, the

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[3] See *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713.
'Although since 1942 legislative amendments and new enactments were required from time to time in order to adapt to changing needs, and to refine and improve the whole system of compensation, the principles and object underlying the 1942 Act and its successors have remained unaltered'. (*S A Eagle Insurance Company v Pretorius* 1998 (2) SA 656 (SCA) at 659 J).

[4] See also *S A Eagle Insurance Company Ltd v Van der Merwe* NO 1998 (2) SA 1091 (SCA) at 1095J -1096 B; *Padongelukkefonds (Voorheen Multilaterale Motorvoertuigongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA) at 574A-B; and *National Employers General Insurance Company Ltd v Roberts* 1994 (1) SA 38 (A) at 47H.

object whereof, as stated in section 3, is '....the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles...'.

[9] Section 17 (1) provides:

> '(1) The Fund or an agent shall –
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> (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
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> (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
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> be obliged to compensate any person (the third party) 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 or 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] In *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 para 6, this court held: 'Section 17 (1) distinguishes between the liability of the Fund in the case of a claim for compensation where the identity of the owner or the driver of the vehicle involved has been established and the case of a claim for compensation involving an unidentified vehicle. Section 17 creates liability in both cases, the only difference being that in the case of the unidentified motor vehicle claims the Fund's liability is made "subject to any regulation made under Section 26".'

[11] The question is thus whether the promulgation of the regulation was a valid exercise of the power granted to the Minister to make regulations by section 26. Section 26 (1) reads:

> '(1) The Minister shall or may make regulations to prescribe any matter which in terms of this Act shall or may be prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act.'

[12] Of section 26(1) this Court stated in *Bezuidenhout* (para 10):

> 'It is certainly not clear whether the modifier at the end of s 26(1) modifes the whole section or only the words which immediately precede it. In my view, however, this is of no consequence since it must in any event be implied that s 26(1) cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith. See *R v Hildick-Smith* 1924 TPD 69 at 92 and Caney *Statute Law and Subordinate Legislation* at 88. Bennion *Statutory Interpretation* 3rd ed (1997) at 189 points out that underlying the concept of delegated legislation is the basic principle

> that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the Legislature, as indicated in the enabling Act, must be the prime guide to the making of delegated legislation and the extent of the power to make it. *Bennion* continues as follows:
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> "The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the Legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it." '

[13] It is unnecessary to define with precision the nature of the act performed by the Minister, for, however defined, and whatever its true nature, the conduct of the Minister in promulgating the regulation is subject to constitutional scrutiny. It is a concept central to our constitutional order that neither the legislature nor the executive may exercise any power or perform any function beyond that conferred by law (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58).

[14] The exercise of all public power must comply with the Constitution and the question whether the Minister acted *intra* or *ultra vires* in promulgating the regulation is a constitutional matter. (See *Pharmaceutical Manufacturers Association of SA and Another: In re ex*

parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC).) Thus what would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid by virtue of the doctrine of legality under the Constitution (*Pharmaceutical Mnfrs.* para 50*;* see also *Minister of Correctional Services and Others v Kwakwa and Another* 2002 (4) SA 455 (SCA) para 35*).* The doctrine of legality required of the Minister that he comply with the Constitution as well as act within the parameters of the power conferred upon him by the Act.

[15] Of the regulation which is 'not a model of clarity' (*Thugwana* para 6), this court stated: 'Once a claimant is in a position to make an affidavit, the 14-day period begins to run. But the claimant may have difficulties in making the necessary arrangements to depose to an affidavit or to submit it to the police. If the affidavit is submitted more that 14 days after the claimant was in a position to do so, the question would arise whether it was reasonably possible for this to have been done within the 14-day period. If so, the fund will incur no liability. If not, the 14-day period would be extended for so long as it was not reasonably possible for the claimant to have submitted it – but no longer. Any other interpretation would absolve a claimant from the obligation to submit an affidavit at all if this was not reasonably possible within the 14-day period, or provide no time limit in such a case for the furnishing of the affidavit; and manifestly neither interpretation can have been what the legislature intended.' (See *Thugwana* para 7.)

