

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(LIMPOPO DIVISION, POLOKWANE)

CASE No:3733/2022

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO THE JUDGES: YES/NO  
(3) REVISED: YES/NO

**DIAMOND AJ**

**SIGNATURE**

**DATE**

In the matter between:

NYAMBIRAI CHENGETO

APPLICANT

and

ROAD ACCIDENT FUND

FIRST RESPONDENT

MINISTER OF TRANSPORT

SECOND RESPONDENT

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**JUDGMENT**

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**DIAMOND A J:**

## INTRODUCTION

[1] This application concerns a constitutional challenge to the validity of the proviso to Section 17(6), dealing with interim payments in terms of the Road Accident Fund Act 1996 (Act 56 of 1996) ("the Act"). The challenge strikes at the heart of the statutory scheme designed to provide interim relief to victims of road accidents. It juxtaposes the formal equality of the legislative text against the substantive inequality of the lived reality of indigent litigants in South Africa.

[2] The Applicant, an indigent victim of a motor vehicle accident, approaches this Court for an order declaring that the statutory requirement, of Section 17(6) that medical costs must be "already incurred" before an interim payment can be made, constitutes unfair discrimination. She contends that this requirement effectively reserves the benefit of interim relief for the wealthy, who have the financial capacity to create such liability, while excluding the poor, who do not.

[3] The First Respondent ("the Fund") and the Second Respondent ("the Minister") oppose the application. They contend, *inter alia*, that the matter is moot as the Applicant's personal claim has been settled; that the Act provides adequate alternative remedies through Section 17(4) undertakings; and that the Applicant could have utilized Rule 34A of the Uniform Rules of Court.

- [4] This judgment must therefore traverse three distinct landscapes: firstly, the procedural hurdle of mootness; secondly, the interplay between the Act and the Rules of Court; and thirdly, the substantive constitutional inquiry into whether a statute that is neutral on its face can nonetheless be unconstitutional due to its disparate impact on the poor.

### **THE FACTUAL MATRIX**

- [5] The facts are largely common cause. On 24 December 2019, the Applicant was a passenger in a motor vehicle involved in a collision. She sustained severe bodily injuries, including a mandibular fracture, loss of dentition, and significant scarring. She is a foreign national and a hawker by trade, categorized as an indigent person.
- [6] Following the accident, the Applicant required reconstructive surgery and dental work. However, she lacked the funds to pay private medical providers upfront. Furthermore, due to her financial status, she could not obtain credit to access such services. Consequently, she could not present the Fund with proof that costs had been "incurred" in the financial sense of a debt due and payable.
- [7] The Applicant sought an interim payment from the Fund to facilitate this treatment. She was met with the statutory wall of

Section 17(6) of the Act, which stipulates that the Fund is only liable to make interim payments for costs "already incurred." Because she could not afford to incur the debt, she was denied the payment. She was thus trapped in a cycle of poverty: she needed the money to get treatment, but needed to get treatment (and incur the cost) to get the money.

[8] By the time this matter was argued, the Fund had admitted liability and settled the Applicant's claim for past hospital expenses (paid to the provincial hospital) and loss of earnings. Regarding future medical costs, the Fund provided the Applicant with a statutory Undertaking in terms of Section 17(4)(a) of the Act.

### **MOOTNESS AND THE INTERESTS OF JUSTICE**

[9] Before addressing the merits of the constitutional challenge, it is necessary to consider the Respondents' contention that the matter has become moot. It is common cause that, by the time this application was argued, the First Respondent had settled all of the Applicant's remaining heads of damages and furnished an undertaking in terms of section 17(4)(a) of the Act, with the result that there is no longer a live dispute between these parties about the quantification or payment of her individual claim.

[10] The Respondents raised a point *in limine* that the application is moot. They argue that because the Applicant has been paid and

is in possession of an Undertaking, there is no longer a live controversy between the parties. They rely on the general principle that courts should not decide academic issues.

[11] It is legally accurate that the *lis* between Ms. Chengeto personally and the Fund has been extinguished.

[12] The general principle is that courts do not decide abstract or academic questions where their orders will have no practical effect between the litigants. Our apex courts have repeatedly emphasised that mootness is a relevant consideration in determining whether a matter should be heard, but that it is not an absolute bar: the decisive criterion is whether it is in the interests of justice to determine the issue notwithstanding.<sup>1</sup>

[13] The reported mootness cases arise in the appellate context, where the dispute was live in the court of first instance but became moot before the appeal was heard. In those matters the Constitutional Court and Supreme Court of Appeal have held that an appeal may still be entertained where the issue is of public importance, where it is likely to arise again, and where a

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<sup>1</sup> Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and others 2020 (6) BCLR 748 (CC) Paragraphs [46] –[50]; MEC for Education, Kwazulu-Natal, And Others V Pillay 2008 (1) SA 474 (CC); AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2006 (11) BCLR 1255 (CC).

judgment would provide legal certainty or guidance to lower courts.

