IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 57/06

RENIER ALBERTUS HERMANUS ENGELBRECHT Applicant

versus

THE ROAD ACCIDENT FUND First Respondent

THE MINISTER OF TRANSPORT Second Respondent

Heard on : 2 November 2006

Decided on : 6 March 2007

JUDGMENT

KONDILE AJ:

Introduction

[1] This application for leave to appeal against the decision of the Cape High Court concerns the constitutionality of regulation 2(1)(c)[1] of the regulations made under the Road Accident Fund Act 56 of 1996 ("the Act"). The Act establishes the Road Accident Fund ("the Fund"), the object of which is the payment of compensation to third parties for loss or damage wrongfully and negligently caused by the driving of motor vehicles.[2]

[1] GN 17939, 25 April 1997.

[2] Sections 2 and 3 of the Act.

[2] The applicant is Mr Renier Albertus Hermanus Engelbrecht. The first respondent is the Road Accident Fund and the second respondent is the Minister of Transport ("the Minister").

Background

[3] On 22 February 2002 and on the road between Clanwilliam and Citrusdal, the applicant's motor vehicle was involved in a collision with a truck. As the truck did not stop after the collision the applicant was unable to establish the identity of its owner or driver. The applicant was injured in the collision.

[4] After the collision the applicant was in hospital for two to three days. The ophthalmologist who treated the applicant considered that the latter could have returned to work on 5 March 2002.

[5] Section 17(1)(b) of the Act says:

> "The Fund . . . shall . . . 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 or damage which the third party has suffered as a result of any bodily injury to himself or herself . . . caused by or arising from the driving of a motor vehicle by any person . . . , if the injury . . . is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle . . . ."

[6] Section 26(1) of the Act reads:

> "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."

[7] On 1 March 2002 the applicant's attorneys addressed a letter to the station commander of the South African Police Service, Clanwilliam, which recorded the time, date, location and circumstances of the collision between the applicant's motor vehicle and an unidentified truck. The applicant himself went to the police on 4 May 2002 to submit an affidavit with particulars of the accident.

[8] In due course the applicant instituted action against the Fund in the Cape High Court, claiming compensation in an amount of R214 324,80 in terms of section 17(1)(b) of the Act. In his particulars of claim the applicant alleged that he was injured as a result of the negligence of the driver of the unidentified truck.

[9] The Fund defended the action. In its plea it admitted that a collision occurred on the aforesaid road involving the applicant's motor vehicle but denied knowledge of the applicant's other allegations and put him to the proof thereof.

[10] Shortly before the trial in the High Court, the Fund introduced a special plea. In the special plea the Fund took the preliminary point that it was not liable to compensate the applicant because he had failed to comply with regulation 2(1)(c), made in terms of section 26 of the Act. Regulation 2(1)(c) provides:

> "(1) 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 –
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> . . . .
>
> (c) 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".

[11] The applicant subsequently conceded that he did not comply with regulation 2(1)(c) because he lodged the affidavit only on 4 May 2002. However, in his amended replication to the Fund's special plea, the applicant contended that regulation 2(1)(c) is in conflict with the provisions of section 34 of the Constitution. Section 34 of the Constitution provides:

> "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."

Therefore, it is argued that regulation 2(1)(c) is invalid because it imposes an unreasonable and unjustifiable limitation on his right of access to courts.

[12] The Minister was later joined as the second defendant. The Minister then filed notice of his intention to oppose the matter in respect of the constitutionality of regulation 2(1)(c).

High Court decision

[13] At the conclusion of the hearing in the High Court Allie J rejected the constitutional challenge and dismissed the applicant's claim with costs. In effect she upheld the special plea.

[14] In dismissing the claim the High Court stated:

> "It follows that I am not persuaded that Regulation 2(1)(c) is unconstitutional and unjustifiable, nor that it constitutes a limitation on the rights of access to the courts. It is accordingly not necessary to decide whether its objectives can be achieved by less restrictive means."[3]

It is against this finding of the High Court, as well as against the order dismissing the applicant's claim, that the applicant seeks leave to appeal directly to this Court.

Leave to appeal directly to this Court

[15] The application raises a constitutional issue as envisaged in section 167(3)(b) of the Constitution. The matter turns on a direct application of the Constitution and is of public importance. The functioning of the Fund affects all road users in South Africa. There has been extensive litigation involving regulation 2(1)(c).[4] It is desirable that a final decision be reached on its constitutionality.

