IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/10
[2011] ZACC 1

In the matter between:

ANELE MVUMVU	First Applicant
LOUISE PEDRO	Second Applicant
BIANCA SMITH	Third Applicant
and	
MINISTER FOR TRANSPORT	First Respondent
ROAD ACCIDENT FUND	Second Respondent

Heard on : 4 November 2010

Decided on : 17 February 2011

JUDGMENT

JAFTA J:

[1] This case concerns a constitutional challenge to legislative provisions that placed a cap on the recovery of damages by the victims of motor collisions under the Road Accident Fund Act[1] (Act). This cap was contained in section 18 of the Act.[2] It

[1] 56 of 1996.

[2] The full text of the provision is set out at n 17 below.

has since been removed by the Road Accident Fund Amendment Act[3] (Amendment Act), which came into effect on 1 August 2008. The amendment does not apply to claims that arose before it came into effect.

[2] The Western Cape High Court, Cape Town[4] (High Court) granted an order that declared parts of section 18 inconsistent with the Constitution and invalid. The High Court further ordered that the invalidity order will apply to all claims not yet prescribed or in respect of which no final settlement has been concluded or no final judgment has been made.[5] The court also directed that these claimants would qualify for no greater compensation than those who suffered bodily injury after the Amendment Act took effect.

[3] The applicants, who all sustained bodily injuries in motor vehicle accidents on different dates before 1 August 2008, are Ms Anele Mvumvu, Ms Louise Pedro and Ms Bianca Smith. In these proceedings they seek confirmation of the High Court's declaration of invalidity and leave to appeal against the ancillary order limiting the amount of compensation they may claim to what is recoverable under the Amendment Act. They cite the Minister for Transport (Minister) and the Road Accident Fund (Fund) as respondents.

[3] 19 of 2005.

[4] *Mvumvu and Others v Minister of Transport and Another*, 28 June 2010, Case number 7490/2008, unreported, per Bozalek J.

[5] The order is quoted below at [18].

[4] The respondents too are dissatisfied with the order invalidating the section with immediate effect and directing that claimants should receive compensation equivalent to what is obtainable under the Amendment Act. But they do not oppose confirmation of the declaration of invalidity to the extent that the order this Court makes does not affect claims that arose before 1 August 2008.

Factual Background

[5] On 14 February 2005 Ms Mvumvu was a passenger in a minibus taxi that travelled from the Eastern Cape to Cape Town. On the way the driver lost control of the vehicle and as a result it rolled. Ms Mvumvu suffered serious bodily injuries which necessitated that she be conveyed to hospital by helicopter. She remained in hospital for two months while undergoing various operations which included a partial amputation of her right foot. As a result she incurred medical costs in excess of R25 000.

[6] Before the accident, Ms Mvumvu had been employed as a seasonal fruit-picker on farms in Stellenbosch. Since the accident she has been unable to gain employment due to her injuries. Her only source of income is a disability grant she receives from the government. She lives in an informal house described by her as a shack. She stays with her mother, her brother, two children of her deceased sister and two children of her own. The family lives on her grant and the child support grants which collectively come to the paltry amount of R1 070 per month.

[7] Ms Mvumvu lodged a claim for compensation with the Fund which admitted liability to compensate her. But the Fund pointed out that she was not entitled to any compensation over and above the sum of R25 000 it had already paid for her medical bills. As the taxi in which she was travelling was unlicensed, the Fund contended that by virtue of section 18(1)(b) of the Act,[6] her claim was limited to R25 000. Since this amount has been paid for her medical care, the Fund informed her that the claim has been settled in full. This meant that she could not receive compensation for the loss of income or earning capacity. Nor could she claim general damages from the Fund. As the taxi driver died in the accident she could theoretically sue his estate but she alleges that it has no assets.

[8] On 7 June 2007, Ms Pedro was travelling in a minibus taxi between Citrusdal and Cape Town. The driver lost control of the vehicle which crashed into rocks on the side of the road. Ms Pedro sustained fractures to both of her arms as well as to her ankle. She was hospitalised for three weeks during which period a screw was inserted into her right arm and a plate into her left arm.