[14] This case presents a different procedural posture: the matter became moot between the parties before it could be heard in this Court. The question is whether a High Court, sitting as court of first instance, nonetheless has the jurisdiction – or, indeed, the duty – to decide the constitutional validity of section 17(6) in circumstances where the underlying dispute between the immediate parties, has been settled.

[15] The question, in my view, is whether the principles governing the justiciability of a dispute, where the dispute between the immediate parties has become moot, are confined to appellate courts or whether they also apply to courts of first instance.

[16] In answering that question, the starting point must be section 172(1) of the Constitution, which states as follows:

*172. Powers of courts in constitutional matters. — (1) When deciding a constitutional matter within its power, a court—*  
*(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*  
*(b) may 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.*

[17] The constitutional challenge in this matter is directed not at case specific conduct but at the validity of a statutory provision of general application. The question whether section 17(6) unjustifiably discriminates against indigent claimants is an objective one; it does not depend on the subjective interests of the present litigants alone, and any declaration of invalidity will have effect beyond this case, subject to confirmation by the Constitutional Court. In this sense, the Court is not merely resolving a private dispute; it is fulfilling its constitutional role as guardian of the Bill of Rights and the rule of law.

[18] In my view, a court of first instance retains jurisdiction to adjudicate a constitutional dispute by applying, *mutatis mutandis*, the principles that govern a court of appeal's discretion to determine an appeal which has become moot between the parties after judgment in the court of first instance but before the hearing of the appeal.

[19] In *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others*<sup>2</sup> the Constitutional Court stated that:

*Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:*

*(a) whether any order which it may make will have some practical effect either on the parties or on others;*

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<sup>2</sup> 2020 (6) BCLR 748 (CC) in Par 55.

- (b) the nature and extent of the practical effect that any possible order might have;*
- (c) the importance of the issue;*
- (d) the complexity of the issue;*
- (e) the fullness or otherwise of the arguments advanced; and*
- (f) resolving the disputes between different courts.*

[20] In my view, it is apposite to have regard to the sequence of events that led to the dispute between the parties becoming moot. The following dates can be determined from the papers:

- Accident: 24 December 2019 (motor vehicle collision).
- Claim (RAF 1) lodged with the Fund: 1 October 2020.
- Public hospital account (Polokwane Provincial Hospital) submitted to RAF: 24 February 2021.
- That hospital account paid by RAF: 17 March 2021.
- Merits settlement (liability 100% in favour of Plaintiff) made order of court by Madavha AJ: 11 October 2021 (annexure NC2).
- Founding affidavit in the constitutional application deposed to: 29 March 2022.
- Application issued by Registrar: 19 April 2022 (stamp on Notice of Motion).
- Application served on RAF: 3 May 2022.
- RAF's offer on loss of earnings (past and future), for R 727 725.50, made: 12 May 2022; accepted by Applicant's attorney: 13 May 2022 (Annexure AA3).<sup>3</sup>

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<sup>3</sup> The actual date of payment of the past and future loss of earnings cannot be determined from the papers.

- Undertaking in terms of s 17(4)(a) issued: 13 May 2022; amended version acknowledged by Applicant's attorney: 19 May 2022 (Annexures AA4–AA5).

[21] The Applicant argues, compellingly, that the Fund employs a strategy of settling individual constitutional challenges to insulate the legislation from scrutiny. If this Court were to uphold the mootness defense, the discriminatory effect of Section 17(6) would remain in the statute books.

[22] The chronology of events shows that the First Respondent settled the outstanding heads of the Applicant's claim and furnished the section 17(4)(a) undertaking within approximately ten days of being served with this constitutional application. If trial courts were to treat such post-service settlements as a reason to decline jurisdiction on mootness grounds, a statutory provision that is alleged to be unconstitutional in its systemic operation could be effectively insulated from judicial scrutiny by the simple expedient of buying off each challenger in turn. That would be inimical to the supremacy of the Constitution and the obligation in section 2 that law or conduct inconsistent with the Constitution is invalid.

[23] This would result in a situation where only those indigent litigants fortunate enough to secure persistent legal representation can force a settlement, while the vast majority of unrepresented or under-represented claimants remain barred from interim relief.

The constitutional validity of a statute is an objective question of law that affects the broader public, not merely the litigants before the Court.

