IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 26286/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 21 JUNE 2021

SIGNATURE: .....

In the matter between:

LEGAL PRACTITIONERS INDEMNITY INSURANCE Applicant

FUND NPC

And

THE MINISTER OF TRANSPORT First Respondent

THE ROAD ACCIDENT FUND Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant claims the following relief:

"1. It is declared in terms of section 172(1)(a) of the Constitution, 108 of 1996 that the provisions of Regulation 2(1)(b) and Regulation 2(2) of the RAF Regulations, issued by the Minister of Transport in terms of sec 26 of the Road Accident Fund Act, 56 of 1996 are inconsistent with the Constitution and invalid;

2. In terms of Sec 172(1)(b) of the Constitution, Regulation 2(1)(b) and Regulation 2(2), to the extent that they relate to minors and persons under curatorship, are set aside;

3. It is declared that sec 23(2) of the RAF Act is to be read as including minors and persons under curatorship who claim in terms of sec 17(1)(b) of the RAF Act, 1996

4. Alternatively, to par 3 supra, it is declared that minors and persons under curatorship with valid claims against the Road Accident Fund shall enjoy the protection of delayed completion of prescription as envisaged by sec 13(a) of the Prescription Act, 68 of 1969."

Legal Framework:

[2] The relief claimed by the applicant emanates from certain regulations that were promulgated by the first respondent, the Minister of Transport ("the Minister") in terms of the Road Accident Fund Act, 56 of 1996 ("the Act"). The Act constitutes social security legislation and aims at protecting the rights of persons who have suffered loss due to the negligent driving of a motor vehicle.

[3] Section 2 of the Act established the second respondent, the Road Accident Fund ("the Fund") and section 3 defines the object of the Act as follows:

"The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."

[4] Section 17 provides for the liability of the Fund to make payment in accordance with the object of the Act and reads as follows:

"17. (1) The Fund or an agent shall —

(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;

(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,

be obliged to compensate any person (the third party) for any loss the third 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."

[5] The two categories of claims will herein be referred to as section 17(1)(a) or *identified vehicle* claims and section 17(1)(b) or *unidentified vehicle* claims. *In casu* the second category of claims forms the subject matter of this application.

[6] Section 17(1)(b) provides that claims in instances where the vehicle is unidentified will be subject to any regulation made in terms of section 26. Section 26(1) empowers the Minister to:

".....make regulations regarding any matter that shall or may be prescribed in terms of the Act or which is necessary or expedient in order to achieve or promote the object of the Act."

[7] Pursuant to the provisions of section 17(1)(b) and section 26, the Minister promulgated regulations on 21 July 2008 in Government Notice No. R. 769, *Government Gazette* No. 31249. Regulation 2 is applicable to the issue *in casu* and reads as follows:

"2. Further provision for liability of Fund in terms of section 17(1)(b)

(1)(a) A claim for compensation referred to in section 17(1)(b) of the Act shall be sent or delivered to the Fund in accordance with the provisions of section 24 of the Act, within two years from the date on which the case of action arose.

(b) A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the owner not driver thereof has been established, shall become prescribed upon the expiry of a period of two years

from the date upon which the cause of action arose, unless a claim has been lodged in terms of paragraph (a).

(c) In the event of a claim having been lodged in terms of paragraph (a) such claim shall not prescribe before the expiry of a period of five years from the date upon which the cause of action arose.

(2) Notwithstanding anything to the contrary contained in any law a claim for compensation referred to in section 17(1)(b) of the Act shall be sent or delivered to the Fund within two years from the date upon which the cause of action arose irrespective of any legal disability to which the third party concerned may be subject." (own emphasis)

[8] Prescription of claims under section 17(1)(a) are regulated by section 23 of the Act, to wit:

"23(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.

(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against:

a. a minor;

b. any person detained as a patient in terms of any mental health legislation; or

c. a person under curatorship.

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five years from date on which the cause of action arose." (own emphasis)

Locus standi

[9] Prior to considering the merits of the applicant's case, it is prudent to deal with the applicant's *locus standi.*

[10] The applicant is a non-profit, registered short term insurance company, established in 1993 by the Attorneys Fidelity Fund Board in terms of section 40A(a)(i) of the then Attorneys Act, 53 of 1979. The Attorneys Act, 53 of 1979 was repealed and replaced by the Legal Practice Act, 28 of 2012 ("the LPA").

