

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1349/2008

In the matter between:-

VENESSA DA SILVA

Plaintiff

and

ROAD ACCIDENT FUND
THE MINISTER OF TRANSPORT

First Defendant
Second Defendant

HEARD ON: 21 NOVEMBER 2013

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 24 JANUARIE 2014

[1] In these proceedings, the applicant seeks a declaration of constitutional invalidity together with allied **relief**. The application to have the impugned statutory provision declared inconsistent with the constitution, to have it invalidated and to have the consequential relief, following upon the declaration of invalidity, granted – is not opposed by either of the two respondents.

[2] Although the respondents do not oppose the grant of the relief sought, I am nonetheless required to supply **reasons** when granting the declaration of invalidity – **South African Liquor Traders Association v Chairperson, Gauteng Liquor Board & Others** 2009 (1) SA 656 (CC) at [15] where the court held

that it was undesirable for a court of first instance to give no reasons. Therefore, the purpose of this judgment is to fulfil that obligation.

- [3] The nature and **purpose** of this application need to be outlined upfront. The applicant is the plaintiff in an action pending in this court. The first and the second respondents are the first and the second defendant's respectively in that action. At the time of the road accident which precipitated the action she instituted against the respondents, she was a social passenger in a family car driven by her spouse. The car collided with an animal. It is her case that the exclusive negligence of her spouse was the sole cause of the accident. She averred further in her summons that she sustained severe bodily injuries in the accident. She added that as a result of such injuries she incurred substantial past medical expenses apart from her other damages.
- [4] The action is defended. The essence of the defence raised is that she has no claim. The defendants have simply invoked the prohibitive statutory provisions contained in section 19(b)(ii) of the Road Accident Fund Act, 56 of 1996. That section, as it stood at the time of the applicant's accident, absolutely excluded any claim to compensation arising out of such circumstances.
- [5] Meanwhile section 19(b)(ii) of the Road Accident Fund Act, 56 of 1996 has since been repealed by section 8 of the Road Accident Fund Amendment Act, 19 of 2005. The latter came

into force on 1 August 2008, some two years after the accident in which the applicant was involved.

- [6] However, notwithstanding the repeal, section 8 Road Accident Fund Amendment Act 19 of 2005 specifically provides that any claim for compensation under section 17 Road Accident Fund Act 56 of 1996 in respect of which the cause of action arose prior to 1 August 2008 must be dealt with as if the 2005 Amendment Act had not taken effect. In the result, it follows that the applicant has no valid claim against the first respondent despite her injuries and despite the fact that she was not to blame for the injuries she sustained. She was injured before the cut-off date.
- [7] In her pending **action**, the applicant challenges the constitutional validity of section 19(b)(ii), Act No 56 of 1996, the impugned statutory provisions, as it stood prior to 1 August 2008. The thrust of her challenge is that the section violates her fundamental right to equality as enshrined in section 9 of the Constitution. She, therefore, seeks an order declaring the impugned provision inconsistent with the constitution and thus invalid.
- [8] The matter was enrolled for a three day hearing as from 6 November 2013. The peculiar circumstances of the accident, the crucial averments and the substantive merits are not in dispute. The parties are all agreed that, but for the statutory exclusion in question, the applicant would be entitled to

compensation in the sum of R4 014 079,90 together with an undertaking to pay her future medical expenses.

[9] Consequently the only **issue** that arises in the instant matter is whether the applicant's claim against the first respondent is justifiably excluded by virtue of the operation of the impugned provision, or whether she is entitled to the order of invalidity sought, in which event her claim statutorily excluded would be constitutionally recognised. The only live issue which thus remains to be determined relates to the legal question pertaining to the constitutional validity of the impugned provision.

[10] In the light of the above, the parties mutually agreed to have the action removed from the high court trial roll and also to have the constitutional issue dealt with by way of motion proceedings, hence the current application was launched on 14 November 2013.

[11] Before I proceed any further, I deem it prudent to outline the fourfold **structure** of this judgment. I propose to go about in this way: Firstly, I set out the background facts. Secondly I explain the legislative matrix as at the time of the accident and the subsequent legislative dynamics. Thirdly I deal with the grounds on which the impugned, provision is challenged. Fourthly, I conclude by considering the appropriateness of the remedy sought.

[12] **The factual matrix.**

The applicant was born on 3 June 1974 she is presently 39 years of age, she was 32 years of age at the time of the accident. I was not in a position to accurately ascertain the level of her formal education. She is a married woman. Her husband is a gentleman by the name of Victor Da Silva. She now lives at Edenvale in Johannesburg in Gauteng. She is the mother to two young girls. Her daughters are 11 and 9 years of age.