[24] Furthermore, the "wrong" complained of—the denial of interim relief during the litigation process—is by its nature temporary and often resolved (by final settlement) before an appeal can be heard.

[25] Having regard to these factors, this Court is satisfied that, although the dispute between the parties about the Applicant's personal claim is now spent, the constitutional issue remains live in a very real sense. It affects a large and vulnerable class of indigent road accident victims who are unlikely to have either the resources or the opportunity to mount repeated High Court challenges, and there is a demonstrable risk that, unless a court now pronounces on the validity of section 17(6), the issue will continue to arise in practice but will consistently evade review. In these circumstances, and applying by analogy the interests of justice approach articulated by the higher courts, this Court concludes that it is both constitutionally permissible and constitutionally appropriate to determine the merits of the challenge to section 17(6), notwithstanding that the matter is technically moot as between the present parties.

## THE IMPUGNED PROVISION AND THE "INCURRED" TRAP

[26] Section 17(6) of the Act provides:

*"The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in respect of medical costs, loss of income and loss of support: **Provided that the Fund or such agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered.**"*<sup>4</sup>

[27] The interpretation of the word "incurred" has been the subject of much litigation, most notably in the *Discovery Health* matters. Courts have held that a cost is "incurred" even if paid by a medical aid (because the member remains liable).

[28] The position of the indigent is starkly different.

[29] The indigent claimant cannot "incur" the cost because no private service provider will offer them treatment on credit. They are credit-invisible. The proviso thus functions as a wealth test: those with capital or credit can access interim relief; those without, cannot.

## ALTERNATIVE REMEDIES

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<sup>4</sup> Emphasis added.

[30] The Respondents contend that the declaration of invalidity is unnecessary because the legal system provides adequate alternatives. I deal with each of these alleged alternatives below.

#### THE SECTION 17(4) UNDERTAKING

[31] The Respondents argue that Section 17(4)(a) of the Act, which allows the Fund to furnish an Undertaking for future costs, cures any prejudice. They submit that an indigent claimant need only present this Undertaking to a medical practitioner to receive treatment.

[32] This argument ignores the commercial reality of the Road Accident Fund's standing in the economy. This Court takes judicial notice of the implication regarding the Fund's failure to pay its debts. In *Road Accident Fund v Legal Practice Council*,<sup>5</sup> the Fund itself approached the court effectively admitting a liquidity crisis and seeking to suspend payments for 180 days.

[33] In the Legal Practice Council judgment, the court remarked as follows in paragraph 1 of the judgment:

*“The applicant, the Road Accident Fund (RAF), according to the evidence presented in this application by its current chief executive officer, is experiencing severe financial difficulties that have been exacerbated by the Covid-19 pandemic. Its implosion is imminent and will have disastrous consequences for this country since s 21(2)(a) of the Road Accident Fund Act 56 of 1996 (RAF Act) will then be triggered. Section 21(1) and (2)(a) provide that no claim for compensation in respect of loss or*

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<sup>5</sup> 2021 (6) SA 230 (GP)

*damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle shall lie against the owner or driver of a motor vehicle or against the employer of the driver, unless the RAF or an agent is unable to pay any compensation. The RAF seeks extraordinary relief in this application as a step to stabilise its precarious financial position to prevent a constitutional crisis, because it is also constitutionally enjoined to pay reasonable compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle (RAF's application). “*

[34] It is an inescapable inference that private medical providers would be hesitant, if not outright refractive, to accept Undertakings from an entity with a notorious reputation for delayed payment and whose Chief Executive Officer deposed under oath that it is unable to meet its obligations. An undertaking is merely a promise to pay. When that promise comes from a bad debtor, the market will certainly reject it.

[35] Consequently, for an indigent person, Section 17(4) Undertaking is a theoretical remedy that fails in practice. It does not provide the immediate liquidity required to secure admission to a private hospital or to pay the deposit for a necessary operation. It is not a functional equivalent to the interim cash payment available to a wealthy claimant under Section 17(6).

#### RULE 34A OF THE UNIFORM RULES OF COURT

[36] The Respondents further argued that the Applicant ought to have utilized Rule 34A to compel an interim payment. This submission is legally untenable.

[37] Rule 34A is a procedural rule subordinate to the Act. The proviso to Section 17(6) contains the phrase "notwithstanding anything to the contrary in any law contained." This constitutes a statutory override. As held by the Full Court in *Road Accident Fund v Manqina*,<sup>6</sup> this "notwithstanding" clause renders Rule 34A ineffectual for claiming costs that have not yet been incurred.

