



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 8742/2014

In the matter between:

ADVOCATE SAALEHA MOOLA N.O.

As curator ad litem for GUGU BUYISIWE PRECIOUS THABETHE PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

ORDER

The following order is granted:

1. The special plea of prescription is upheld.
 2. Each party shall bear its own costs.
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JUDGMENT

Sibiya J

[1] This matter was set down for one day on 8 June 2026 and I was advised that the only issue for determination on that day was the special plea of prescription. The special plea was contained in a notice to amend dated 5 June 2026 and the plaintiff indicated that it would not be objecting to the proposed amendment and that it could be effected forthwith.

[2] The plaintiff further indicated that it would not be filing a replication to deal with the special plea and that I should determine the special plea on the papers as they stood. This was the agreement in chambers and the basis on which I agreed to hear the argument on the special plea.

[3] The defendant's special plea is framed as follows:

‘1.

The Plaintiff's claim for compensation arises from the alleged negligent driving of a motor vehicle where the identity of neither the driver nor the owner has been established. The Plaintiff sues in her personal capacity.

2.

The Plaintiff's claim is accordingly brought under Section 17(1)(b) of the Road Accident Fund Act No. 56 of 1996 ('the Act'), as amended and the regulations promulgated under section 26 of the Act.

3.

In terms of Regulations 2(2) of 2008, of the Act, a claim for compensation referred to in section 17(1)(b) of the Act shall be sent or delivered to the Fund in accordance with the provisions of section 24 of the Act, within two years from the date upon which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything contrary in any law.

4.

The Plaintiff's claim arose on 1 July 2009, when it is alleged that Plaintiff was involved in a motor vehicle accident with an unidentified vehicle at or near the R103 near Colenso, KwaZulu-Natal.

5.

Accordingly Plaintiff was obliged to send or deliver her claim for compensation on the prescribed form to the Defendant on or before 1 July 2011.

6.

The Plaintiff sent her claim form to the Defendant on 28 June 2012 which was received by the Defendant on 29 June 2012.

7.

In terms of Section 17(1)(b) read with regulation 2(2) of 2008 of the Act, the Plaintiff's claim is therefore deemed to have prescribed and Plaintiff's claim is therefore unenforceable against the Defendant.

WHEREFORE Defendant prays that Plaintiff's claim be dismissed with costs.'

[4] The relief sought in the special plea is opposed from the bar. Prior to dealing with such opposition, it is necessary to set out the relevant chronology which is not in dispute.

[5] Ms Gugu Buyisile Precious Thabethe (Ms Thabethe) was involved in an accident with an unidentified vehicle on 1 July 2009. She lodged her claim against the Road Accident Fund (RAF) on 29 June 2012, acting personally (ie she was not represented by a curator or acting under assistance).

[6] On 6 March 2014, the RAF conceded the merits via email, subject to a 10% apportionment being applied against Ms Thabethe. This concession was accepted by Ms Thabethe on the same day. On 24 April 2014, the RAF withdrew the offer in respect of the merits via email from the same claims handler who had communicated the offer a month and a half before.

[7] Summons was issued following such withdrawal, on 24 June 2014, and the matter was defended. In October 2023, an application was launched for the appointment of a curator to act on behalf of Ms Thabethe in these proceedings. In his founding affidavit, Ms Thabethe's husband, Mr Simphiwe Thabethe (Mr Thabethe), was at pains to explain that

'12.1 It is *not my submission that the plaintiff is of unsound mind*. On the contrary, she is able to understand the proceedings to a certain extent. However, because of her persistent and permanent neuro-cognitive deficits, it is in her best interest, in my view, that she be assisted in the prosecution and finalization of this action against The Road Accident Fund.

12.2

13. I therefore digress, that *I shall not be seeking an order declaring the Plaintiff to be of unsound mind and incapable of managing her own affairs*. However, this position may change depending on whether her condition deteriorates further as she gets older and whether she receives the requisite medical treatment and support she needs once her action against the Road Accident Fund is finalized.’ (Own emphasis.)

The application was granted and a curator *ad litem* was appointed to assist Ms Thabethe in the further prosecution of her claim on 15 April 2024.

[8] In opposing the special plea, Mr *Moola* advanced legal argument on behalf of the plaintiff from the bar. The thrust of his argument was that the regulations that the defendant relies on have been declared to be unconstitutional and were set aside by the Gauteng Division of the High Court in 2021 in *Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and Another*.¹ He added that the order of invalidity did not need to be confirmed by the Constitutional Court, as it relates to regulations and not Acts. In support of this submission, he placed reliance on *Mulowayi and Others v Minister of Home Affairs and Another*,² where it was held that:

‘It is trite that declarations of invalidity in respect of regulations are not subject to confirmation by this Court. However, a party can still appeal to this Court against orders of constitutional invalidity concerning regulations.’