[11] In terms of the provisions of section 77(1) of the LPA, the applicant continues to exist as the entity that provides personal indemnity insurance to legal practitioners that practice with a Fidelity Fund Certificate as an attorney or advocate in terms of section 34(2)(b) of the LPA.

[12] The applicant indemnifies legal practitioners against professional liability to pay compensation to any third party:

[12.1] that arises out of the provision of legal services by the insured; and

[12.2] where the claim is first made against the insured during the current insurance year.

[13] As such, the applicant is at risk of liability where legal practitioners are held liable for prescription of Road Accident Fund claims. These claims include claims for minors and persons under curatorship where the negligent driven vehicle or its driver cannot be identified.

[14] The applicant states that it is currently involved, through subrogation, as a defendant in two pending disputes under:

[14.1] case number: 13674/2014 in the South Gauteng Local Division of the High Court; and

[14.2] case number: 10798/2015 in the Pietermaritzburg Division of the Kwa-Zulu Natal High Court.

[15] In both disputes, the legal practitioners, who are insured with the applicant, are sued for professional negligence on the allegation that they lodged third party claims for compensation on behalf of their clients, with the RAF in terms of section 17 of the RAF Act, after a period of two years, had lapsed.

[16] The RAF has on the strength of the provisions of Regulation 2(1)(b) and 2(2) of the RAF Act repudiated the claims which culminated in the two actions *supra*.

[17] Should the claims succeed, the applicant will be liable to satisfy the judgment debts and thus, according to the applicant, it has a direct and substantial interest in the relief sought herein.

[18] The second respondent denies that the applicant has the necessary *locus standi* to claim the relief sought herein. The second respondent submits that section 38(a) of the Constitution only grants legal standing to a person whose rights are infringed or threatened.

[19] According to the second respondent, the applicant's only interest is its liability to indemnify legal practitioners who did not lodge a valid claim in terms of section 17(2)(b) within the two year period prescribed by the regulations.

[20] In *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 SCA the court defined the test for legal standing to institute legal proceedings as follows in paragraph [22]:

> *"[22] The question whether a litigant's interest is sufficient to clothe it with standing must be determined in the light of the factual and legal circumstances of the case ... ."*

[21] It is not in dispute that the applicant is legally obliged in terms of statute to indemnify legal practitioners against cases based on professional negligence. The applicant through the principle of subrogation has a direct interest in the litigation that ensues. The issue in the two matters referred to by the applicant in its founding papers, provides both factual and legal circumstances that clothe the applicant with the necessary standing to pursue the relief claimed herein.

[22] The question then arises whether the applicant's standing in common law falls within any of the categories mentioned in section 38 of the Constitution. Section 38 lists the following categories of persons:

"(a) anyone acting in their [its] *own right;*

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interests of its members."

[23] If one has regard to the categories, it is clear that the applicant is firstly acting in its own interests as envisaged in section 38(a) of the Constitution.

[24] Although the applicant does not rely on public interest as a ground for *locus standi*, it is apposite to have regard the following remarks by Froneman J in *Ngxuza and*

Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (ECD) at 618J-619F:

"Section 38 is new and introduces far-reaching changes to our common law of standing ... .

There is no cogent reason for a restrictive interpretation of the provisions of the section because of the narrow content given to standing under the common law ... .

Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality ...All this speaks against a narrow interpretation of the rules of standing.

It is true that the nature of public law litigation creates problems of its own, namely that of proper representation. The kind of problems that may arise are those associated with ensuring (1) that only those who wish to be involved in the case are; (2) that those who wish to be involved are given the chance to make the representations they may wish to make; and (3) that the party presenting the case adequately represents future interests. These problems are, however, not factors that militate against a broad view of standing. At most they require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation."

[25] The issues *in casu* will have far-reaching consequences for the rights of minors and persons under curatorship whose claims fall within the provisions of section 17(2)(b) of the Act. It is, no doubt, in the public interest to determine whether the impugned regulations are in accordance with the Constitution and the principle of legality.

[26] One should further bear in mind that the minors and persons under curatorship referred to in the impugned regulations cannot act in their own interest.

[27] In the premises, I am satisfied that the applicant has the necessary *locus standi* to seek the relief claimed herein.