[9] She is unemployed and the accident has reduced her ability to function effectively. At the time the case was instituted in the High Court she had not recovered completely and the injury to her ankle still gave her pain. Because she was

[6] For the text of the provision see n 17 below.

a fare-paying passenger her claim too was limited to R25 000 by section 18(1)(a)(i) of the Act.[7]

[10] In May 2007, Ms Smith was employed as a site clerk as part of her training in civil engineering. During the course of her employment and while travelling in a vehicle owned by her employer, an accident occurred. The driver lost control of the vehicle which left the road and rolled. Ms Smith suffered serious injuries and underwent surgery in hospital where she spent two months.

[11] Section 18(2) of the Act limits her claim for compensation to the difference between R25 000 and any lesser amount she may claim under the Compensation for Occupational Injuries and Diseases Act[8] (COIDA). Since her claim for medical costs under COIDA exceeds R25 000, section 18(2) deprives her of further compensation from the Fund. As in the case of Ms Mvumvu, her compensation covers medical costs only.

In the High Court

[12] As already noted, the applicants sought to remove the barrier that hindered them from claiming full compensation for the losses they had suffered. They instituted an application in which they challenged the constitutionality of section 18 of the Act (impugned provisions). They contended that the impugned provisions violate

[7] Section 18(1)(a)(i) of the Act limits the liability of the Fund with respect to persons injured while being conveyed "for reward"; see n 17 below.

[8] 130 of 1993.

their right to equality;[9] the right to dignity;[10] the rights to security of the person and effective remedy[11] and the rights to health care and social security.[12]

[13] Although the Minister initially sought to defend the constitutionality of the impugned provisions, he did not persist with his opposition to the declaration of invalidity. Instead, both respondents chose to abide the decision of the court. Remedy was the only contested issue.

[14] Meanwhile, Parliament had already passed the Amendment Act which repealed the impugned provisions but the repeal had not been put into operation at the time these proceedings were launched. The Amendment Act came into force while the proceedings were pending in the High Court.

[15] Notwithstanding the repeal, the applicants persisted in asking for relief in the High Court. This was made necessary by section 12 of the Amendment Act[13] which stipulates that claims that arose before 1 August 2008 must be dealt with in terms of the old scheme regulated by the impugned provisions. Put differently, the section keeps the repealed provisions in force for purposes of determining claims that arose before 1 August 2008.

---

[9] Entrenched in section 9 of the Constitution.

[10] Entrenched in section 10 of the Constitution.

[11] Entrenched in section 12 read with section 38 of the Constitution.

[12] Entrenched in section 27 of the Constitution.

[13] Section 12 provides:

> "Any claim for compensation under section 17 of the principal Act in respect of which the cause of action arose prior to the date on which this Act took effect must be dealt with as if this Act had not taken effect."

[16] In determining whether the impugned provisions infringed the applicants' rights and are therefore unconstitutional, the High Court preferred to test the provisions against the equality clause. Following its analysis of the provisions against section 9 of the Constitution, the court held that the challenged provisions were arbitrary and constituted unfair discrimination which is not justified in terms of section 36 of the Constitution.[14]

[17] Having found that the provisions were unconstitutional, the High Court investigated the question of remedy. While it accepted that the applicants were entitled to a remedy that effectively vindicates their rights, it took account of the information placed before it by the Fund, regarding the impact which an order of invalidity with immediate effect would have on the financial viability of the Fund.

[18] After weighing various considerations the High Court issued the following order:

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

[14] Section 36(1) provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of 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 relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

(2) It is declared that section 18(2) of the Road Accident Fund Act 56 of 1996, as it stood prior to 1 August 2008, was inconsistent with the Constitution and invalid.

(3) Such declarations of invalidity will apply to and govern all claims instituted or to be instituted under the Road Accident Fund Act 56 of 1996, which at the date of this order:

(a) have not prescribed; and

(b) have not been finally determined by judgments at first instance or on appeal; and

(c) have not been finally determined by settlement duly concluded.

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

(5) This order is referred to the Constitutional Court for confirmation of the order of constitutional invalidity.

(6) The respondents are ordered, jointly and severally, to pay the costs of this application, including the costs of the expert witness Munro."