[9] Mr *Moola* further placed reliance on the fact that the RAF had conceded liability and was thus precluded from relying on prescription. He submitted that the plaintiff was under curatorship and therefore did not have to comply with reg 2(2), as it did not apply to her in terms of *LPIIF*. It was submitted that there had been no appeal against *LPIIF*.

[10] Ms *Rasool* responded that there was no replication and the plaintiff is thus not entitled to rely on matters falling outside the special plea, such as the concession of the merits, which had in any case been withdrawn prior to the issuing of summons.

¹ *Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and Another* (GP) unreported case no 26286/2020 (21 June 2021) (*LPIIF*).

² *Mulowayi and Others v Minister of Home Affairs and Another* [2019] ZACC 1; 2019 (4) BCLR 496 (CC) para 27; see also *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC) para 13 and *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2023] ZACC 45; 2024 (3) SA 330 (CC) para 26.

[11] I specifically asked the parties if I am precluded from considering the concession of the merits and the acceptance thereof, even though this formed part of the plea which was contained in the same document as the special plea. Mr *Moola* responded that I ought to consider the particulars of claim and the plea in their totality as they stand. Ms *Rasool*, on the other hand, submitted that all the court is called upon to determine is the special plea which stands alone from the plea and to which there is no replication.

[12] While I initially held the view that I was bound to have regard to the concession of the merits, on a proper consideration, it does not form part of the special plea, the content of which is reproduced in paragraph 3 of this judgment. It is relevant, as since the plaintiff did not file a replication, its opposition must be limited to legal argument. To clarify, the issue of the concession of the 'merits' and its subsequent withdrawal after acceptance thereof would ordinarily be dealt with at the determination of the action, and has no bearing on the merits or otherwise of the special plea of prescription. I say this mindful of the provisions of s14 of the Prescription Act 68 of 1969, which provide for the interruption of prescription through the acknowledgment of liability.

[13] Having said that, the law seems to me to be clear. The regulations on which the RAF relies have been found to be unconstitutional and set aside in *LPIIF*, *insofar as they apply to minors and persons under curatorship*. The reason for this was that they unfairly discriminate between minors and persons under curatorship whose claims emanate from unidentified vehicles, as opposed to those whose claims emanate from identified vehicles.

[14] Section 17(1)(b) of the Road Accident Fund Act 56 of 1996 (the Act) provides for compensation in relation to claims where neither the identity of the negligent vehicle nor the driver is known (colloquially referred to as 'unidentified claims'). This section, read with regulation 2(1)(b)³ has been repeatedly found not to be offensive

³ Regulation 2(1)(b) A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the owner nor the driver thereof has been established, shall become prescribed upon the

to the Constitution, as the basis of the differentiation is valid and serves a legitimate government purpose.

[15] It is in reg 2(2) of the Road Accident Fund Regulations, 2008 (the 2008 Regulations) that the differentiation is made which has been found in *LPIIF* to offend against the Constitution. It reads as follows:

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

[16] The ‘differentiation’ is in the form of treating persons with legal disabilities the same as people without such disabilities only in respect of ‘unidentified claims’, while acknowledging the difference when it comes to identified claims. I agree with the reasoning in *LPIIF* that the regulations unfairly discriminate and infringe on the rights of minors and persons under curatorship to be treated equally before the law,⁴ and that they are accordingly unconstitutional. This is because, indeed, ‘minors and persons under curatorship do not have the physical and legal capacity and/or knowledge to lodge claims on their own behalf’.⁵

[17] However, I am not called upon to determine the constitutionality of the 2008 Regulations, and it appears from the argument of Mr *Moola* that I ought to consider myself bound by the declaration of invalidity which was made by the Gauteng Division of the High Court. This creates somewhat of a difficulty, in that ordinarily an order of a single judge of a division of the high court is not binding on another division. I can find nothing that creates a different rule insofar as orders of constitutional invalidity⁶.

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

⁴ *LPIIF* para 49.

⁵ *LPIIF* para 60.

⁶ See *Shabalala v Attorney-General, Transvaal, and Another; Gumede and Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 618E-F, where the court dealt with the issue of *stare decisis* as follows:

‘I see no reason to depart from this salutary principle simply because the point at issue involves an interpretation of the Constitution.’