CONSTITUTIONAL CHALLENGE

[28] The applicant submits that regulation 2(1)(b) and regulation 2(2) ("the regulations") that impose a two year period on minors and persons under curatorship for the lodging of a claim for compensation under section 17(1)(b) is constitutionally invalid insofar as it relates to minors and persons under curatorship. In challenging the constitutional validity of the impugned regulations, the applicant relies on certain sections of the Constitution dealt with *infra*.

Section 9: Equality

[29] Prior to considering the submissions by the parties, it is apposite to have regard to the relevant subsections relied upon by the applicant, namely:

"9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

9(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 a category of persons, disadvantaged by unfair discrimination may be taken.

9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more on grounds, including race, gender, sex, pregnancy, marital status, ethnic or social orientation, age, disability, religion, conscience, belief, culture, language and birth.

9(4) No person may unfairly discriminate against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

9(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[30] A handy approach to determine whether there has been unfair discrimination for purposes of section 9 is to be found in *Harkson v Lane NO and Others* 1998 (1) SA 300 CC at paragraph 50(a):

"(a) Does the provision differentiation 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 there is a violation of section 8(1). Even if does bear a rational connection, it might nevertheless amount to discrimination.

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

(b)(i) 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.

(b)(ii) 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 an 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 section 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 (section 33 of the interim Constitution)."

[31] The applicant contends that the discrimination contained in the regulations falls within the listed grounds prohibited by section 9(3) and falls short of being rationally connected to the purpose of the Act contained in section 3.

[32] With reference to the dicta in *Sali v National Commissioner of the South African Police Service and Others* [2014] ZACC 19, namely:

"If the differentiation was based on one of the grounds listed in section 9(3), it is presumed to be unfair. This means that an applicant needs only to show that the differentiation complained of was based on a listed ground for the double presumption to be triggered."

[33] The applicant submits that the double presumption has been triggered *in casu*.

[34] The applicant submits that the regulations differentiate between minors and persons under curatorship in unidentified vehicle cases and minors and persons under curatorship in identified vehicle cases. The differentiation discriminates without constitutional justification against minors and persons under curatorship in unidentified vehicle cases and infringes their right to equality guaranteed by section 9 of the Constitution.

[35] The Minister, firstly submitted that the impugned regulations do not differentiate between *people* or *categories of people*. According to the Minister, the provisions of the regulations read together with section 17(1)(b) of the Act provide for a different procedure and time period for the lodgement and processing of the claims in unidentified vehicle cases. The differentiation introduced by the regulations is, therefore not directed at persons but rather at the cause for the claim.

[36] In analysing this submission it is important to bear in mind that section 9 guarantees the right of minors and persons under curatorship to equal protection and benefit of the Road Accident Fund Act. As such minors and persons under curatorship is a *category of persons* as envisaged in section 9.

[37] The Fund acknowledges the differentiation, but submits that the differentiation serves a legitimate governmental purpose. The purpose of the two year time period within which to lodge a claim in an unidentified motor vehicle case is to eliminate fraud and to facilitate proof. According to the Fund the Supreme Court of Appeal has on more than one occasion found that there are good reasons for having stricter requirements for unidentified vehicle cases as the possibility of fraud is greater and the Fund would find it difficult to obtain evidence to controvert the claimant's allegations. [See: *Mbatha v Multilateral Motor Vehicle Accident Fund* 1997 (3) SA 713 SCA, *Road Accident Fund v Thungwana* 2004 (3) SA 169 SCA, *Geldenhuys & Joubert v Van Wyk and Another* 2005 (2) SA 512 SCA, *Road Accident Fund v Makwetlane* 2005 (4) SA 51 SCA]

[38] Mr Labuschagne SC, counsel for the applicant, has correctly pointed out that the issue *in casu* differs from the issues that had been decided by the Supreme Court of Appeal in previous matters.

[39] The issue *in casu* is not limited to the two year period to lodge a claim under section 17(1)(b) of the Act, but includes the fact that minors and persons under

curatorship who have claims under section 17(1)(b) is, with reference to regulation 2(2) and section 23 of the Act, being treated differently from minors and persons under curatorship who have claims under section 17(1)(a).

[40] The fact that persons of full legal capacity must submit their claims under section 17(1)(b) within two instead of three years, is not the issue *in casu.* The problem is rather that persons who do not possess full legal capacity and who have claims under section 17(1)(b) are not afforded the same protection provided in terms of section 23(2) to similar persons in identified vehicle cases.

[41] I agree with the applicant that the differentiation does not fulfil a legitimate government purpose.