- [13] Prior to her misfortune, she was gainfully employed in Durban as a personal assistant to an insurance broker. She earned approximately R7 800,00 per month then. Her earnings enabled her to contribute meaningfully to her own needs and those of her family. Her work was meaningful and enjoyable to her as a person.
- [14] The applicant was travelling as a social passenger in a motor vehicle which was driven by her husband. The accident occurred near Kestell in the Free State Province on 29 April 2006. It happened during night time. The car collided with a horse which emerged from the side of the road. The road accident was occasioned by the sole negligent driving of her husband. As a result of the ensuing physical impact, her husband lost control over the car. The car went off the road. She was crushed inside the car. The roof the wrecked car pressed down on her head.
- [15] From the scene of the accident she was rushed to Bethlehem Medi Clinic. She was later airlifted from there to Durban where

she was admitted to St Augustine Hospital. She resided in Durban at the time. On admission to St Augustine Hospital her state of consciousness was measured. The reading was $\pm$ 11.5 out of 15 on the glasgow coma scale. It was established that she had sustained multiple skull fractures.

[16] Her head injuries required major reconstructive surgery to the frontal lobe of her skull and her right orbital area. She then underwent, among others, a right frontal temporal craniotomy. The surgical operation became necessary to elevate and repair multiple frontal, temporal and orbital fractures. She was also ventilated for some time. After that initial craniotomy she needed further surgery. It took the form of the left frontal burrhole for the insertion of an external ventricular drain. She was hospitalised for eight weeks following the accident. She spent more than seven of those weeks in the intensive care unit.

[17] Her pituitary gland was damaged in the accident. As a result she now suffers from diabetes insipidus, a condition which requires her to be on medication for the rest of her life. The injury has also largely contributed to her uncontrolled weight gain. These then are some of the adverse effects of the accident. Her past medical expenses alone have exceeded R500 000,00. She suffered traumatic amnesia as a result of the accident. What she recounted about her accident in her founding affidavit, is derived from what her husband told her and what is apparent from her medical records as well as her expert assessment reports.

- [18] The serious head injuries she sustained in the accident rendered her unemployable in her previous capacity. More than a year after the accident she was still completely incapacitated. Her previous employer was no longer prepared to keep her position open any longer. She was consequently laid off.
- [19] During April 2009 the family moved from Durban to settle in Johannesburg. She found it very difficult to find employment. Eventually she secured a secretarial position at a lower salary than her pre-accident salary. She earned R6 500. Her new employer was continually dissatisfied with the quality of her work. As a result she lost that work in December 2011.
- [20] She is currently in the employ of a school. She works a few hours only in the afternoon. She earns R2 000.00 per month since January 2013 as a tuckshop assistant. She is paid out of the school charity fund. It will be readily appreciated that she is currently in a position that amounts to nothing more than a sheltered form of employment. Although at times she struggles with the pressures of her present job position, by and large she manages as best she can.
- [21] The occupational therapists and individual psychologists, on both sides of the adversarial litigation line, who have examined the applicant, have concluded that she can no longer work in the same capacity as she did before the accident.

[22] By virtue of a great variety of medical assessment reports done by medical experts, the parties are agreed that but for the legislative impediment which is at the heart of the applicant's challenge in order to have a declaration of constitutional invalidity, she would have been entitled to receive from the first respondent compensation in the amount previously specified together with an undertaking to pay future medical expenses in terms of section 14(4) Road Accident Fund Act 56 of 1996.

[23] The applicant's post injury conditions have been assessed by a range of professional experts acting on her behalf and those acting on behalf of the first respondent. the findings of those experts largely concur that she has suffered brain injury so severe that it has occasioned lasting deficits which cannot be cured.

[24] **The first dimension of the legislative matrix at the time of the plaintiff's accident** – The old 1996 legislation applied to all claims for compensation (lodged by victims of road accidents) arising out of the driving of motor vehicles. Section 17(1)(a) Act 56 of 1996 provided:
Section 17 – Liability of Fund and agents.