[16] The plaintiff was hospitalised for a period of approximately three weeks immediately following upon the collision. On 20 July 1999 he reported the collision to the Mondeor police station. Although an officer's accident report (OAR) form was completed, no affidavit, in the sense contemplated by the regulation, was submitted by the plaintiff to the police. On those facts, it is plain that the plaintiff was in a position to submit the affidavit required by the regulation to the police at the latest by the 20 July 1999. No written statement, much less one sworn to before a Commissioner of Oaths, was made by the plaintiff. It follows that there has been non-compliance with the provisions of the regulation by the plaintiff.

[17] Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has not been established, as it would usually be difficult for the RAF to secure evidence to dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to

eliminate fraud and facilitate proof of legitimate claims, falling as it does within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none. That legitimate end, may not, however, be achieved by means that sweep too broadly.

[18] Not all limitations that seek to achieve so laudable a motive as the elimination of fraud are for that reason alone constitutionally acceptable. The limitation in this case must be viewed against the backdrop of 'the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed of their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons' (per Didcott J in *Moholomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14).

[19] The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted - rationality being the minimum threshold requirement. (See *Pharmaceutical Mnfrs*

para 85 and 86.) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful. Whether such a rational relationship indeed exists is an objective one.

[20] The 14-day period is but one part of a composite scheme. There are at least three other component parts to the regulation. It requires of a claimant that he/she: (i) submit an affidavit; (ii) to the police; (iii) which sets out the particulars of the occurrence concerned. For its practical efficacy the regulation is dependent on co-operative members of the police who are well aware of the duty cast upon them by the regulation. Whether a justiciable dispute comes before a court of law may depend in no small part on the whim of a particular member of the police services. Extraneous factors such as the knowledge and professionalism of the police, as also the storage capacity and reliability of records kept at any given police station (see *Geldenhuys & Joubert v Van Wyk, Zendra and Road Accident Fund*; and *Van Wyk, Zendra v Geldenhuys & Joubert and Road Accident Fund* SCA cases 471 & 472/2003 para 20, 21 and 22 delivered on 30 November 2004) are beyond the control of a claimant and may likewise be beyond the control of the Minister of Transport. And yet, the police have an important role to play, which if not diligently discharged could result in the loss of a claimant's right.

[21] The consequence of non-compliance with the regulation, a harsh one at that, is arbitrary and indiscriminate. It matters not that a claimant may in fact have been the victim of a hit and run collision and that such fact could perhaps be established by means of some other compelling evidence. Assuming an otherwise valid claim, the effect of the regulation is to non-suit a claimant should there be non-compliance with its provisions. Indeed, as this court held in *Thugwana* (para 16) 'that is likely to be the situation in the vast majority of cases, as the vast majority of claimants are unlikely to be aware of the requirements of the regulation'.

[22] I cannot accept that a regulation that non-suits the vast majority of claimants could possibly ' ... achieve or promote the object of this Act'. On the contrary, to my mind, it runs counter to the purpose and scope of the Act. In a country where so few are possessed of the sophistication and means to enforce their rights, the imposition of the conditions envisaged in the regulation and the undifferentiated and arbitrary consequences of its enforcement may well be regarded as being unreasonable. Such a regulation can hardly be said to have been authorised by the Act or countenanced by the Constitution. Accordingly, for the reasons given, I would hold that Regulation 2(1)(c) is *ultra vires*.