[42] In the result I am satisfied that the differentiation amounts to discrimination.

[43] The following stage of the enquiry is whether the discrimination is unfair.

[44] The Minister submitted that, should the court find that there is discrimination, the discrimination does not fall within a ground listed in section 9(3). According to the Minister, the applicant relies on an unlisted ground under section 9(1) and bears the onus to establish that the alleged discrimination is unfair. The Minister contends that the applicant has failed to acquit the aforesaid onus.

[45] Although the differentiation is not specifically directed at age (minors) or disability (persons under curatorship), the differentiation created by the regulations indirectly results in the treatment of the same category of persons, to wit minors and persons under curatorship, unequally insofar as the prescription of their claims are concerned. In the result, I agree that minors and persons under curatorship falls within one of the grounds listed in section 9(3). Discrimination has, therefore, been established and unfairness is presumed.

[46] But even if I am wrong and the differentiation does not fall within one of the grounds listed in section 9(3), the differentiation, in my view, still amounts to discrimination. The differentiation viewed objectively, manifestly have an adverse effect on the rights of minors and persons under curatorship to claim compensation in unidentified vehicle cases in comparison to their counterparts in claims where the vehicles are identified.

[47] The impact of the discrimination is self-evident. A minor that sustains a serious brain injury in an identified vehicle case will have the necessary finances to get specialised care, proper educational assistance and will be compensated for his/her loss of earnings or earning ability.

[48] A minor in an unidentified vehicle case will forfeit these benefits and will be left to fend for her/himself without any form of assistance. The same applies for persons under curatorship.

[49] In the result, I find that the provisions of regulation 2(1)(b) and 2(2) unfairly discriminate between the two categories of claimants and infringes on the right of minors and person under curatorship to be treated equally before the law.

Section 34: access to court

[50] Section 34 reads as follows:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[51] The applicant contends that minors and persons under curatorship who have claims in identified and unidentified vehicle claims, have a legal and justiciable right to claim compensation in terms of the Act.

[52] The imposition of a two year prescription period, however, differentiates between the time period in which the two categories of minors and persons under curatorship may approach a court to seek damages for their loss.

[53] In the result, the regulations infringe upon the section 34 rights of minors and persons under curatorship to bring their claims before court.

[54] The Minister does not agree. The Minister contends that once a claim has been lodged in terms of regulation 2(1)(a), a claimant that claims in terms of section 17(1)(b) is entitled to approach a court of law.

[55] The problem, however, with the lodgement of claims by minors and persons under curatorship, is that they simply do not have the capacity to do so within the prescribed two year time period. In the result and due to no fault of their own, their claims will prescribe whereas those of minors and persons under curatorship who claims under section 17(1)(a) will not.

[56] I agree with the applicant that the regulations infringe the constitutional right of minors and persons under curatorship with claims under section 17(1)(b), to claim damages in terms of the Act before a court.

Justification

[57] Section 36 of the Constitution provides for the limitation of rights in the Bill of Rights and section 36(1) reads as follows:

"36(1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose; and

(e) the less restrictive means to achieve the purpose."

[58] The nature of the right in question is the right of a minor or person under curatorship to have access to social security in the form of compensation for loss suffered due to injuries sustained in a motor vehicle collision. The regulations impact on this right by treating minors and persons under curatorship whose claims emanate from unidentified vehicle cases unequally and limiting their access to court. The respondents do not challenge the right in question.

[59] Insofar as the importance of the purpose of the limitation, the nature and extent of the limitation and the relationship between the limitation and its scope is concerned, the Fund addressed the limitation of the section 34 rights and submits that the limitation is permissible. The reasons underlying the aforesaid submission is summarised in its answering affidavit as follows:

"51.1 First, unlike other prescription provisions which this court has declared to violate the rights of access to courts, Regulation2(1)(b) and 2(2) provides a substantial period for claimants in which to lodge their claims – a full two years after the accident.

51.2 Moreover, within those two years, the claimant need not institute legal proceedings but is only required to lodge a claim with the RAF. Provided this is done, the claimants then have a further 5 years within which to institute action against the RAF.

51.3 In this regard it should be made clear that the lodging of a claim with the RAF, unlike the institution of legal proceedings, does not require the claimant to be legally assisted. In fact the RAF has been encouraging and promoting what are termed "direct claims" which are lodged directly by the claimants themselves as it reduces the amount of money spent on legal fees.