“(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) ...

be obliged to compensate any person (the third party for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

[25] In this instance, section 17(1)(a) has to be read together with section 19(b)(ii) which provided:

"Liability excluded in certain cases – The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage –

19(a)

19(b) 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 –

(i)

(ii) is a person referred to in section 18(1)(b) and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned, and was being conveyed in or on the motor vehicle concerned; or"

[26] The practical effect of section 19(b)(ii), the impugned provision, was to exclude certain claims for compensation from been lodged against the Road Accident Fund by the victims of the road accidents. The exclusions applied to claims which arose in the following circumstances:

Where the claimant was a social passenger in the offending vehicle provided the driver of the vehicle in which the social passenger was travelling was entirely to blame for the accident and provided such driver was a member of the social passenger's household or such driver was a person who owed the social passenger a legal duty of support.

[27] It will be readily appreciated that the statutory exclusion in terms of section 19(b)(ii) did not apply to a driver (social passenger) in circumstances where two or more vehicles were involved in the same road accident which was occasioned by the combined contributory negligent driving of at least two drivers – section 17 read together with section 19.

[28] I point out that section 18 placed a monetary limitation of R25 000.00 on compensation claims of six different categories of passengers where fault, on the part of the driver or the owner of the vehicle in which the affected passenger was travelling, was, was the sole cause of the road accident. Those passenger categories with limited claims were:

- “27.1 passengers conveyed for reward;
- 27.2 passengers carried for the purposes of a lift club;
- 27.3 passengers conveyed in the course of the lawful business of the owner of the vehicle;
- 27.4 passengers who were employees of the driver or owner of the vehicle and were being transported in the course of their employment;
- 27.5 passengers who were conveyed under circumstances other than those referred to in section 18(1)(a);

27.6 employees who are entitled to compensation in terms of the Compensation of Occupational Injuries and Diseases Act.”

[29] Apart from those total exclusions and relative limitations, the rest of the victims of road accidents were entitled to claim full and proper compensation from the Road Accident Fund in respect of the injuries and the losses they sustained and suffered as a result of the road accidents. Their right to compensation entitled them to claim past medical expenses, past hospital expenses, past loss of earnings, future medical expenses, future hospital expenses, future loss of earnings, general damages for pain, suffering and future loss of amenities of life. The claimant is usually furnished with a written undertaking to cover future medical and hospital expenses to be incurred in connection with the treatment of the injuries sustained in the accident.

[30] **The second dimension of the legislature matrix introduced by the Road Accident Fund Amendment Act 19 of 2005.** This national legislation came into operation on 1 August 2008. The amendment was indicative of a recognition, not only by the responsible cabinet minister but by the government as a collective, that the absolute exclusions and the relative limitations previously outlined were not in keeping with certain core values enshrined in the bill of rights and that they were thus unconstitutional.

[31] The purpose of the amendment was achieved in two ways: Firstly, section 18(1) Act 56 of 1996 was deleted and

substituted with subsection 2(a). The effect of the 2005 amendment was that the relative limitations as imposed by the old 1996 legislation as they previously read were abolished. Secondly, section 19 Act 56 of 1996 was amended by deleting the impugned provision.

[32] At the heart of the applicant's problem is section 12 Amendment Act 19 of 2005. Notwithstanding the deletion of the exclusions in terms of section 19 Act 56 of 1996, section 12 Amendment Act 19 of 2005 specifically provides that:

“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.”

The words “principal act” must be understood to be reference to the old legislation, Act 56 of 1996. The effect of section 12, therefore, is that the applicant is not meaningfully assisted by the 2005 legislative amendment. It follows, therefore, that her claim is still excluded unless the old section 19(b)(ii) as it read prior to its repeal by the 2005 legislative amendment is declared to be inconsistent with the constitution and thus invalid. As far as the applicant was concerned the 2005 legislative intervention was not adequately curative.

[33] **The third dimension of the legislative matrix was in the form of transitional measures.** The Road Accident Fund (Transitional Provisions) Act 15 of 2012 came into force on 13

February 2012. The purpose of the transitional legislation is recorded in the preamble as being:

“... to provide transitional measures in respect of certain categories of third parties whose claims were limited under the RAFA, 1996, prior to 1 August 2008 and to provide for matters incidental thereto.”

The importance of the date, 1 August 2008, lies in the fact that that was the date on which the old 1996 legislation was substantially amended by the 2005 amendment statute.

[34] The transitional statute puts in place some arrangements for people referred to as third parties. The phrase “third party” is restrictively defined as a person who, firstly, has a right to claim compensation from the Road Accident Fund in terms of section 17 Act 56 of 1996; secondly, whose claim is subject to the limitations imposed by section 18(1) or section 18(2) of that old statute and thirdly, whose claim has, upon this transitional statute taking effect being 13 February 2013, not prescribed or been finally determined by settlement or judgment. Those then were the targeted victims of the transitional measures.