[38] It is apposite to refer to the judgment of the Full Court in *Manqina*, where the Court explicitly recognized the hardship caused by Section 17(6). The Court noted that while indigent claimants may be in "dire need" of assistance, the hands of the judiciary were tied by the text of the Act until such time as a constitutional challenge was brought.<sup>7</sup>

*"Even the constitutionally guaranteed interests of minor children which courts, as upper guardians of all minors, are required to protect, that cannot be done in isolation of the general constitutional framework. It might very well be so that indeed the minor child and many other Road Accident Fund claimants are in dire need of assistance through interim payments to afford much-needed medical treatment. However, and to the extent that the constitutional validity of the provisions of s 17(6) is not challenged, it is not for the courts to tell the legislature how to deal with that situation, which may be dire, as pointed out above, absent considerations of constitutional validity. As long as that section remains in the statute book in its current form, the courts are not entitled to usurp the constitutionally ordained power of the legislature to pass legislation, based not on what the clear purpose of the statute is, but on what the court considers to be fair."*

[39] That constitutional challenge is now before this court.

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<sup>6</sup> 5. *Road Accident Fund v Manqina* 2023 (2) SA 1 (ECM) .

<sup>7</sup> Par 21.

[40] A court cannot use a Rule of Court to order a payment that the empowering Statute expressly forbids. The indigent claimant is thus trapped: they cannot use the Act (because they haven't incurred costs) and they cannot use the Rules (because the Act overrides them).

#### THE USE OF PUBLIC HEALTH CARE FACILITIES

[41] The First Respondent contended that any prejudice allegedly suffered by the Applicant is mitigated, if not cured, by the availability of treatment in the public health system. On this argument, indigent claimants such as the Applicant can receive adequate care in provincial hospitals, which then claim directly from the Fund in terms of section 17(5), thus obviating the need for interim cash payments to finance private treatment.

[42] That contention cannot be accepted at face value. In substance it amounts to what can be described as a public healthcare defence<sup>8</sup> – the proposition that a defendant may resist or reduce a claim for medical expenses by alleging that the plaintiff can or should receive equivalent treatment in the public sector rather than in a private facility. Our courts have held that such a defence is not self-proving; it carries with it an evidential burden on the party who advances it.

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<sup>8</sup> See the discussion of Muano Mudzanani in *De Rebus*, 30 Junie 2023 to be found at <https://www.derebus.org.za/the-common-law-public-healthcare-defence-remains-a-viable-defence-despite-the-sca-ruling-in-mashinini-vs-mec-for-health-mpumalanga/>

[43] In *Ngubane v South African Transport Services*<sup>9</sup> the Appellate

Division decided as follows:

*“Though the onus of proving damages is correctly placed upon the plaintiff, this submission, which is really concerned with the duty to adduce evidence, is to my mind unsound. By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate - and as far as I am aware the customary - basis on which a claim for future medical expenses is determined. Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the evidence, including that adduced in support of an alternative and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive”.*<sup>10</sup>

[44] The Supreme Court of Appeal confirmed this approach in the judgment of *Mashinini v Member of the Executive Council for Health and Social Development, Gauteng Provincial Government*<sup>11</sup> and confirmed, furthermore, that a respondent faced with a claim for future medical costs has an evidential duty to provide evidence to the court that the plaintiff will be able to receive the same standard of medical care in a public facility as he would have received in a private healthcare facility.

[45] It is my view that, within the context of this application, any bald and generalized statement that a victim of a motor vehicle

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<sup>9</sup> 1991 (1) SA 756 (A)

<sup>10</sup> At 784C-F

<sup>11</sup> [2023] JOL 58643 (SCA).

collision will receive equal treatment in a public health facility is untenable.

[46] One would have expected the First and the Second Respondents to adduce evidence before this court that, in general, that victims of motor vehicle accidents will receive treatment that is substantially of the same standard of treatment available to victims in private healthcare facilities. The two Respondents did not do so.

[47] The court cannot close its eyes to this aspect. There is substantial literature available on the disparities between public and private healthcare in South Africa, including specific examples of differential standards of care based on resource constraints.

[48] *Ramokolo, Vundli, et al.*<sup>12</sup> states as follows:

*"Given current resource constraints, and demand for neonatal intensive care beds, it is unlikely that the South African public health system has the capacity to provide highly resource-intensive specialised care for VLBW infants. Their survival depends on timely referral to facilitate delivery in tertiary settings, necessitating a responsive and expansive health system. Particularly in rural settings, such as Limpopo and Mpumalanga provinces, neonatal survival rates depend on the quality of district-level neonatal care."*

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<sup>12</sup> A landscape analysis of preterm birth in South Africa: systemic gaps and solutions." South African Health Review 2019.1 (2019): 133-144.