51.4 For this reason the RAF provides staff members who assist members of the public to lodge claims themselves, rather than via an attorney."

[60] The justification provided *supra*, once again, fails to take into account that minors and persons under curatorship do not have the physical and legal capacity and/or knowledge to lodge claims on their own behalf.

[61] Having regard to the purpose of the Act, the limitation of the rights of minors and persons under curatorship to claim the social benefit afforded by the Act, cannot be justified in a democratic society based on human dignity and equality.

[62] It is hugely unfair to minors and persons under curatorship to forfeit their rights contained in section 23 of the Act, simply because fate intervened and the injuries they sustained are due to an unidentified vehicle collision.

[63] The next ground of justification revolves around the finances of the Fund and the fact that unidentified claims, which might be fraudulent claims, drains the funds of

the Fund to the prejudice of claimants in justified claims. The Fund emphasised the fact that it has been functioning with a deficit for a long time.

[64] The Fund then proceeds to set out the number of claims received from March 2018 and the huge negative impact it has had on the financial position of the Fund.

[65] Lastly the Fund submits that to allow claims lodged behind the two year period in unidentified vehicle cases would negatively impact on its ability to accurately forecast future financial liability. This is so, because the Fund utilises existing claim patterns to obtain an actuarial estimation of its future liabilities. The end result is that the Fund's forecasting and budgeting exercise would be substantially compromised.

[66] The Fund did not deal with the claims of minors and person under curatorship at all. Having regard to the issue in question, one would have expected the Fund or the Minister to provide statistics in respect of this category of claimants and to estimate the financial impact claims of minors and persons under curatorship in unidentified vehicle cases would have on the Fund's financial liabilities.

[67] Although fraudulent claims are of concern to the Fund, the possibility of fraudulent claims in instances where minors and persons under curatorship lodge claims in unidentified vehicle claims could never justify the infringement of their human rights *in casu.*

[68] I could not find any justification for the limitation of the rights of minors and persons under curatorship caused by the promulgation of regulation 2(1)(b) and 2(2).

Section 1(c): legality

[69] Section 1(c) of the Constitution provides that the democratic state of the Republic of South Africa is based on the supremacy of the Constitution and the rule of law.

[70] The applicant contends that section 23 of the Act provides that prescription does not run against minors and persons under curatorship. The regulations are at odds with section 23 in that it provides for the prescription of claims of minors and persons under curatorship in unidentified vehicle matters. The regulations do not have the status of an Act of Parliament and cannot oust the provisions of section 23.

[71] In the result, the regulations offend against the principle of legality contained in section 1(c) of the Constitution in that the Minister was not empowered to determine by regulation the limitation of time within which a claim may be made.

[72] The Minister submits that the applicant's failure to challenge the constitutional validity of section 17(1)(b) which provides that claims for unidentified vehicles are subject to any regulation made under section 26 is fatal to its legality challenge.

[73] Mr Matebese SC, counsel for the Minister, contends that section 26 of the Act empowers the Minister to promulgate regulations. In promulgating the regulations to give effect to the provisions of section 17(1)(b) the Minister acted within his statutory powers and the regulations do not infringe the principle of legality.

[74] Mr Labuschagne, however, pointed out that the Minister's powers contained in section 26 is still subject to constitutional scrutiny.

[75] This principle was enunciated in *Road Accident Fund v Makwetlane* (649/2002) [2005] ZASCA 1 (17 February 2005), in which the Supreme Court of Appeal considered the Minister's power to issue regulations in term of section 26 of the Act. The Court held as follows from paragraph [12]:

"Of section 26(1) this Court stated in Bezuidenhout v Road Accident Fund 2003 (6) SA 61 (paragraph 10):

> *'It is certainly not clear whether the modifier at the end of s 26(1) modifies 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:

'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 [1998] ZACC 17; 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] ZACC 1; 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."

[76] The regulations are in clear conflict with the provisions of section 23. Having regard to *Makwetlane supra*, it is against the principle of legality to issue regulations that is in conflict with the provisions of the Act.

[77] Consequently the applicant has succeeded in its legality challenge and I find that the regulations offend the principle of legality.

REMEDY

[78] Section 172 provides for the powers of courts in constitutional matters and section 172(1) provides as follows:

"1. 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 an 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."