In this Court

[19] The first issue is whether the impugned provisions limit the applicants' equality rights entrenched in section 9 of the Constitution. If the answer to this question is in the affirmative, the next issue is whether that limitation is justified. If not the question that arises is what would constitute an appropriate remedy which vindicates the rights.[15] In determining the first question it is convenient to begin with the interpretation of the impugned provisions. Once their true meaning is established, it must be measured against the terms of section 9 of the Constitution.

[15] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

The Interpretation of Section 18 of the Act

[20] The Act constitutes social security legislation whose primary object has been described as "to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle".[16] By placing a cap of R25 000 on certain claims, section 18 undermines this purpose.[17]

---

[16] *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 23.

[17] In the unamended form section 18 provides:

> "(1) The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No. 44 of 1957), or another Act of Parliament governing the said Force, but subject to subsection (2)–
>
> (a) to the sum of R25 000 in respect of any bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned–
>
> (i) for reward; or
>
> (ii) in the course of the lawful business of the owner of that motor vehicle; or
>
> (iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or
>
> (iv) for the purposes of a lift club where that motor vehicle is a motor car; or
>
> (b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage.
>
> (2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to

[21] What emerges from the section is that it has a disparate impact. In the main it targets those workers and the class of people who use public transport such as taxis and buses. For the limitation to be triggered, the fault of the driver or owner of the vehicle in which the affected passenger was, must have been the sole cause of the accident. If two or more vehicles were involved and no less than two drivers contributed to the accident, albeit to varying degrees, the limitation does not apply. Passengers of these drivers would be entitled to full compensation under the Act.[18]

[22] Section 18 creates six categories of passengers whose claims are subject to the cap. These are passengers conveyed for reward;[19] passengers carried for purposes of a lift club;[20] passengers conveyed in the course of the lawful business of the owner of the vehicle;[21] passengers who were employees of the driver or the owner of the vehicle and were transported in the course of their employment,[22] passengers who

---

> compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in respect of such injury or death–
>
> (a) the liability of the Fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent, or the amount of R25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act...".

[18] See section 17 read with sections 18 and 19 of the Act.

[19] Section 18(1)(a)(i).

[20] Section 18(1)(a)(iv).

[21] Section 18(1)(a)(ii).

[22] Section 18(1)(a)(iii).

were conveyed under circumstances other than those referred to in section 18(1)(a)[23] and employees who are entitled to compensation in terms of COIDA.[24]

Is Section 18 of the Act Inconsistent with Section 9 of the Constitution?

[23] Invoking section 9 of the Constitution the applicants attack the impugned provisions on two bases. First, they argue that these provisions are arbitrary. Secondly, they submit that the provisions amount to unfair discrimination which contravenes section 9(3) of the Constitution. In support of the latter claim the applicants have alleged that the majority of claimants affected by the impugned provisions are mainly black working people, who rely on public transport. The respondents conceded that these provisions are inconsistent with section 9. But before this Court confirms the invalidity order it must be satisfied that the impugned provisions are at odds with the Constitution.

[24] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[23] Section 18(1)(b).

[24] Section 18(2).

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

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

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

[25] The correct approach to a constitutional challenge based on the equality clause was summarised in *Harksen v Lane NO and Others*[25] as follows:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

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

(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.

(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

[25] Above n 15 at para 54.

> complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

Although this test was formulated with reference to the interim Constitution it has been applied to challenges based on section 9.[26]

[26] Proof of infringement of either section 9(1) or 9(3) will justify a declaration of constitutional invalidity. Therefore it is not necessary to begin with the rational connection enquiry if a court holds that the discrimination is unfair and unjustifiable.[27] Having regard to the view I take of the challenge based on section 9(3), I propose to consider it first.

[27] As mentioned earlier the impugned provisions limit compensation payable to the applicants and similarly placed victims to R25 000 regardless of the extent of the loss suffered. It cannot be gainsaid that by placing this cap on recoverable compensation the provisions treat these victims differently from other claimants whose claims are not limited. The question that arises is whether the differentiation constitutes unfair discrimination envisaged in section 9(3).

---

[26] *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC).

[27] *National Coalition of Gay and Lesbian Equality and Others v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 18.