[18] While I accept that the Constitutional Court has held that it need not confirm orders of constitutional invalidity of regulations, this creates a difficulty such as exists in the present case. The *LPIIF* judgment is not marked 'reportable' or 'of interest to other judges', nor is it available on online case databases like Saflii, LexisNexis or Juta. It appears to underestimate the far-reaching effects of the orders therein resulting in the fact that the invalidity of the regulation is not widely known or available. Although the declaration was made in June 2021, the impugned regulations still read exactly the same as they read under the repealed 1997 regulations, and under the 2008 Regulations. The judgment has simply not been given effect to five years later, and, in fact, it seems nothing has been done consequent to the judgment.

[19] The consequence of the above is that there appears to be uncertainty in what the law is. Regulations to national legislation cannot be unconstitutional in Gauteng and constitutional in KwaZulu-Natal. It is for that reason that I will consider the judgment of a single judge in Gauteng to be binding on me insofar as the declaration of invalidity is concerned. This is also because it seems to me that there can be no reasonable justification for treating people with a legal disability, which is ordinarily freely acknowledged,⁷ and is in fact even acknowledged in the Act⁸ to which the 2008 Regulations relate, as if they do not have such a disability.

[20] I do find it curious that the impugned regulations have read the same since the first regulations in terms of the Act came into operation on 1 May 1997. The differentiation was not introduced in the 2008 Regulations.

See also *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 810H-811D and *Ex parte Minister of Safety and Security and Others: In re S v Walters* 2002 (2) SACR 105 (CC) paras 58-60.

⁷ See in this regard s 13 of the Prescription Act.

⁸ Section 23(2) of the Act specifically contains the following provision in relation to persons involved in accidents where the identity of the driver is known:

'(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against—
(a) a minor;
(b) any person detained as a patient in terms of any mental health legislation; or
(c) a person under curatorship.'

[21] I must also mention that while I accept that a declaration of invalidity of regulations need not be confirmed by the Constitutional Court, the court in *LPIIF* went further in paragraph 88(3) of its order and held:

‘3. It is declared that section 23(2) of the Road Accident Fund Act, 56 of 1996 is to be read as including minors and persons under curatorship who claim in terms of section 17(1)(b) of the Road Accident Fund Act, 56 of 1996.’

In my view, that declaration goes further and impacts the Act itself. I do not align myself with that paragraph of the order in *LPIIF*.

[22] Having clarified the law, the question then becomes whether the declaration of invalidity has retrospective application. This is relevant because when the relevant regulations were set aside on 21 June 2021, Ms Thabethe was not under curatorship, as a curator *ad litem* was only appointed on 15 April 2024 to assist her. Also, they had not been set aside when she had the accident or lodged the claim.

[23] I will return to whether Ms Thabethe is indeed ‘a person under curatorship’, in the true meaning of the concept, later in this judgment. However, I am mindful that her husband made it clear in his application for the appointment of a curator *ad litem* that she is not of unsound mind or incapable of handling her own affairs. Indeed, she had acted without assistance from the time she lodged the claim until 2024.

[24] In considering whether the declaration of invalidity is retrospective in its application, I started by looking at the wording of *LPIIF*. The retrospectivity issue was not dealt with at all in the body of the judgment, and the court determined that ‘a suspension of the declaration of invalidity will not be just and equitable’.⁹

[25] Upon realising the relative importance of this determination and that it was addressed only superficially at the trial, I then sent an email to the parties directing them to make comprehensive submissions on the question of the retrospective applicability of the declaration of invalidity. They were given until noon on 24 June 2026 to do so. Only the plaintiff provided written submissions and at 14H30 on 26 June 2026, an email was sent to both parties confirming that no submissions had been received from the defendant.

⁹ *LPIIF* para 87.

[26] The plaintiff contends that the declaration of invalidity is retrospective on the basis that the court did not limit the retrospective effect of invalidity or suspend it, as empowered by s 172(1)(b) of the Constitution. Reliance is also placed on *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others*,¹⁰ where the Constitutional Court held that:

‘In summary, the consequences that ordinarily flow from the declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated. That is, the order will have immediate retrospective effect. This is the default position.’

[27] In *President, RSA and Another v Women's Legal Centre Trust and Others*,¹¹ the Supreme Court of Appeal held that it is up to parliament to determine if and to what extent the legislation it enacts should apply retrospectively. When a ‘court makes a final declaration of constitutional invalidity, without suspension thereof, should it consider the consequences of the declaration and whether its retrospective effect should be ameliorated on just and equitable grounds’.¹²

[28] In *Cape Town City v Independent Outdoor Media (Pty) Ltd and Others*,¹³ the court, dealing with a provision in the National Building Regulations and Building Standards Act 103 of 1977, confirmed that the invalidity existed from the time the Constitution came into effect. It urged that the courts must have regard to the consequences of unlimited retrospective effect.