[79] In *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 CC at paragraph 19 the Constitutional Court discussed the remedies as follows:

"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of theses all-important rights."

[80] The applicant submits a just and appropriate remedy would be to read section 17(1) of the Act in a manner that vindicates the rights of minors and persons under curatorship.

[81] The Minister, with reference to *National Coalition for Gay and Lesbian and Another v Minister of Home Affairs and Others* 2000 (1) BCLR 39 CC and *Provincial Minister for Local Government, Environmental Affairs and Development Planning , Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (10) BLCR 1187 CC, submitted that the remedy of reading-in should be resorted to sparingly in order to avoid an *"unsupportable budgetary intrusion"* and *"a violation of the separation of powers".*

[82] Mr Theron SC, counsel for the Fund, submits that a reading down of the regulations to exclude minors and persons under curatorship would not do violence to the

language of the regulations. The Fund, however, contends that any declaration of invalidity should be suspended for two years in order for the Fund to compute the financial impact on it and to seek the further appropriation of funds from Treasury in order to deal with the impact of such a declaration.

[83] I agree that the remedy of reading down would be a just and appropriate remedy vindicate the rights of minors and persons under curatorship.

[84] The only issue that remains is whether the declaration of invalidity should be suspended for two years.

[85] The question of the suspension of an order of invalidity was discussed in *South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs and Others* 2017 (5) BCLR 641 (CC) at paragraphs [89] and [90]:

> *"[89] First, the respondents are not automatically entitled to suspension. In Ntuli the Court held that in the same way that arguments are made to justify an infringement of rights under the limitations clause, it is important that all the relevant information is placed before the Court when it is asked to suspend a declaration of invalidity.*[1]
>
> *[90] Second, none of the parties to the proceedings before the High Court led any specific evidence before the High Court as to the far reaching and potentially dire consequences of a failure to limit the effect of the declaration of invalidity. This is made plain by the novel submissions of the Premier. Although the defect in the law*

[1] *Ntuli* above n 72 at para 41.

was procedural – not substantive – and in such circumstances a suspension may often be appropriate,[2] suspension does not simply follow as a matter of course.[3] In the absence of evidence being put before the Court as to why the Court should have suspended the order, it would hardly be fair to conclude that it erred in failing to do so. It was only in the proceedings before this Court that clear reasons were given for the suspension of the order of invalidity and the limitation of its retrospective effect."

[86] Although the Fund averred in general terms that the impact of claims of minors and person under curatorship will necessitate the Fund to compute the financial impact on it and to seek further appropriation of funds from Treasury in order to deal with the impact of such a declaration, the Fund did not provide any detail in respect of the impact the declaration of invalidly will have on the financial ability of the Fund to pay the claims.

[87] Weighing the limited category of claims the declaration of invalidity will apply to against the devasting impact the infringement has on the rights of minors and persons under curatorship, I am of the view that a suspension of the declaration of invalidity will not be just and equitable.

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[2] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at paras 213-4.

[3] See *Ntuli* above n 72 at para 42. See also *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* [2016] ZACC 26; 2016 (11) BCLR 1419 (CC) at paras 22-3, which dealt with the extension of a suspension order, and reiterated that extensions will not be granted lightly as a matter of course or for the asking.

[88] In the result an order as prayed for by the applicant will follow.

ORDER

In the premises, I grant the following order:

1. It is declared in terms of section 172(1)(a) of the Constitution, 108 of 1996 that the provisions of Regulation 2(1)(b) and Regulation 2(2) of the RAF Regulations, issued by the Minister of Transport in terms of section 26 of the Road Accident Fund Act, 56 of 1996 are inconsistent with the Constitution and invalid.
2. In terms of section 172(1)(b) of the Constitution, Regulation 2(1)(b) and Regulation 2(2), to the extent that they relate to minors and persons under curatorship, are set aside.
3. It is declared that section 23(2) of the Road Accident Fund Act, 56 of 1996 is to be read as including minors and persons under curatorship who claim in terms of section 17(1)(b) of the Road Accident Fund Act, 56 of 1996.
4. The First and Second respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to absolved, which costs include the costs of two counsel.

jvnieuwenhuizen

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 21 April 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 21 June 2021

APPEARANCES

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Instructed by:	State Attorney Office, Pretoria
Counsel for the Second Respondent:	Advocate E.L. Theron SC and Advocate M. Kgomongwe
Instructed by:	Sekati-Sekati Incorporated