[49] *Maphumulo, Winnie T., and Busisiwe R. Bhengu.*<sup>13</sup> discuss widespread quality deficits in public healthcare, increased litigation due to medical negligence, and structural resource problems.

[50] A South African online publication Spotlight<sup>14</sup>, published, an investigative journalism piece, *Orthopaedic surgery: What is behind SA's long waiting lists?* analysing official data from the Minister of Health<sup>15</sup> and some of the key findings are :

- Waiting times for procedures range from 4 weeks to 10 years depending on province and procedure type.
- In the Eastern Cape (Frere Hospital): Up to 9-10 years for arthroplasty (joint replacement). The MEC stated: "Currently, the only access to the arthroplasty theatre list is once a month, with three to four joints that can be done per list." This is due to budget constraints to buy implants.

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<sup>13</sup> Challenges of quality improvement in the healthcare of South Africa post-apartheid: A critical review." *Curationis* 42.1 (2019): 1-9.

<sup>14</sup> Spotlight describes itself as follows: "Spotlight is a South African online publication that strives to produce compelling, in-depth, public interest health journalism that deepens public understanding of important health issues. We cover TB, HIV, non-communicable diseases (like diabetes and hypertension), health reforms (like National Health Insurance), and the functioning of South Africa's healthcare system. We are donor-funded and most of our work is republished by media partners such as Daily Maverick and News24."

<sup>15</sup> *Orthopaedic surgery: What is behind SA's long waiting lists?* Available at <https://www.spotlightnsp.co.za/2023/09/15/orthopaedic-surgery-what-is-behind-sas-long-waiting-lists/>.

- In the Free State there is a 4 weeks for femur fracture and 5 years waiting time for arthroplasty.

[51] Dell, Angela J., D. Kahn, and J. Klopper<sup>16</sup> remark that 95% of orthopedic surgeons in South Africa work either full-time or part-time in the private sector and that this creates a massive human resource disparity: the public system (serving 80% of the population) has access to only a fraction of the specialist workforce. The authors come to the following conclusion<sup>17</sup>:

*“Although this analysis provided a limited examination of surgical resources, it highlighted differences and revealed interprovincial disparities. South Africa is unique in that although it is classified as an upper middle income country (UMIC), it comprises of two sectors; a public sector which has resources similar to other LMICs, and a private sector which has resources similar to HICs”<sup>18</sup>.*

[52] Against this backdrop, the Respondents' assertion that indigent claimants can simply access equivalent care in the public system is not supported by the evidence. The public system may provide some care, but the literature demonstrates that it does so with multi-year delays, under conditions of severe resource constraint, and often at a standard that falls short of what is available in the private sector. The Fund has placed no evidence before this Court to show that victims in general can be treated

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<sup>16</sup> "Surgical resources in South Africa: an analysis of the inequalities between the public and private sector." South African Journal of Surgery 56.2 (2018): 16-20.

<sup>17</sup> P. 20.

<sup>18</sup> UMIC (Upper Middleclass Country); LMIC (Lower Middle Income Countries); HIC (High Income Countries).

at a public facility within a reasonable time frame and at a standard comparable to private care.

[53] In my view, therefore, the argument that indigent victims of motor vehicle collisions can access public health care facilities, is no answer to the claim of the applicant.

### **THE CONSTITUTIONAL ANALYSIS: EQUALITY AND DIGNITY**

[54] Having disposed of the defenses, I turn to the substantive constitutional challenge. The Applicant relies on Section 9 (Equality) and Section 10 (Dignity) of the Constitution.

[55] Section 9 of the Constitution reads as follows:

- (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.*

and Section 10 of the Constitution states as follows:

*“Everyone has inherent dignity and the right to have their dignity respected and protected”*

[56] *Harksen v Lane NO*<sup>19</sup> The Constitutional Court formulated the test to determine whether a statutory provision unfairly discriminates against a person as follows:

*“At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:*

*(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 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).”*

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<sup>19</sup> 1998 (1) SA 300 (CC) Par 54.

[57] The first step is, therefore, to establish whether the provision differentiates between classes of claimants.<sup>20</sup>

[58] In *City Council of Pretoria v Walker*<sup>21</sup> stipulates the following:<sup>22</sup>

*“ The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2).”*

[59] On the face value of the text of Section 17(6) it does not differentiate between people. Despite this, it can hardly be disputed that the lived reality of the vast majority of South Africans, is that they are unable to afford healthcare services, and they are highly dependent on public healthcare facilities.

[60] The consequence, therefore, of the stipulation that future medical costs must have been “incurred” before the Fund may make an interim payment, is to differentiate on, socioeconomic grounds, between those litigants who have the financial means to incur legal costs for medical services upfront, on the one hand, as opposed to all those litigants in a state of poverty that do not have the means to do so.