[3] *Engelbrecht v The Road Accident Fund and Another* ("*Engelbrecht HC*"), case no 3701/2003, 2 August 2006, unreported, at para 53.

[4] *Road Accident Fund v Smith* 2007 (1) SA 172 (SCA); *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA); *Road Accident Fund v Thugwana* 2004 (3) SA 169 (SCA); *Strauss v Road Accident Fund* 2006 (1) SA 70 (T); *Mawethu v Road Accident Fund* 2005 (6) SA 485 (W); *Makwetlane v Road Accident Fund* 2003 (3) SA 439 (W); *Thugwana v Padongelukfonds* 2003 (1) SA 310 (T).

[16] Furthermore, the applicant contends, correctly in my view, that since the Supreme Court of Appeal ("the SCA"), in *Makwetlane*,[5] has already ruled negatively on the subject matter of the constitutionality of regulation 2(1)(c), there would be no point in attempting to appeal to that Court or to the Full Bench of the High Court, which is bound by the SCA's decision. It is therefore in the interests of justice that leave to appeal be granted in this case.

The Makwetlane decision

[17] In *Makwetlane*, the Court split on the question of the constitutionality of regulation 2(1)(c). The minority judgment of Ponnan AJA held that the regulation violates the Constitution and is ultra vires.[6] The majority, in a judgment written by Marais JA and concurred in by Howie P, Jones AJA and Southwood AJA, held that regulation 2(1)(c) is not inconsistent with the Constitution because the claimant in a hit-and-run case has no enforceable claim at common law. The majority accordingly reasoned that section 34 of the Constitution did not come into the picture at all since the failure to comply with regulation 2(1)(c) prevented a justiciable claim from coming into existence.[7]

[18] The applicant in the present case, while appealing against the judgment of the High Court, is, in effect, challenging the reasoning and conclusions of the SCA, pertinent to this case, in *Makwetlane* and in the other judgments. The deponent to the

[5] *Makwetlane SCA* above n 4.

[6] Id at para 22.

[7] Id at paras 45-47.

Minister's affidavit also relies heavily on the majority judgment in *Makwetlane*, as well as on the other judgments of the SCA. More importantly, the High Court regarded the findings in *Makwetlane* as "the applicable law".[8] This Court is therefore obliged to consider, in the course of this judgment, the decision of the SCA in *Makwetlane*, among others, on which we heard full argument.

Does a victim of a hit-and-run motorist have a justiciable claim?

[19] Relying on *Makwetlane*[9] the respondents have submitted that the applicant has no pre-existing legal right or valid and legally enforceable claim at common law and that, therefore, regulation 2(1)(c) does not infringe upon the applicant's right of access to courts. It is so that section 34 of the Constitution finds application where there exists a "dispute" that can be resolved by "the application of law". For this reason, the first question before us is whether a victim of a hit-and-run motorist has a justiciable claim.

[20] A right of action to recover damages arises from a variety of causes including a delict, a contract or a statute. Under the common law, the applicant has an enforceable right not to be injured unlawfully and culpably against all other persons, including the driver of a hit-and-run motor vehicle. A driver who injures any person is at common law liable to compensate him/her for the patrimonial loss sustained. Success or failure in recovering the loss is another matter. In any event the establishment of the identity of the owner or driver of the offending motor vehicle

[8] *Engelbrecht HC* above n 3 at para 32.

[9] *Makwetlane SCA* above n 4 at paras 43 and 46.

does not guarantee success in recovering the loss or damage at common law. It is for that reason that the compulsory motor vehicle insurance regime came into existence in the first place. The following remarks of Centlivres CJ in *Barkett v SA National Trust and Assurance Co Ltd*[10] are in this respect apposite:

> "It is notorious that there are many people of very moderate means or even of no means who own cars. All these people must insure under the Act and the right of recourse given to insurance companies in the circumstances stated in sec. 14 of the Act[11] is in many cases more illusory than real. The object that the Legislature intended was to ensure that third parties injured through the negligent driving of motor vehicles should receive adequate compensation and this object could only be achieved by placing a greater burden on insurance companies than they bore prior to the passing of the Act." (Footnote added.)