[23] After the appeal had been argued before this court, the parties were invited to file supplementary heads of argument in respect of certain defined issues. Those heads of argument, which should have been filed on behalf of the plaintiff by 30 July 2004, were not. Nor were they filed by the 27 or 31 August 2004, being the successive extensions of time granted by the President of this court for that purpose. Correspondence from the Registrar of this Court to the plaintiff's attorney made it plain that no heads of argument would be received thereafter and that this court would proceed to consider and prepare judgment. That notwithstanding, heads of argument came to be served on behalf of the plaintiff on the Registrar of this court at approximately 9pm on 10 September 2004. It was accompanied by an application for condonation, which was not opposed by the RAF. Although the reasons advanced for the tardiness makes far from compelling reading and it might well have been arguable that the heads of argument could have been served and filed much earlier had the plaintiff's representatives manifested greater diligence and tenacity, the delay which in fact ensued has not prejudiced the RAF in any way as to justify a refusal of the application for condonation. Those late supplementary heads of argument, did, however, have the undesirable effect of delaying the finalisation of the judgment of this court. By the time those heads of argument came to be lodged, some four months after the hearing of the appeal, of the five

Judges who had heard the matter, two were on leave, one had retired and one had returned to duty in the Provincial Division.

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V M PONNAN
ACTING JUDGE OF APPEAL

MARAIS JA

[24] I have had the benefit of reading the judgment of my learned brother Ponnan but am unable to share in his conclusion that regulation 2(1)(c) is invalid in law.

[25] A regulation which purports to attenuate substantively an unqualified right of action conferred by enabling legislation would be obviously *ultra vires.* It was so held by this court in both *Padongelukkefonds (voorheen Multilateral Motorvoertuig-ongelukkefonds) v Prinsloo* 1999(3) SA 569 (SCA) and *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) in relation to a regulation requiring physical contact to have occurred between the vehicle involved in a ‘hit and run’ case and the claimant before liability could arise. In

constitutional law parlance such a regulation would infringe the principle of legality.

[26] A regulation which imposes a reasonable time limit for the lodging of a claim in such a case is not *ultra vires.* It was regarded in *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) at 718E-F as being consistent with 'the general rule that the right to prescribe time limits within which procedural acts must be done is inherent in the right to regulate'. See too *Geldenhuys and Joubert v Van Wyk and Road Accident Funds; Van Wyk v Geldenhuys and Joubert and Road Accident Fund,* cases 471 & 472/2003, 30.11.2004 (SCA).

[27] In regulation 2(1)(c) we have a requirement which, in my view, falls into neither of these two conceptually clear categories. What the claimant is required to do must be done <u>after</u> the occurrence which is alleged to give rise to the claim and in order for the claim to come into existence. The liability of the Fund, if any, is plainly derivative; it is made answerable for the delict of an unidentifiable driver. The delict is constituted by the negligent driving of a motor vehicle which results in physical injury or death causing loss. The commission of the delict cannot depend upon what steps are, or are not, taken after the occurrence by the claimant. Unlike the situation in the cases of *Prinsloo* and *Bezuidenhout*, the regulation does not purport to qualify the

substantive circumstances of the occurrence which the enabling legislation has decreed shall potentially give rise to liability. I say 'potentially' for the reason given in paras [6] and [7] of this judgment.

[28] Nor does the requirement in issue fall into the category of things which must be done *vis-à-vis* the Fund as part of the process of instituting the claim, for example (as in the case of *Mbatha),* lodging the claim in prescribed form within two years from the date on which the claim arose. Such a requirement is plainly procedural in character even although a failure to comply with it may result in inability to pursue the claim. Here the claim will not have arisen before the required act is done.

[29] The requirement in regulation 2(1)(c) is not procedural in the ordinary sense in which that word is understood in the context of litigation. The step to be taken is not one to which either the Fund or the court is to be privy, and it does not constitute a step in the actual making of a claim. Yet it is a step which must be taken by the claimant after the commission of the delict as a condition precedent to the Fund having to compensate the claimant. Can it rightly be said that it amounts to a substantive attenuation of the liability which the enabling legislation intended should exist and that it is therefore *ultra vires* on that ground? I think not.