[35] Section 2 of Transitional Provisions Act 19 of 2012 provides as follows as regards third parties:

“(a) Subject to the remaining provisions of this Act, the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of

the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005), and section 17(4A)(b) of the New Act.

- (b) The right of the third party to claim compensation for non-pecuniary loss is limited to a maximum amount of R25 000.00, unless –
 - (i) The third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008, indicating a serious injury, within two years of this Act taking effect; and
 - (ii) It is determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008, that the third party suffered a serious injury.”

[36] I hasten to point out that the foregoing transitional provision, section 2 of the new 2012 statute, made no reference whatsoever to absolute exclusions in terms of section 19(b)(ii) of the old 1996 statute. Consequently the legislative plight of social passengers such as the applicant still remained unchanged although section 19(b)(ii) of the old 1996 statute was repealed seven years earlier by the 2005 amendment statute. I have to stress the point in order to drive the message home: The Transitional Provisions Act 15 of 2012 contained no remedial transitional arrangements for victims of road accidents whose claims were absolutely excluded as invalid in terms of section 19(b)(ii) Act 56 of 1996.

[37] By virtue of the narrow definition of a “third party” as contained in section 2 Act 15 of 2012, those transitional arrangements only remedied the statutory plight of those passengers whose

relative rights to claim compensation were subject to the monetary ceiling imposed by subsection (1) or subsection (2) of section 18. On the contrary social passengers such as the applicant are still completely disqualified and absolutely excluded from accessing any benefits whatsoever provided by the social legislation to the rest of the victims of road accidents. It is the applicant's contention that such a legal situation is constitutionally flawed and untenable. Those then are the shortcomings of the legislative matrix. The 2005 and 2012 legislative measures though designed to protect and to advance interests of certain categories of victims of the road accidents previously disadvantaged by unfair statutory discrimination, did not fully promote the achievement of equality in that sphere.

[38] **Unconstitutionality of the impugned provision** – It is the applicant's case that the impugned statutory provision is inconsistent with the constitution and, therefore, invalid on the ground that it violates the equality guarantee contained in section 9 of the constitution. To that issue I now turn.

[39] Section 9 of the constitution guarantees that:

- “(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.

- (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.”

[40] It is trite that proof of an infringement of either section 9(1) or section 9(3) of the constitution will almost invariably justify a declaration of constitutional invalidity. The two subsections outlaw unequal treatment and unfair discrimination of persons respectively. Therefore, it becomes imperative to consider whether the differentiation and discrimination are unfair and unjustifiable.

[41] Ms Annandale, counsel for the applicant, submitted that section 19(b)(ii) Road Accident Fund Act 56 of 1996, as it read prior to 1 August 2008, is inconsistent with the constitution and for that reason invalid.

[42] The decision in *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) which was handed down on 12 February 2011 is instructive. In that case the Constitutional Court finally confirmed a provisional declaration

of invalidity granted by the Western Cape High Court in respect of sections 18(1)(a)(i), section 18(1)(b) and section 18(2) of the old Act 56 of 1996 as it read before 1 August 2008. The court found that the monetary capping provisions contained in those subsections of section 18 constituted a violation of section 9(3) of the constitution. Those capping provisions in terms of section 18 had virtually the same effect in respect of categories of persons or passengers adversely affected by the absolute exclusions in terms of section 19(b)(ii) of the old Act 56 of 1996.

[43] Given the similarity in effect between the relative capping limitation imposed by section 18 and the absolute exclusion imposed by section 19(b)(ii), the following observations of the Constitutional Court in the *Mvumvu* case are quite apposite to the current matter, in my view:

“44.1 The Road Accident Fund Act constitutes social security legislation whose primary object has been described as being 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 the vehicle and the cap on certain claims undermines this purpose.

44.2 Section 18 manifestly had a disparate impact as it targeted in the main those persons who used public transport and did not apply where two or more vehicles were involved and no less than two drivers contributed to the accident.

44.3 It could not be gainsaid that by placing the R25 000.00 cap on recoverable compensation, such limiting provisions treated certain victims differently from others whose claims were not limited.