[21] At common law a justiciable claim accrued to the applicant the moment he was injured and suffered loss or damage as a result of the wrongful and negligent driving of the unidentified truck, irrespective of whether its driver or owner could be traced. The remedy is part and parcel of a right (*ubi ius ibi remedium*). Support for this view is found in *Oslo Land Co Ltd v The Union Government*[12] where Watermeyer JA held:

> "In negligence cases the cause of action is an unlawful act plus damage, and so soon as damage has occurred all the damage flowing from the unlawful act can be recovered, including prospective damage . . . ."

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[10] 1951 (2) SA 353 (A) at 364.

[11] Section 14 of the Motor Vehicle Insurance Act 29 of 1942 provided:

> "When a registered company has paid any compensation . . . it may, without having obtained a formal cession of the right of action, recover from . . . the owner of the insured motor vehicle in question . . . so much of the amount paid by way of compensation as the third party . . . could . . . have recovered from the person whose negligence or other unlawful act caused the loss or damage, if the registered company had not paid any such compensation."

[12] 1938 AD 584 at 592.

[22] Knowledge of the identity of the debtor[13] or owner or driver of the motor vehicle is relevant to the issue of when prescription begins to run but not to the existence of a justiciable claim. The SCA in *Makwetlane* therefore erred when it held that the victim of an unidentified driver would have no justiciable claim or enforceable remedy at common law.[14] It follows also that the related submission of the respondents referred to in paragraph 19 above has to be rejected. The recent decision of the SCA in *Smith*[15] at least clarified the fact that a claim exists in the present circumstances but, unless there has been compliance with the regulation, the claim is not enforceable.[16]

[23] The applicant's current claim has been created by a statute, namely, the Road Accident Fund Act. The Act can be employed by anyone who is injured in consequence of the negligent driving of a vehicle in a hit-and-run situation to claim compensation for any loss sustained. The Act is the latest statute in a long line of national legislation beginning with the Motor Vehicle Insurance Act 29 of 1942. The stated primary concern of the legislature in enacting these statutes is, and has always been, "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."[17]

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[13] In terms of the definitions in the Prescription Act 18 of 1943, "'debtor' means a person against whom a right is enforceable by action."

[14] *Makwetlane SCA* above n 4 at paras 43 and 45.

[15] *Smith* above n 4.

[16] Id at paras 5-6.

[17] *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F.

[24] As indicated above, the victim of a negligent hit-and-run motorist has a legal right to claim compensation for loss he/she actually suffered, previously under the common law, but now under statute. Section 17(1)(b) of the Act creates that justiciable right. Therefore section 34 of the Constitution finds application and the applicant may rely on the right of access to courts.

Status of regulation 2(1)(c)

[25] Counsel for the Fund has submitted that the legislature bestowed a wide and almost unfettered discretion on the Minister to regulate upon a claimant's claims in respect of injuries and/or losses arising from collisions where the driver and/or the owner cannot be identified. This submission ignores the fact that Parliament required the Minister, in terms of section 26 of the Act, to make regulations that would "*achieve or promote the object of [the] Act*." (Emphasis added.) The Minister does not, therefore, have the power to limit the enforceability of a justiciable claim as much as he likes, if at all. I say if at all, because it is questionable whether the Minister is empowered to determine, by regulation, as he has done here, the limitation of time within which a claim may be made or an action brought or to impose conditions on the institution of an action, having regard to the provisions of section 16(1) of the Prescription Act[18] and section 3 of the Act.[19] It is however unnecessary for this Court

[18] Section 16(1) of the Prescription Act provides that:

> "Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any *Act of Parliament* which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act." (Emphasis added.)

[19] Section 3 of the Act provides that "[t]he 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." See also

to express a view or to pronounce on this issue as there has been no relevant challenge from the applicant.

[26] The following remarks, which were relied upon by the minority in *Makwetlane* in support of its view,[20] are worth repeating here:

> "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 lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.
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> . . . .
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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."[21] (Footnotes omitted.)