[30] First, the premise from which the question posed proceeds does not exist. In the case of *Geldenhuys and Joubert* it was held by this court that the lodging of a claim within the two-year period prescribed by regulation 2(3) was ‘a precondition to the existence of the debt under the Act’ and that if the claim is not lodged within that period there is no ‘debt’. (At para [25]). By parity of reasoning, so it seems to me, the same must apply to the requirement in regulation 2(1)(c). It was emphasised in that case that the current legislation expressly empowers the Minister ‘to subordinate the Fund’s liability’ in ‘hit and run’ cases ‘to regulatory conditions’. (At para [30]). It follows that no accrued and vested right to be compensated by the Fund was intended to come into being merely upon the happening of the occurrence. At best the loss sustained was to be potentially compensable by the Fund. Whether or not liability to compensate would arise was intended to depend upon what further requirements might be set by regulation under s 26 of the Act.

[31] The regulatory power so conferred is of course constrained by the need to stay within well-established boundaries. Apart from the express injunction in s 26 that any such regulation must ‘be necessary or expedient … in order to achieve or promote the object of this Act,” there are the constraints implied *ex lege* or articulated in the Constitution. In my view, regulation 2(1)(c) is expedient to achieve or promote the

objects of the Act. My reasons for so thinking will emerge as this judgment proceeds.

[32] Secondly, even if it were to be assumed that the legislature intended that the mere happening of the occurrence should give rise to a right to compensation by the Fund, it would not follow that regulation 2(1)(c) would have to be regarded as thwarting that aim. Of paramount importance, in my opinion, is that this is a potestative condition with which it would ordinarily be within the power of a claimant to comply. The regulation does not purport to deprive, willy nilly, the victim of a 'hit and run' driver of 'the greatest possible protection' which the enabling legislation intended him or her to have. It merely requires the victim to take a step which it would ordinarily be within the victim's power to take, on pain, if the step is not taken, of not being compensated by the Fund.

[33] Are there any other grounds upon which regulation 2(1)(c) can held to be *ultra vires*? If there is a rational purpose behind the requirement; if the steps required to be taken to achieve that purpose are not unreasonable and serve the purpose; if the requirement is regulatory in character and furthers the objects of the enabling legislation; and, if it does not fall foul of any provision in the Constitution, it cannot be declared to be invalid.

[34] The purpose of the regulation.

The Fund is obviously in a parlous position when faced with a claim in a ‘hit and run’ case. It will have no driver’s version of the incident available to it and, if it has to pay the claim, the right of recourse which s 25 of the Act gives it in such circumstances will be valueless. Fraudulent claims are an obvious danger in alleged ‘hit and run’ cases. (See the case of *Mbatha, supra*, at 718H.) The obligation placed upon a claimant by the regulation is obviously intended to discourage fraud and to provide little time for plots to be hatched. How effective it has proved to be or will be or whether there are other and better ways of deterring fraud and ensuring *bona fides* is beside the point. As long as the regulation has the potential to deter fraud and that potential is not so minimal as to be derisory, it cannot be said to have no rational purpose. I turn to that question.

[35] The compulsory involvement of the police soon after the incident is alleged to have taken place, and the injury or injuries sustained, is calculated to make would – be fraudsters apprehensive about embarking upon such an enterprise. The involvement of the police would also mean that there might be a skilled investigation into the alleged incident which might well reveal it to be a fabrication. The need to make a statement by way of an affidavit means that a dishonest claimant would also have to

steel himself or herself to commit perjury. These are considerations which are conducive towards making potential fraudsters think more than twice before chancing their arms. An early report, although obviously not conclusive, also goes some way towards showing *bona fides* and serves at least to eliminate fabricated claims concocted long after the alleged incident, perhaps at the instigation of co-conspirators.

[36] Are the steps to be taken unreasonable and therefore impliedly prohibited by the enabling legislation?

The requirement of an early report to the police is not, to my mind, unreasonable. The period within which it must be done is admittedly very short but, if the vulnerability of the Fund to fraudulent exploitation of its 'hit and run' liability is to be lessened in that manner, the time given must needs be short or the provision will largely fail to achieve its purpose. Moreover, the obligation is not absolute: there are two significant and benign qualifications. First, it must have been reasonably possible to do so, and secondly, the period of 14 days commences to run only after the claimant is 'in a position to' furnish the required affidavit. That the particulars of the alleged incident are required to be set out in an affidavit is also not unreasonable for the reason given in para [12].