[29] Having exhausted this exercise, it is my view that, indeed, the declaration of invalidity has retrospective application. This is so because the effect of retrospective application would be to protect the rights of vulnerable minors and persons under curatorship. However, this finding is not dispositive of the issue, because, ultimately, each case is decided on its own facts.

¹⁰ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others* [2015] ZACC 12; 2015 (5) SA 370 (CC) para 20.

¹¹ *President, RSA and Another v Women's Legal Centre Trust and Others* [2020] ZASCA 177; 2021 (2) SA 381 (SCA) para 48.

¹² *Ibid.*

¹³ *Cape Town City v Independent Outdoor Media (Pty) Ltd and Others* [2023] ZACC 17; 2024 (1) SA 309 (CC) paras 59-62.

[30] The reason the regulations were set aside, insofar as they related to minors and people under curatorship, was their failure to acknowledge that minors and persons under curatorship do not have the physical and legal capacity to lodge claims on their own behalf. It was to address an impossibility of compliance. It is those people that the declaration protects.

[31] Returning now to the issue of whether Ms Thabethe was indeed a person under curatorship, the facts in the present case are that Ms Thabethe acted for herself from the date of the accident in July 2009, to when the claim was lodged in 2012, until 2024 when she was placed under curatorship, more than 10 years after the lodgement of the claim. She did not lack the physical or legal capacity to lodge or indeed prosecute her claim, as confirmed by her husband. She cannot, in my view, claim the protection of the declaration of invalidity.

[32] Therefore, while, indeed, the regulations were unconstitutional from inception, this only applies to persons who could not have lodged their claims timeously because of the legal impediment. The plaintiff's submission that 'the regulations have been set aside' and that the special plea therefore should be dismissed appears to miss the point that the declaration only applies to a limited group of people.

[33] In summary, I find that reg 2(1)(b) and 2(2) have been declared unconstitutional and set aside *to the extent that they relate to minors and persons under curatorship*. This declaration applies retrospectively and such regulations were unconstitutional from the date on which they came into effect in 2008, *to the extent that they relate to minors and persons under curatorship*.

[34] At the time of the accident, and at the time of the lodgement of the claim and for 10 years thereafter, Ms Thabethe was not a minor or a person under curatorship. Moreover, she did lodge the claim and did do all things necessary to ensure that the claim was prosecuted. Even when a curator *ad litem* was appointed to assist her, her husband made it clear that she is 'capable'. It is therefore my conclusion that the declaration of invalidity does not apply to Ms Thabethe and her claim.

[35] It is unfortunate that knowing the far-reaching consequences of upholding the special plea of prescription, the plaintiff's representatives elected to argue it from the bar and without filing a replication.

[36] For the sake of completeness, regarding the issue of the concession of the 'merits' which was accepted, it is my view that the claim, having prescribed by virtue of not having been lodged timeously in terms of the Act and the 2008 Regulations, could not be resuscitated by conceding the merits after the fact¹⁴. Although not strictly before me, I deemed it prudent to also address this argument, given the impact of the conclusion I have reached in relation to the special plea.

[37] Insofar as the issue of costs is concerned, I have borne in mind that the amendment which sought to raise the special plea was brought at the eleventh hour by the defendant, and that the plaintiff allowed the amendment and opposed the special plea from the bar. I do not agree with Ms *Rasool* that the defendant is entitled to costs in that context. In my view, despite the success of the defendant, it would not be just to saddle the plaintiff with costs.

[38] In the result, having considered the special plea and having heard counsel, I grant the following order:

1. The special plea of prescription is upheld.
2. Each party shall bear its own costs.

SIBIYA J

¹⁴ In *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) para 20 the Constitutional Court held that:

'The RAF Act furthermore makes no provision for condonation of a late claim, either based on the ignorance of the claimant, or for any other reason.'

Appearances

Counsel for the Plaintiff:		Mr F Moola SC
Instructed by	:	Chetty Asmall & Maharaj Attorneys
Reference	:	KC/MHS/jd/RT3
Counsel for Defendant	:	Ms Z Rasool
Instructed by	:	State Attorney KwaZulu-Natal
Reference	:	Ms P Chetty/R/LINK 3197541
Date of Hearing	:	08 June 2026
Date of Judgment	:	07 July 2026