Unfair Discrimination

[28] The applicants have placed on record uncontested evidence to the effect that the impugned provisions overwhelmingly affect poor black people. They state that the vast majority of poor people in this country are black people and the mode of transport accessible to them is public transport consisting of, amongst others, taxis and buses. They claim that the provisions impact disproportionately on black people.

[29] It will be observed that the applicants do not assert that the impugned provisions discriminate against black people in a manner that is direct. Indeed they could not make the assertion because the provisions do not expressly place a cap on claims by black people. Instead it applies to claims of the categories of victims mentioned in paragraph 22 above. What is established by the applicants' evidence though is the fact that at a practical level the majority of the victims affected by the cap are black people. This in turn shows that indirectly the provisions discriminate against black people in a manner that is disproportionate to other races.

[30] Section 9(3) prohibits discrimination irrespective of whether it is direct or indirect. In *Pretoria City Council v Walker*[28] this Court had an occasion to consider an equality claim based on indirect discrimination on the ground of race. In that case the Pretoria City Council applied different tariffs for electricity and water consumed in different parts of the municipal area. Higher tariffs were levied in historically white areas which were populated overwhelmingly by white residents, while lower charges

[28] [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

were paid by residents of historically black areas which were overwhelmingly occupied by black people. A resident of the historically white area claimed that by exacting higher charges the City Council had infringed his right to equality.

[31] Confirming an equality claim based on indirect discrimination, Langa DP stated:[29]

> "It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race."

[32] To the extent that the impugned provisions in this case overwhelmingly affect black people, they create indirect discrimination that is presumptively unfair. This is so because the discrimination is based on one of the grounds listed in section 9(3). Absent a rebuttal of this presumption from the respondents, I have to accept that the type of discrimination we are concerned with here is indeed unfair.

[33] But the impugned provisions do constitute discrimination on another basis. There can be little doubt that the cap imposed by these provisions affects the applicants and other similarly situated victims adversely when compared to the

[29] Id at para 32.

claimants whose claims are not limited. In some matters the limited amount of R25 000, as the present facts demonstrate, cover medical costs only and sometimes not even the entire costs.

[34] Where victims were workers whose bodily injuries have rendered them unemployable, the cap denies them compensation for the loss of capacity to work. Consequently they may not even afford the basic necessities of life such as food and shelter. This is the situation in which they find themselves even though they played no role in causing the accident. Moreover other victims who were also passengers like themselves enjoy full compensation for their loss only because they fall outside the targeted categories. This is manifestly unfair. In the circumstances I am satisfied that the impugned provisions discriminate unfairly against the applicants. The issue that remains to be considered is whether this discrimination is justified.

Justification Analysis

[35] The question is whether it has been shown that the cap imposed by the impugned provisions is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[30] The sole reason advanced for the cap is that passengers affected by it would have chosen the driver or owner of the offending vehicle. From this it is to be inferred that these passengers have themselves to blame if their chosen driver or vehicle ended up in an accident.

[30] *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 48.

[36] But no evidence was placed on record to support the proposition that the affected passengers can choose the driver or owner of a taxi. Commuters do not dictate to those who provide public transport which driver they would like to have. Nor, as it was observed by the High Court, do they ordinarily have knowledge of the driver's competence or the roadworthiness of the vehicle.

[37] Moreover it is unfair for the Act to permit full compensation where two drivers have negligently contributed to an accident while at the same time denying full compensation where the sole cause of the accident is the negligence of one driver. In both instances no fault can be attributed to passengers. The passengers affected by the cap are as innocent as those whose claims are not limited.

[38] While it may be legitimate for the State to limit compensation accruing to victims of motor vehicle accidents, it has failed to show why the applicants ought to be singled out in pursuit of this purpose. There is nothing on record which indicates that the unfair discrimination the applicants are subjected to is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Accordingly I find that the impugned provisions are inconsistent with section 9(3) of the Constitution. It follows that the invalidity order issued by the High Court must be confirmed.

Remedy

[39] As the High Court remarked, correctly so in my view, the real dispute between the parties relates to the question of remedy. Each side urged us to grant the remedy which will advance its interests. But before I consider this issue it is necessary to restate the correct approach to relief, following a declaration of constitutional invalidity.