[27] Therefore, where a regulation conflicts with an Act of Parliament or its contents are unreasonable, it is ultra vires at common law and may be struck down by the courts. The doctrine of legality under the Constitution also constrains public power in a similar manner.[22] During oral argument, the applicant tentatively offered the doctrine of legality as an alternative route to finding regulation 2(1)(c) unconstitutional, but acknowledged that this argument was not made on the papers. For this reason I prefer to approach the challenge to regulation 2(1)(c) with reference

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President Insurance Co Ltd v Yu Kwam 1963 (3) SA 766 (A) at 777D-E; *Moloi and Others v Road Accident Fund* 2001 (3) SA 546 (SCA) at paras 23-27.

[20] *Makwetlane* above n 4 at para 12.

[21] Bennion *Statutory Interpretation* 3 ed (Butterworths, London 1997) at 189.

[22] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

to its compatibility with section 34 of the Constitution, rather than on the basis of legality.

[28] The interpretation which has been given to regulation 2(1)(c) by the SCA is that this regulation is peremptory.[23] In *Smith*,[24] the following excerpt from *Bezuidenhout*[25] was cited with approval:

> "But the imperative character of the provision is not necessarily decisive. Even a peremptory statutory provision may be renounced by a person for whose benefit it has been introduced."

Given the clear language of regulation 2(1)(c), which states that the Fund shall not be liable to compensate unless the regulation has been complied with, the SCA was correct in concluding that the regulation must be observed. However, the imperative character of the regulation does not render it immune to challenges on the basis of unconstitutionality. The next question therefore is whether regulation 2(1)(c) infringes the section 34 right of the applicant and if so, whether such infringement is reasonable and justifiable in terms of section 36 of the Constitution.

Section 34 of the Constitution

[29] Special time limits for the institution of litigation and the requirements that govern litigation are not uncommon in our legal system. These may take the form of

[23] *Thugwana SCA* above n 4 at para 11.

[24] *Smith* above n 4 at para 7.

[25] *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) at 709H-710A.

barring a claimant from proceeding with the merits of a claim if the requirements are not met or the time limits are not complied with.

[30] I proceed to consider whether regulation 2(1)(c) is consistent with the applicant's section 34 right of access to courts in order to have his justiciable claim decided. As was held in *Moise*,[26] "untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom."[27] The period of time within which to comply with a requirement, allowed by regulation 2(1)(c), prior to the exercise of the right, will be unfair if it is so inadequate or restrictive as to unduly deprive the majority of claimants of the right of access to the courts, on the one end of the spectrum, or if it is indefinite and prolongs uncertainty because it depends on the subjective knowledge of the provisions of the regulation on the part of the claimant, on the other.

[31] I find it unnecessary, on the particular facts of this case, to consider the limitation that the regulation imposes upon the invocation of the applicant's claim against the background depicted by the state of affairs prevailing in South Africa, as was done in *Mohlomi*.[28] In my view the period of 14 days is too short to amount to a "real and fair" opportunity to access court. Periods of six months, in similar

[26] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening* (*Women's Legal Centre as* Amicus Curiae) 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC).

[27] Id at para 23.

[28] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at para 14.

circumstances, have been held by this Court in *Mohlomi* to be unconstitutional.[29] Support for this view is also found in *Thugwana* where the SCA stated:

> "Subject to what is said in the next paragraph, the effect of the regulation is to deprive a claimant such as the respondent of a valid claim in the event of non-compliance with its provisions. Indeed, 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."[30]

[32] I agree that most citizens will be unaware of the regulation and thus will be denied the right to sue the Fund. Indeed the majority in *Makwetlane* expressed their views as follows:

> "If the respondent's claim against the Fund had been one which lay at common law, [they] 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."[31]

They, however, found that this claim is not rooted in the common law.

Import of the double qualifications

[33] The respondents have submitted that the double qualification in regulation 2(1)(c), namely "if reasonably possible" and "in a position to do so", renders the regulation flexible and saves it from constitutional invalidity and, further, that the

[29] Id at n 28 at para 31.

[30] *Thugwana SCA* above n 4 at para 16.

[31] *Makwetlane SCA* above n 4 at para 45.

mere fact that a claimant has failed to comply with the provisions of regulation 2(1)(c) will not in itself put an end to the claim a claimant may enjoy. I disagree.