[37] It is of course so that victims of 'hit and run' drivers may be oblivious of the regulation and may fail to comply with it through

ignorance. As against that there is the consideration that anyone who suffers injury and loss as a result of such flagrantly unlawful conduct on the part of a ‘hit and run’ driver may reasonably be expected to enquire as soon as reasonably possible what remedies might be available. More importantly, as I shall illustrate later, the availability of a claim of this kind represents an act of legislative largesse. Steps taken by regulation to minimise, as far as possible, fraudulent exploitation of that largesse should not lightly be condemned as unreasonable even if they may sometimes result in a genuine victim not receiving compensation.

[38] Is the regulation regulatory in character and does it further the objects of the enabling legislation?

I have adverted earlier to the problem of characterising correctly this requirement. It neither adds to nor subtracts from the foundational circumstances which the legislature has decreed must exist before any potential liability can arise, namely, negligent driving by an unidentifiable driver of a motor vehicle which results in physical injury and loss to another. It is therefore not inherently subversive of the basic thrust of the legislation. Nor is it a purely procedural requirement within the normal meaning of the word ‘procedural’ in the context of litigation. Yet failure to fulfil it could result in the loss of a genuine potential claim. But the same can be said of a failure to comply with time limits imposed upon the

bringing of an already existing claim and, as has been seen, these are regarded as legitimate regulatory provisions. Where, as here, a regulation is plainly designed to avoid the Fund being duped by fraudsters into paying compensation to undeserving persons to whom the legislature did not intend it to be paid, it cannot be said not to further the objects of the legislation. It is surely as much an object of the legislation that the resources of the Fund not be used to compensate fraudulent claimants as it is that those resources be deployed only in compensating genuine victims of 'hit and run' drivers.

[39] Does the regulation fall foul of the Constitution?

There are only two specific provisions in the Bill of Rights which it was suggested rendered the regulation invalid. I turn to consider them.

[40] Equality – s 9 of the Bill of Rights

Is the victim of a 'hit and run' driver unfairly discriminated against because the regulation imposes a burdensome obligation upon him or her which is not imposed upon the victim in a case where the driver is identifiable? It is so, of course, that in both situations there is a victim who has been injured and has suffered loss as a consequence of the negligent driving of a motor vehicle. They are in the same boat to that extent but they are very differently placed in other vital respects.

[41] In the case of the identifiable driver the claimant, but for s 21 of the Road Accident Fund Act 56 of 1996, would have been able to institute a claim at common law against the driver. In lieu of that common law claim there is a legislatively conferred claim against the Fund. Because the driver is identified, the Fund will, more often than not, have access to his or her version of what happened and may be able to resist successfully an unmeritorious claim. In addition, in a case in which it is held liable, it may, depending on the circumstances, even have a right of recourse in terms of s 25 of the Act against the identified driver.

[42] In a 'hit and run' case, pragmatically viewed, there will be nobody against whom proceedings could actually have been instituted at common law. The existence in theory of such a remedy will be of cold comfort to the victim. Happily, s 17(1)(b) of the Act, subject to regulations made under s 26 of the Act, provides a remedy against the Fund. However, as I have already said, the position of the Fund in such a situation is invidious. It will have no driver's version available to it and, if it has to pay the claimant, the right of recourse which s 25 of the Act gives it in such circumstances will be valueless. To expect, as a matter of course, equality of treatment of two such differently placed claimants is, in my opinion, an unsound and unjustifiable point of departure. Apples cannot be equated with oranges.

[43] Unlike the victim of an identified driver who is deprived of his or her common law remedy against the driver and given instead a remedy against the Fund, the victim of a ‘hit and run’ driver is given a remedy against the Fund even although he or she would have had no enforceable remedy at common law. Such a victim is really the recipient of what may be called legislative social largesse. Had there been any constitutional imperative to bestow that largesse the approach to the questions which this case poses would have had to be very different but there is none. In short, to the extent that the obligations which the regulation imposes upon the victim of a ‘hit and run’ driver are discriminatory, the discrimination is not unfair to such a victim.