The Correct Approach

[40] The correct approach to the question of remedy in cases where an order of constitutional invalidity is contemplated is the following. If the Court finds the challenged legislative provision to be inconsistent with the Constitution, section 172(1) of the Constitution[31] obliges the Court to declare such provision invalid to the extent of the inconsistency. Thereafter the Court must make an order that is just and equitable which may include limiting the retrospective effect of the invalidity order or its suspension. Counsel for the respondents urged us not to follow this approach in so far as the determination of a just and equitable order is concerned.

[41] Proceeding from the premise that Parliament has already cured the defect in section 18,[32] counsel argued that the proper way to approach the issue of remedy is not to enquire into what would in the present circumstances be just and equitable relief. Instead, so it was submitted, the question is whether the cure preferred by Parliament

[31] The full text of the subsection appears in n 35 below.

[32] The Amendment Act abolished the R25 000 cap and replaced it with a general limitation that applies to all claimants. As a result claimants receive an equal amount of compensation, determined in accordance with the seriousness of their injuries.

is constitutionally deficient or incompetent. If it is competent and adequate, the enquiry on remedy ought to be closed without adding anything to Parliament's choice. The question of a just and equitable remedy, it was submitted, will only arise if the Court finds that the preferred cure is not competent.

[42] Expanding on this argument, the respondents submitted that section 12 of the Amendment Act[33] demonstrates that Parliament has decided to address the inequality brought about in two ways. It removed the differentiation caused by the cap prospectively and regarding claims that arose before the Amendment Act came into force, Parliament has decided to retain the old scheme which retains the inequality.

[43] The effect of this argument is that in spite of acknowledging the inequality caused by the cap and seeking to cure it by amending the offending legislation, Parliament nevertheless decided that those whose claims arose before the amendment must continue to suffer the inequality. For the following reasons this argument is, in my view, flawed. First, there is no evidence that when the Amendment Act was passed, Parliament deliberately took a decision to withhold a remedy to all victims whose claims arose before the Amendment Act came into force. It may well be that a remedy was not provided due to an oversight on the part of Parliament. Counsel for the respondent conceded this possibility.

[33] Above n 13.

[44] Secondly, the cap which limits the quantum of compensation to which the applicants and similarly placed victims are entitled, continues to operate by virtue of the impugned provisions. Once these provisions are declared invalid the cap falls away unless this Court suspends the order of invalidity or restricts its retrospective effect. Ordinarily an order of constitutional invalidity has a retrospective effect unless its operation is suspended. In terms of the doctrine of objective constitutional invalidity, unless ordered otherwise by the court the invalidity operates retrospectively to the date on which the Constitution came into force.[34] But if the legislation in question was enacted after that date, as was the present Act, the retrospective operation of invalidity goes back to the date on which the legislation came into force. The consequence of this for present purposes is that the applicants would be entitled to full compensation as if the cap never came into existence.

[45] Thirdly, section 172(1) of the Constitution[35] enjoins the Court to make a just and equitable order, following a declaration of invalidity. Depending on the

---

[34] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) this Court said at para 28:

> "A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of s 98(5) of the Constitution to postpone the operation of invalidity and, in terms of s 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of s 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."

See also *Van der Merwe v Road Accident Fund and Another* above n 26 at para 77.

[35] Section 172(1) provides:

> "(1) When deciding a constitutional matter within its power, a court—

circumstances of the case, such order may include an order limiting the retrospective effect of the declaration of invalidity or suspension to allow a competent authority to correct the defect. In this case there is evidence which warrants the determination of a just and equitable order.

Just and Equitable Order

[46] Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful.[36] Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The Court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed the discretion conferred on the courts by section 172(1) must be exercised judiciously.

[47] As stated earlier, the impugned provisions mostly affect poor people who rely on public transport for travelling. Ordinarily these people do not have a source of income other than selling their labour in the job market. As it was the position in Ms Mvumvu's case, injuries which render them unemployable take away that source of income. This situation is made worse by the fact that the provisions in question deny

---

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
  (i) an order limiting the retrospective effect of the declaration of invalidity; and
  (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[36] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

them compensation for loss of income or earning capacity without giving them something in exchange.