[34] The SCA in *Thugwana* has construed the two phrases as follows:

> "If a claimant is physically or mentally incapable of making an affidavit, it cannot be said that he or she is in a position to do so. He or she would also have to be in possession of the facts which the affidavit has to contain: what is required is an affidavit 'in which particulars of the occurrence concerned were fully set out'. Once the claimant is in a position to make the 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 than 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."[32]

[35] Clearly, on this interpretation, the said phrases have no relevance to the issue whether or not the period of 14 days specified in regulation 2(1)(c) is too short and unfair. They merely serve to introduce, to the regulation, elements which are generally of application to extinctive prescription, that is, the suspension or the interruption of the running of the 14-day period, which otherwise runs from the date upon which the claim in theory arises until the expiry of the period. Their effect is to

[32] *Thugwana SCA* above n 4 at para 7.

postpone or delay, as illustrated hereunder, the commencement or the completion of the 14-day period, if jurisdictional facts exist which justify such postponement or delay.

"In a position to do so"

[36] A claimant may, for example, be rendered not of sound mind or physically incapable in a motor collision. In these circumstances and because he/she is not in a position to make and submit the requisite affidavit to the police, the period of 14 days does not commence to run until he/she is mentally and physically able to do so and, in addition, has knowledge of the identity of the debtor and of the facts from which the claim arises and which the affidavit has to contain.

"If reasonably possible"

[37] A claimant may be physically and mentally capable of making and submitting an affidavit to the police but might submit it more than 14 days after he/she was in a position to do so. This may occur if it was not reasonably possible for him/her to depose to an affidavit and to submit it to the police in time because of, for example, unprecedented floods.

[38] The double qualification in regulation 2(1)(c), ensures that, in respect of a claimant who was prevented from complying with the 14-day requirement, by circumstances over which he/she had no control, the days when he/she was not in a position to make an affidavit and/or when it was not reasonably possible for him/her

to submit it to the police are disregarded for the purposes of the 14-day period. The qualification does not confer on the courts unlimited power to render the period of 14 days flexible or variable. The effect of this double qualification does not counterbalance the gross inadequacy of the 14-day period. In any event, the adequacy of the period in the regulation must not be tested against the truly extraordinary situation.[33] In all the circumstances, I find that regulation 2(1)(c) constitutes a limitation of the right protected in section 34 of the Constitution.

The limitations analysis

[39] The ultimate question is whether the regulation is saved by the provisions of section 36(1) of the Constitution. In other words, is the limitation embodied in the regulation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom? The following factors, which are to some extent in tension, have to be weighed against one another for an appraisal of their proportionality:

(a) the nature and importance of the right that is limited;
(b) the purpose for which the right is limited and the importance of that purpose to an open and democratic society based on freedom, dignity and equality;
(c) the nature and extent of the limitation;
(d) the efficacy of the limitation or the relation between the limitation and its purpose; and
(e) whether the desired ends could be achieved through other means less damaging to the right in question.

[33] *Mohlomi* above n 28 at para 24.

[40] The section 34 right guarantees that justiciable disputes be settled by a court of law. It is an important principle of the rule of law that legal disputes be decided by an independent and impartial court in a fair and public hearing. The supremacy of the Constitution and the rule of law are founding values that are of great importance in the constitutional scheme implicated herein. We have here a very drastic provision and an extreme limitation of the weighty constitutional right of access to courts by victims of hit-and-run drivers. The period of time of 14 days prescribed in regulation 2(1)(c) is very short and palpably unfair as it has an extensive impact, especially on the many illiterate and the poor of this country. Although the means should impair as little as possible the right in question, the period of limitation in regulation 2(1)(c) is so inadequate that practically it nullifies claimants' entrenched right of access to courts. Clearly therefore regulation 2(1)(c) does not meet the threshold test of reasonableness.

[41] I proceed to consider whether the regulation is justifiable, on the assumption that it may still be necessary, despite the manifest unreasonableness referred to above.[34] The purpose for which the section 34 right is limited, stated in the evidence but not in the Act and the Regulations, is the combating of fraud in cases where the claimant claims compensation for injuries arising from the driving of a motor vehicle where the identity of neither the owner nor driver thereof has been established. In principle combating fraud is a legitimate purpose. However a limitation is not justifiable if it does not contribute to an open and democratic society based on human dignity, equality and freedom or if there is no good reason for thinking that it would