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<sup>20</sup> This judgment refers to the equality clause in the 1993 Interim constitution, which is Section 8, But the essence of the equality clause has been retained in the 1996 Constitution, Section 9.

<sup>21</sup> 1998 (2) SA 363 (CC).

<sup>22</sup> at para 31.

[61] This differentiation, brought about by the consequences of the wording of the section, is indirect discrimination, and it violates the prohibition against discrimination referred to in Section 9(3) of the Constitution.

[62] The next question that arises is whether this indirect differentiation bears a rational connection to a legitimate government purpose? If it does not, then there is a violation of Section 9 (3). While the aim of the section as a whole may be to support a legitimate government purpose, viz, to limit the exposure of the fund to expenses already incurred in general. The indirect differentiation, as such, in my view, does not have any legitimate government purpose. At least, none was demonstrated on the papers, and it is difficult to conceive of a legitimate government purpose for treating persons living in poverty differently from persons having the financial means to incur medical costs upfront.

[63] In my view, Section 17(6) discriminates against indigent litigants for the reasons set out above.

[64] The next question to determine is whether the discrimination is unfair.

[65] If the discrimination is based on any of the grounds mentioned in Section 9(3), then the discrimination shall be deemed to be unfair, unless the contrary can be shown.

[66] The discrimination under consideration in this application is, however, not based on any of the grounds enumerated in Section 9(3). The question becomes whether, when can discrimination based on a ground other than one of those mentioned in Section 9(3), Said to be unfair?

[67] In *Harksen* the court stated that:

*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*.”<sup>23</sup>

[68] In *Social Justice Coalition and Others v Minister of Police and Others*<sup>24</sup> the court accepted expert evidence that poverty “perpetuates systemic disadvantage, undermines human dignity, and adversely affects a person’s equal enjoyment of rights and freedoms in a serious manner, comparable to discrimination on listed grounds, including race.”<sup>25</sup>

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<sup>23</sup> Emphasis added.

<sup>24</sup> 2019 4 SA 82 (WCC) (Equality Court).

<sup>25</sup> Par 63, which was eventually accepted by the court

[69] Even if public hospitals were available and equivalent in quality (which is not proved), the Respondents' position amounts to:

- Wealthy victims can choose their provider, pay upfront, and get interim reimbursement.
- Poor victims have no choice—they must use the public system or wait years for a lump sum payment.

[70] This differential treatment based on wealth is the essence of the discrimination. The Fund's argument effectively says: "Indigent people don't need interim payments because we've created a separate, parallel system (Section 17(5) public billing) for them."

[71] This is "separate but equal" logic. It creates a two-tier system:

- Tier 1 (Wealthy): Choice of provider and interim cash liquidity via Section 17(6).
- Tier 2 (Poor): No choice and no cash while relegated to public system via Section 17(5).

[72] The Constitution prohibits not only different treatment that is overtly harmful, but also treatment that reinforces a status hierarchy or undermines dignity.

[73] Forcing indigent victims into the public system (even if adequate) while allowing wealthy victims to choose private care and receive

interim cash payments perpetuate a caste system based on economic status.

[74] In my view, if the facts of the application before this court are evaluated against the principles set out in *Harksen* and *Social Justice Coalition*, there can be no doubt that the discrimination against indigent and poor victims of road accidents is unfair.

### **THE MANQINA INVITATION**

[75] It is apposite to refer to the judgment of the Full Court in *Manqina*, where the Court explicitly recognized the hardship caused by Section 17(6). The Court noted that while indigent claimants are in "dire need" of assistance, the hands of the judiciary were tied by the text of the Act until such time as a constitutional challenge was brought.

[76] That challenge is now before me. The *Manqina* judgment serves as judicial confirmation that the defect is statutory and cannot be cured by interpretation alone. The statute itself is the barrier to justice.

### **JUSTIFICATION (SECTION 36)**

[77] Once unfair discrimination is established, the burden shifts to the Respondents to justify the limitation of rights in terms of Section 36 of the Constitution.

[78] The Second Respondent (the Minister) filed an answering affidavit which detailed the legislative history of the Act but notably failed to provide any justification for the limitation.

[79] There is no evidence before this Court regarding the financial impact of extending interim payments to the indigent, nor any policy rationale for why the "incurred" proviso is necessary to achieve a legitimate government purpose.

[80] A history lesson is not a justification. The State has failed to discharge its onus. In the absence of any justification, the limitation of the Applicant's rights to equality and dignity is unconstitutional.