[48] In our young democracy and because of our history, which was characterised by inequalities and discrimination, constitutional breaches such as the present must be redressed effectively by, where possible, vindicating the infringed rights fully. This Court in *Fose v Minister of Safety and Security*[37] said:

> "Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

[49] However, in determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government.[38] These competing interests need to be carefully weighed.

[50] In this case, the respondents have presented evidence which shows that an order of invalidity with unlimited retrospective effect will increase the Fund's financial

[37] [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[38] *S v Bhulwana; S v Gwadiso* above n 36 at para 32.

liability by approximately R3 billion. The respondents argue that this will pose a serious threat to the sustainability of the Fund whose deficit at present stands at over R40 billion. The Chief Executive Officer of the Fund has asserted that the Fund is "just barely able to cover its payment obligations on a day to day basis."

[51] In the light of the facts mentioned above, an unlimited retrospective order of invalidity is likely to have a crippling effect on the Fund's operation. It must be recalled that the Fund provides social security insurance without which all road users would be left with no cover for loss sustained in motor vehicle accidents. This is an important consideration.

[52] The respondents were not required to show the potential risk of the Fund collapsing in order to persuade this Court to intervene and adjust the effects of the order of invalidity. It was sufficient for them to show that the order will have serious budgetary implications. This Court has cautioned against remedies that are likely to lead to an "unsupportable budgetary intrusion".[39] Two reasons motivate this approach. First, budget matters fall eminently within the domain of the legislature and the executive. Secondly, ordinarily courts are ill-suited to determine such matters.[40]

[39] *Tsotetsi v Mutual & Federal Insurance Co Ltd* [1996] ZACC 19; 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at para 9; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 75; *Van der Merwe v Road Accident Fund and Another* above n 26 at para 73 and *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O'Connell and Others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC) at para 56.

[40] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at paras 29 and 58; *Minister of Health and Others* v *Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 10 BCLR 1033 (CC) at paras 37-8 and *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 61.

[53] The considerations mentioned above point to the fact that Parliament is best suited to determine the extent of compensation to which the applicants are entitled. It is regrettable that when Parliament decided to cure the defect, it left their position unaltered. Nonetheless I am of the view that the matter must be remitted to Parliament for it to provide relief for the inequality which the old scheme continues to cause. Therefore, I intend to suspend the invalidity order for 18 months to give Parliament the opportunity to fix the problem.

[54] But if Parliament fails to cure the defect within the period stated above, the invalidity order will come into operation with immediate effect and it will operate retrospectively to the date on which the Act came into force. What this means is that the applicants will be entitled to unlimited compensation as if the cap was never enacted. However, the declaration of invalidity ought not to apply to claims in respect of which a final settlement has been reached or a final judgment has been granted, before the date of this judgment.

[55] Before I consider the question of costs I need to mention one matter. Apart from the impugned provisions there are others imposing similar caps. These provisions are not covered by the declaration of invalidity to be issued in this matter. But they suffer from the same defect. They are section 18(1)(a)(ii), section 18(1)(a)(iii) and section 18(1)(a)(iv) of the Act.[41] When deciding the amount of

[41] See n 17 above.

compensation to which the applicants are entitled, it is desirable that Parliament address the plight of those affected by these subsections as well.

Costs

[56] The applicants have successfully challenged the constitutionality of the provisions in question and therefore they are entitled to costs of the proceedings. The costs must follow the cause.

Order

[57] The following order is made:

1. It is declared that sections 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996, as they read before 1 August 2008, are inconsistent with the Constitution and invalid.
2. The declaration of invalidity referred to in paragraph 1 above is suspended for 18 months from the date of this order, to enable Parliament to cure the defect.
3. In the event of the declaration of invalidity coming into force without Parliament having cured the defect, the order of invalidity will not apply to claims in respect of which a final settlement has been reached or a final judgment has been granted, before the date of this order.
4. The costs order granted by the High Court is confirmed.
5. The respondents are ordered to pay the costs of proceedings in this Court, jointly and severally.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, and Skweyiya J concur in the judgment of Jafta J.

For the Applicants:	Advocate G Budlender SC instructed by Kruger & Co.
For the Respondents:	Advocate W Trengove SC and Advocate S Budlender, instructed by the State Attorney, Johannesburg, for the first respondent, and Edward Nathan Sonnenbergs Inc for the second respondent