[34] Compare paras 209 and 210 in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

achieve the purpose it is designed to achieve. Furthermore, the more substantial the limitation of the fundamental right, the more compelling the grounds of justification must be. As stated in *Mohlomi*, it does not follow that all limitations that are meant to achieve a laudable result are constitutionally sound for that reason:

> "Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which [section 34] bestows on everyone to have his or her justiciable disputes settled by a court of law."[35]

[42] There is no evidence of a causal relationship between the regulation and its purpose. No good reason has been shown for thinking that the limitation would achieve the purpose it is designed to achieve. The evidence does not suggest that the police or the Fund use the affidavits for investigatory purposes. In fact, it has been conceded by the respondents that the intended result of the regulation has not been attained. It is apparent that this measure has not been carefully designed to achieve the objective in question. Also, it has also not been shown that there are no other means which could be employed to achieve, realistically, the purpose of the regulation without unduly restricting the section 34 right. The limitation inflicts very severe harm to a right that is of particular importance to an open and democratic society based on human dignity, equality and freedom. Yet it does not even achieve the benefits that it is designed to achieve. There is therefore no, or insufficient, proportionality between the grave harm done by the regulation and its perceived beneficial purpose. The latter is far outweighed by the former. The respondents attribute the failure of the regulation to attain its objective to the lack of proper

[35] *Mohlomi* above n 28 at para 12.

training and capacity and the under-staffing of the police service. Such excuses do not justify the drastic attenuation of the important constitutional right of access to courts.

Conclusion

[43] For all these reasons the respondents have failed to show that regulation 2(1)(c) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I accordingly find that regulation 2(1)(c) is inconsistent with section 34 of the Constitution.

Remedy

[44] I turn now to consider appropriate relief in view of the fact that regulation 2(1)(c) has been found to be inconsistent with the Constitution. Section 172(1)(a) of the Constitution demands that this Court declare invalid a law that is inconsistent with the Constitution. Section 172(1)(b)(ii) however confers a discretion on this Court to make an order that is just and equitable including an order suspending the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect. The respondents gave no reason or no cogent reason for this Court to exercise its discretion and suspend an order of invalidity. Furthermore, regulation 2(1)(c) which imposes one of the conditions on the institution of an action for the recovery of a debt, is in my view not necessary for the furthering of the objects of the legislation as a whole. The provision must be struck down or severed from the other provisions in regulation 2(1). The legislature is at liberty, if so advised, to respond by amending the statute and substituting an alternative which will be constitutional.

[45] Section 172(1)(b)(i) provides:

> "When deciding a constitutional matter within its power a court – may make any order that is just and equitable, – including an order limiting the retrospective effect of the declaration of invalidity."

What is implied in this provision is that a declaration of invalidity has retrospective effect but a competent court has a discretion to make an order that is just and equitable, limiting the retrospective effect of an order of invalidity. This Court in *S v Bhulwana*; *S v Gwadiso*[36] held that "as a general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity." That principle was apparently applied in *Mohlomi*[37] and there is no reason not to apply it in this matter.

Costs

[46] I find no good reason to depart from the general rule that costs must follow the result.

Order

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

1. The application for leave to appeal is granted.
2. The appeal is upheld with costs including the costs of two counsel.

[36] 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[37] *Mohlomi* above n 28 at para 25.

3. (i) Regulation 2(1)(c) of the regulations made in terms of section 26 of the Road Accident Fund Act 56 of 1996, published in Government Gazette 17939 of 25 April 1997, is declared to be inconsistent with section 34 of the Constitution and accordingly invalid.

   (ii) Such declaration 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 have neither prescribed, nor been finally determined by judgments at first instance or on appeal or by settlement duly concluded.

4. The order of the High Court is set aside and replaced with the following:

   The special plea is dismissed with costs including the costs consequent upon the employment of two counsel.

5. The present case is remitted to the Cape High Court for the determination of the claim.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, Van Heerden AJ, Van der Westhuizen J and Yacoob J concur in the judgment of Kondile AJ.

For the Applicants:	Advocate JC Heunis SC and Advocate W de Haan instructed by Smit Kruger Inc.
For the First Respondent:	Advocate R Stockwell SC and Advocate T Motau instructed by Lindsay Keller & Partners.
For the Second Respondent:	Advocate J Whitehead SC and Advocate N Bawa instructed by The State Attorney, Johannesburg.