## **REMEDY**

[81] Once a court concludes that a statutory provision is inconsistent with the Constitution, section 172(1) of the Constitution guides the remedial inquiry. Section 172(1)(a) obliges a court, when deciding a constitutional matter within its power, to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) empowers a court to make any order that is just and equitable, including limiting the retrospective effect of such a declaration or suspending a declaration of invalidity to allow the competent authority an opportunity to correct the defect.

[82] Our courts have recognised a range of remedial options once invalidity has been found. These include<sup>26</sup>:

- A simple declaration of invalidity, with immediate effect, striking down the impugned provision in whole or in part, without further modification.
- A declaration of invalidity coupled with severance, where the offending words or phrases are excised from the provision, leaving the remainder intact and operable.
- A declaration of invalidity coupled with reading down, where the court adopts a constitutionally compliant interpretation that falls within the bounds of the statutory text, thereby avoiding invalidity without altering the wording.
- A declaration of invalidity accompanied by reading in, where the court cures an unconstitutional omission by inserting words into the statute so as to extend its protection or operation to those unconstitutionally excluded.
- A declaration of invalidity whose effect is suspended for a specified period, during which Parliament is afforded an opportunity to correct the defect, often accompanied by interim arrangements to protect affected persons in the meantime.

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<sup>26</sup> For an overview of constitutional remedies, see Currie, Iain, and Johan De Waal, *The Bill of Rights Handbook* (Juta and Company Ltd, 2013), chapter 8.

[83] The choice among these remedies is not mechanical. It is guided by the overarching requirement that the order must be just and equitable in the circumstances, bearing in mind the nature of the right infringed, the extent of the invalidity, the impact of the order on those affected, and the need to respect the proper domain of the Legislature. In exercising this remedial discretion, courts have repeatedly emphasised that they must interfere no more than necessary with the legislative scheme to cure the constitutional defect.

[84] Severance is generally appropriate where the unconstitutional portion of the provision is textually and conceptually discrete, so that it can be removed without doing violence to the structure or purpose of the statute. Reading down is appropriate where the language is reasonably capable of bearing a meaning that is consistent with the Constitution; in such cases, a court will prefer an interpretation that avoids invalidity over one that necessitates it. Reading in is a different kind of intervention: it is a remedial technique used where the defect lies in an omission—where the statute fails to provide for a constitutionally required protection or inclusion—and cannot be cured by either severance or interpretation alone.

[85] Ackerman J *National Coalition for Gay and Lesbian Equality and Others V Minister of Home Affairs and Others*<sup>27</sup> articulated the requirements for an order to read words into a statute as follows:

*“In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.”*

[86] A further remedial option is to suspend the declaration of invalidity under section 172(1)(b)(ii), allowing Parliament time to enact a considered legislative solution. Suspension is often coupled with an interim reading in, or with tailored interim measures, to prevent ongoing rights violations during the suspension period. Whether suspension is appropriate will depend, among other things, on the complexity of the legislative task, the extent of the disruption that immediate invalidity would cause, and the degree of ongoing prejudice to those affected.

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#### WHY READING IN IS THE APPROPRIATE REMEDY IN THIS CASE

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<sup>27</sup> 2000 (2) SA 1 (CC) in par 74.

[87] In the present matter, the constitutional defect in section 17(6) arises from an omission. The section confers a power on the Fund to make interim payments in respect of medical costs, loss of income and loss of support, but restricts that power to costs “already incurred” and losses “already suffered”. The effect of this formulation is that indigent claimants, who lack the means to incur such costs in the first place, are excluded from the practical benefit of interim relief. The section is thus under-inclusive: it fails to extend the statutory benefit to a class of persons who, constitutionally, cannot be excluded.

[88] This is not a case where severance of the offending wording would yield a constitutionally compliant scheme. If the proviso requiring that costs be “already incurred” and losses “already suffered” were simply struck out, the Fund could be exposed to unstructured claims for interim payments without any statutory criteria limiting that discretion. Such a remedy would create a vacuum in the very place where Parliament chose to regulate interim payments and would materially disrupt the legislative design. It would also risk imposing significant and unquantified fiscal burdens on the Fund in a manner that Parliament has not considered.

[89] Nor can the defect be cured by reading down. The requirement that costs be “incurred” and losses “suffered” has a settled legal meaning, and the proviso is reinforced by the “notwithstanding

anything to the contrary in any law contained” clause. As interpreted in existing case law, the language does not reasonably admit of a construction in terms of which a claimant who has neither incurred a legal obligation to pay, nor actually suffered a loss, can nonetheless qualify for an interim payment. To read the section as if it already included indigent claimants who lack the capacity to incur costs would not be interpretation but judicial amendment.