- 44.4 The nature of the discrimination was indirect and operated against mainly black people who constitute the majority of persons in South Africa who utilize public transport. Those provisions therefore indirectly discriminated against black people in a manner disproportionate to other races.
- 44.5 This constituted discrimination on the basis of race which is a specified ground in section 9(3) of the Constitution and was consequently presumptively unfair.
- 44.6 The provisions at issue in Mvumvu also discriminated on a basis other than race as they affected the applicants and other similarly situated victims adversely when compared to claimants whose claims were not limited.
- 44.7 Where the victims were workers whose bodily injuries rendered them unemployable, the cap denied them compensation for the loss of capacity to work despite the fact that they played no role in causing the accident whilst other victims who were also passengers like the applicants were entitled to enjoy full compensation for their loss only because they fell outside of the targeted categories. This was manifestly unfair.”

[44] I am of the view that all those considerations apply with even greater force to those completely excluded in terms of section 19(b)(ii) and denied benefits of the social security legislation. The section discriminates in a strikingly and similarly arbitrary way against certain categories of persons. It does so in a manner which is inconsistent with both section 9(1) and section 9(3) of the constitution. Unlike section 18 which relatively limits passenger claims, section 19 completely excludes passenger claims the targeted passengers. There lies the harshness and arbitrariness of the impugned provisions. It does not get worse than that anywhere in the old statute I am

here grappling with. It has caused untold hardships in the past. It is hard to conceive any equitable rationale for such discrimination and differentiation. In my view it was and still is unjustifiable treatment – this presumptively unfair.

[45] Whilst in the *Mvumvu* decision the court found that the relative caps imposed in terms of section 18 predominantly discriminated against blacks as a particular race – the absolute exclusions imposed in terms of section 19 predominantly discriminates against persons on the grounds of marital status. It specifically targets persons linked together by marital relationship from which creates duties of support *ex lege*.

[46] Section 19 further discriminates, on the grounds of sex, indirectly but still yet predominantly against persons using the road. In this country, a common feature of the road is generally that where families travel together, almost invariably, men are the drivers and women passengers. As a result of this overwhelming culture of travelling section 19 has a greater adverse impact on women than men.

[47] This sort of discrimination is plainly arbitrary. Consider this scenario. A car was driven by X, a man. There were two women passengers in the car, his wife Y and her friend Z. They got involved in an accident before 1 August 2008 as a result of the exclusive negligence of X. The two passengers sustained serious bodily injuries. On the one hand Y would have virtually no claim because she was the negligent man's wife. On the other hand Z would now, after 1 August 2008 be

entitled to claim full compensation because there was no marital relationship between her and the negligent driver, X. I can think of no justification that could possibly rationalise such tenuous differentiation between the two women. Such an unequal treatment is fundamentally unfair.

[48] More often than not children, like their mothers, are passengers in vehicles driven by their fathers. Generally, most of them are too young to drive or are still unlicensed to drive. The impugned section 19 also discriminates predominantly against children on the grounds of age. Children who are unable to drive are routinely transported in vehicles driven by a person who heads the family household or a person who owes them a duty of support. Such persons are customarily fathers. However, even where such persons are mothers, the adverse legal consequences of section 19 are the same to children. The legal position is simple. It is this: If a child was injured in a road accident before 1 August 2008 as a result of the negligent driving by a parent – then an injured child, has no claim against the Road Accident Fund.

[49] On the contrary, his friend Y, a passenger in the same car would now after 1 August 2008 have a valid and unlimited claim. The child X is therefore discriminated against not only on the ground of age but birth as well.

[50] Whereas the constitution guarantees everyone the right to equality before the law, as well as the right to equal protection and equal benefit of the law – the impugned statutory provision

denies those excluded passengers all those fundamental rights. Those innocent passengers who bear no delictual responsibility for the accident have their claims either absolutely excluded or drastically reduced for reasons that have nothing to do with their actions, conduct or culpability. The entire arbitrary nature of the discrimination(s) constituted by the exclusions imposed by the impugned provision is, in my view, manifestly contrary and indeed inimical to the guarantee and prohibition embodied in section 9(1) and section 9(3) respectively of the constitution.

[51] I am also persuaded by Ms Annandale's submission that the impugned provision also violates the applicant's fundamental rights to dignity as enshrined in section 10 of the constitution. Moreover, the impugned provision also violates her fundamental rights to health care services and social security. Such rights are constitutionally guaranteed by section 27.

[52] On the facts I am inclined to conclude that the impugned provision, in other words, section 19(b)(ii) Act 56 of 1986, read as it stood prior to 1 August 2008, is indeed inconsistent with the constitution, something which the supreme law does not countenance. Accordingly I hold the view, and it is a very firm view, that it ought to be declared constitutionally invalid.