[44] I might add that even if it were so that equality of treatment is required *prima facie*, it is at least conceivable that there might be evidence at the disposal of the Fund which would show that the difference in treatment of these different kinds of claimant is justifiable under s 36 of the Constitution. To decide the point against the Fund at this belated stage of the litigation when the issue was not raised in the court of first instance where evidence could have been led, does not seem justifiable.

[45] Access to courts – s 34 of the Bill of Rights.

If the respondent's claim against the Fund had been one which lay at common law, I would have had little, if any, doubt that limitations upon its invocation of the kind which the regulation imposes would have been unreasonably restrictive and would have amounted to an unconstitutional fetter upon the access to courts for which s 34 of the Bill of Rights makes provision. *Cf Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) and *Moise v Greater Germiston Transitional Local Council: Minister of Justice intervening* 2001 (4) SA 491 (CC). But it is not such a claim. Nor, unlike a claim against the Fund when there is an identifiable driver, is it a legislatively conferred claim given in lieu, and to the exclusion, of an enforceable common law claim. As I have said, it amounts to a gratuitous benefit given to a victim of the negligent driving of a motor vehicle in circumstances where the victim would have had no enforceable remedy against the culprit at common law because of inability to identify the culprit. This statutory remedy against the Fund was conferred despite the inability of the Fund to exercise a right of recourse against the culprit.

[46] That remedy was not intended to be available come what may. It was to be available 'subject to any regulation made under section 26'. The definition of 'this Act' in s 1 'includes any regulation made under section 26'. But this obviously can only mean any *intra vires* regulation. I

have already explained why I consider that this regulation is not *ultra vires* on any other ground. The remaining hurdle of s 34 of the Bill of Rights is one which does not need to be cleared. That seems to me to be so because once one concludes that no justiciable claim against the Fund comes into existence unless and until regulation 2(1)(c) has been complied with, it must follow that there is no dispute in existence which there is a constitutional right to have access to a court to resolve. To suggest that the regulation is an unlawful fetter upon access to a court implies that there is in existence a justiciable claim. But there is not.

[47] I agree with Ponnan JA that the respondent failed to comply with the regulation. Having concluded that it is not *ultra vires* it follows that, subject to what follows, the magistrate was correct in upholding the Fund's special plea. Section 24(5) of the Act provides that if the Fund does not within 60 days of the making of a claim 'object to the validity thereof, the claim shall be deemed to be valid in law in all respects.' Counsel for the parties were not able to throw any light upon whether the Fund had so objected. In the circumstances an order similar to that made in *Road Accident Fund v Thugwana* 2004 (3) SA 169 (SCA at 175-6 should be made. Counsel for the Fund supported the taking of this course.

[48] It is ordered:

1. The appeal succeeds with costs, including the costs of two counsel. The order of the court below and the order of the magistrate is set aside. The following order is substituted therefor:

(a) The plaintiff is given leave to file a replication to raise the provisions of s 24(5) of the Act in answer to the special plea within 15 days.

(b) If plaintiff fails to do so timeously or within such further period as this court might allow on good cause shown, the plaintiff's claim is dismissed with costs, and the plaintiff is ordered to pay the costs of the hearing on the special plea.

(c) The plaintiff is ordered to pay the costs of the hearing on the special plea.

2. The period of 15 days shall run from the date of this order.

3. The respondent shall pay the costs of the appeal in the court *a quo.*

4. In the event of it being found, or conceded by the appellant, that the respondent's claim must be deemed to be valid by virtue of s 24(5) of the Act, all the costs orders hitherto made in this order shall fall away and instead each party shall pay his and its own costs save that the magistrate must make such order as to the costs of any hearing on the applicability of s 24(5) as is considered just.

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R M MARAIS

JUDGE OF APPEAL

CONCURRING:

HOWIE P

JONES AJA

SOUTHWOOD AJA