[90] A simple declaration of invalidity without more, or a declaration accompanied only by suspension, would likewise be insufficient. If the proviso were declared invalid and left inoperative pending Parliament’s response, indigent claimants would remain without access to interim payments in the interim period, and the Fund would lack clear statutory guidance on how to exercise its interim-payment powers in relation to them. A suspended declaration without an interim textual solution would perpetuate the very inequality and hardship that this judgment seeks to cure.

[91] In these circumstances, a declaration of invalidity coupled a carefully crafted interim reading-in is the most appropriate remedy. It directly addresses the unconstitutional omission by extending the reach of section 17(6) to indigent claimants who are unable, for reasons of poverty, to incur the relevant costs or to absorb ongoing loss of income, while leaving the rest of the statutory scheme intact. The core feature of section 17(6)—that

interim payments are exceptional advances against the final award, and that they are subject to conditions—remains unchanged. The remedy does not create a new head of liability; it merely adjusts the eligibility criteria so that they no longer discriminate unfairly on the basis of socio-economic status.

[92] The wording proposed by this Court goes no further than is necessary to cure the constitutional defect. It does not entitle all claimants to interim payments as of right. It confines the extension to those who are indigent and who can demonstrate that the costs for which interim relief is sought are necessary medical expenses or losses of income or support which they are financially unable to incur or sustain without interim assistance. This preserves Parliament's evident intention that interim payments be controlled and conditional, while ensuring that the statutory benefit is not reserved in practice for the relatively wealthy.

[93] The remedy is also faithful to the legislative purpose. Section 17(6) was enacted to alleviate the hardship suffered by road accident victims pending finalisation of their claims, by allowing the Fund to make advances towards medical expenses and loss of income or support. Yet, as currently framed, it excludes precisely those victims who are least able to weather the economic shock of serious injury, and who have no access to credit or savings. Reading in an indigency-based exception

restores the section to its underlying constitutional and policy purpose, rather than subverting it.

[94] Finally, the remedial wording is sufficiently precise and administrable. Courts and the Fund are familiar with assessing indigency and necessity in a variety of statutory contexts. The concepts of “indigent”, “necessary medical expenses” and “loss of income or support” are not novel; they are capable of objective application and review. The remedy does not require the Court to engage in complex re-design of the funding model of the Road Accident Fund or to make polycentric budgetary choices best left to the Legislature, since the Fund is in any event liable to pay the medical costs.

[95] The order leaves the broader policy questions to Parliament, while ensuring that, in the interim, the section operates in a manner that is compatible with the Constitution.

[96] For these reasons, this Court is satisfied that a declaration of invalidity coupled with an interim reading in is an appropriate and constitutionally compliant remedy in this case. It respects the separation of powers by intervening only to the extent necessary to cure the identified defect, while giving effective relief to the class of persons whose rights have been infringed. It is, in the language of section 172(1)(b), a just and equitable response to the inconsistency between section 17(6) and the Constitution.

## **COSTS**

[97] The Applicant has successfully vindicated constitutional rights.

Following the principle in *Biowatch Trust v Registrar, Genetic Resources*, the Respondents must pay the costs.

## **ORDER**

In the result, the following order is made:

1. The proviso to Section 17(6) of the Road Accident Fund Act 56 of 1996 is declared unconstitutional and invalid to the extent that it limits the power of the Road Accident Fund to make interim payments only to costs that have "already been incurred", thereby unfairly discriminating against indigent claimants who are financially unable to incur such costs.
2. The legislature is afforded 24 months to rectify Section 17(6) so that the section will be constitutionally compliant.
3. The Declaration of Invalidity in paragraph one is suspended for the 24-month period mentioned in paragraph 2 above.
4. To remedy the invalidity during the period mentioned in paragraph 3 above, Section 17(6) of the Road Accident Fund Act 56 of 1996 is to be read as follows (the reading-in is indicated in bold):

*"The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in*

*respect of medical costs, loss of income and loss of support: Provided that the Fund or such agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered, **unless the third party is indigent and the costs constitute necessary medical expenses which the third party is financially unable to incur or sustain without an interim payment.**"*

5. The orders in paragraphs 1 - 4 are referred to the Constitutional Court for confirmation in terms of Section 172(2)(a) of the Constitution.
6. The First and Second Respondents the Applicant is ordered to pay the costs of the Respondents, and the costs of counsel shall be taxed on scale C, as is contemplated in Rule 67A(3)(a), including the costs of two counsel where employed.



G J DIAMOND

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

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DATE OF HEARING: 23 JULY 2025.

DATE OF JUDGMENT: 19 JANUARY 2026.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 19 JANUARY 2026.

POLOKWANE HIGH COURT