[53] **The appropriate remedy** – It is a vitally important aspect of the matter. The range of a proposed remedy has to be appropriate. A rangeless remedy may have drastically crippling impact on the coffers of the first respondent and

financially embarrass the second respondent as well. In Mvumvu's case the Constitutional Court suspended the declaration of invalidity for a specified period in order to enable parliament to cure the statutory defects. On the strength of available evidence the Constitutional Court was of the view that an unlimited retrospective order of invalidity was likely to have a crippling effect on the operations of the Road Accident Fund. The court took a twofold view of the appropriate remedy. In the first place the court determined that parliament rather the court itself was best suited to ascertain the extent of appropriate compensation to which the applicants in that particular case were entitled. In the second place the court also determined that parliament itself needed to find a curatively appropriate remedy for the inequality which the old 1996 scheme continued to perpetuate by virtue of section 12 of Amendment Act 19 of 2005 – vide *Mvumvu*, supra, at [53].

- [54] It was in an attempt to give effect to the injunction of the Constitutional Court and in an effort to meet the terms of the invalidating order that parliament enacted the Transitional Provisions Act 15 of 2012. Lamentably and despite the transitional measures introduced by parliament, the transitional measures did not create any curative remedy for the anomalies, inequalities and unfair discriminations that were imposed by the section 19(b)(ii) Act 56 of 1996 that has since been repealed by the Amendment Act 19 of 2005. The transitional measures enacted by the Transitional Provisions Act 15 of 2012 were restricted to those passengers whose claims had been relatively capped by section 18, but not those

whose claims had always been completely excluded by section 19 of the old statute.

[55] It seems to me that if the applicant and other claimants in a position similar to hers, were to be afforded the protection similar to that provided to section 18 passengers by the Transitional Provisions Act, that would prevent further inequalities of legislative treatment between those passenger victims whose claims are completely excluded and those passenger victims whose claims are merely capped. In the case of the latter category of passenger victims those old capping provisions in terms of section 18 have already been found to be inconsistent with the constitution and declared invalid.

[56] The transitional measures introduced for the benefit of passenger victims whose claims were previously capped and were thereby disadvantaged, have been chosen by parliament. Now if those same measures were to be extended to those passenger victims who have all along been disadvantaged, differently treated for all the wrong reasons, that would prevent the court from intruding into matters of executive policy or from usurping the legislative functions of parliament.

[57] In that event, the probable financial burden on the Road Accident Fund would be substantially alleviated by a remedy whose range would only be those passenger victims whose claims were previously precluded by section 19(b)(ii) Act 56 of 1996. Given the agreement already reached by the parties

regarding the applicant's quantum of compensation to which she would have been entitled but for the exclusion created by the impugned provision, I am satisfied that the order sought in prayer 4 of the notice of motion is an appropriate relief in this particular matter.

[57] The applicant had no choice but to litigate in order to vindicate her constitutional rights. In the light of my inclination to provisionally strike down the impugned provision, I am of the view that she is entitled to the fruit of her success. The declaration of invalidity would also benefit all those in a similar legislative predicament as hers. The matter is complex. Moreover it is of great importance to the general public. That being the case, the employment of two counsels was warranted.

[58] Accordingly I make the following order:

58.1 It is declared that section 19(b)(ii) of the Road Accident Fund 56 of 1996, as it read prior to 1 August 2008, is inconsistent with the Constitution and invalid.

58.2 The order in paragraph 58.1 above does not apply to claims in respect of which a final settlement has been reached or which have prescribed or in which a final judgment has been granted, before the date of this order.

58.3 Claims to which the order in paragraph 1 applies shall be governed by the Road Accident Fund (Transitional Provisions) Act 15 of 2012, provided that in respect of such claims the period of one year contemplated in

section 2 of the Act shall not commence running until the date of this order.

58.4 Upon confirmation of the invalidity of section 19(b)(ii) of the Road Accident Fund Act 56 of 1996, as it read prior to 1 August 2008, by the Constitutional Court, the Road Accident Fund is directed within 14 days to:

- (a) Pay an amount of R4 014 079.90 to the applicant within 14 days hereof; and
- (b) Issue the applicant with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 within the same period of time.

M. H. RAMPAL, AJP

On behalf of applicant:

Adv. A. M. Annandale SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondents:

Adv. Rudlender
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M. H. RAMPAL, J

On behalf of plaintiff:

Adv

Instructed by:

BLOEMFONTEIN

On behalf of defendant:

Adv

Instructed by:

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