CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 57/07
[2008] ZACC 17

MARIUS KRUGER	Applicant
versus	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF TRANSPORT	Second Respondent
THE ROAD ACCIDENT FUND	Third Respondent

Heard on : 19 February 2008

Decided on : 2 October 2008

JUDGMENT

SKWEYIYA J:

Introduction

[1] The applicant, Mr Kruger, an attorney, has approached this Court to secure confirmation of the Pretoria High Court's order declaring a proclamation issued by the President on 11 July 2006 and published in Government Gazette No 29041 to be "null and void and of no force and effect." Because the issuing of the Proclamation

concerned the "conduct of the President",[1] the High Court referred its order to this Court for confirmation in terms of section 172(2)(a) of the Constitution.[2]

[2] We also have before us an application by the Road Accident Fund (the Fund) which was established as a juristic person by section 2(1) of the Road Accident Fund Act 56 of 1996 (the Principal Act).[3] The object of the Fund is payment of compensation in accordance with the provisions of the Principal Act.[4] The Fund applies for direct access to this Court to obtain certainty about the status of another Proclamation which was issued by the President on 28 July 2006 and published in Government Gazette No 29086. It seeks an explicit order on its effect in this regard because of what it refers to as the uncertainty created by the order made in the Pretoria High Court. More particularly, it seeks an order declaring that the Second Proclamation lawfully brought sections 1 to 5 of the Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act) into force and operation on 31 July 2006. The Fund's legal representatives were given leave to file written submissions in this matter and were also allowed to present oral argument in this Court.

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[1] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[2] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[3] Section 2(1) of the Principal Act provides: "There is hereby established a juristic person to be known as the Road Accident Fund."

[4] Section 3 of the Principal Act.

[3] The matter concerns the constitutional validity of the two Proclamations, both of which were issued by the President with the intention of bringing into operation certain sections of the Amendment Act which would result in the amendment of a number of sections of the Principal Act.

[4] The one, Proclamation R27, was published in the Government Gazette on 19 July 2006 (the First Proclamation) and the other, Proclamation R32, was published in the Government Gazette on 31 July 2006 (the Second Proclamation). They both bear the signatures of the President and the Minister of Transport, Mr JT Radebe, as required by section 101 of the Constitution.

[5] Section 101 of the Constitution, which deals with decisions by members of the executive arm of government, provides that:

> "(1) A decision by the President must be in writing if it—
>
> (i) is taken in terms of legislation; or
>
> (ii) has legal consequences.
>
> (2) A written decision by the President must be counter-signed by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.
>
> (3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.
>
> (4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
>
> (i) tabled in Parliament; and
>
> (ii) approved by Parliament."

[6] The publishing of proclamations in the Government Gazette facilitates easy and quick access by the public to formal orders and decisions by legal authorities. In the present matter such authority is the President who is the head of State and head of the National Executive. The authority is vested in him and he exercises such authority with other members of Cabinet.[5]

[7] For ease of reference the full text of each of the two Proclamations, as they appear in the respective Government Gazettes, is set out below:

[5] Section 85 of the Constitution, which deals with the executive authority of the Republic, provides that:

> "(1) The executive authority of the Republic is vested in the President.
>
> (2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
> (b) developing and implementing national policy;
> (c) co-ordinating the functions of state departments and administrations;
> (d) preparing and initiating legislation; and
> (e) performing any other executive function provided for in the Constitution or in national legislation."

First Proclamation

PROCLAMATION

by the

President of the Republic of South Africa

No. R.27, 2006

ROAD ACCIDENT FUND AMENDMENT ACT, 2005 (ACT No. 19 OF 2005): PROCLAMATION WITH REGARD TO THE COMMENCEMENT OF SECTIONS 4, 6, 10, 11 and 12

In terms of section 13 of the Road Accident Fund Amendment Act, 2005 (Act No. 19 of 2005), I hereby determine **31 July 2006** as the date on which sections 4, 6, 10, 11 and 12 will come in operation.

Given under my Hand and Seal of the Republic of South Africa at Pretoria, on this Eleventh day of July, Two Thousand and Six.

T.M. MBEKI
President

By Order of the President-in-Cabinet:

J.T. RADEBE
Minister of the Cabinet

Second Proclamation

PROCLAMATION

by the

President of the Republic of South Africa

No. R.32, 2006

ROAD ACCIDENT FUND AMENDMENT ACT, 2005 (ACT NO. 19 OF 2005). PROCLAMATION WITH REGARD TO THE COMMENCEMENT OF CERTAIN SECTIONS.

In terms of section 13 of the Road Accident Fund Amendment Act, 2005 (Act No. 19 of 2005), I hereby, amend Proclamation No. R. 27 of 2006, by the substitution for the reference to section 4, 6, 10, 11 and 12 in the said Proclamation for the reference to section 1, 2, 3, 4 and 5 of the Amendment Act, 2005 (Act No. 19 of 2005).

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this 28th day of July Two Thousand and Six.

T.M MBEKI
President

By order of the President-in-Cabinet:

J.T.RADEBE
Minister of the Cabinet

[8] The two Proclamations were issued and published within days of each other by the President, who was competent in terms of section 13 of the Amendment Act[6] to determine by proclamation in the Government Gazette the dates on which the provisions of the Amendment Act would come into operation.

[9] It is permissible under section 81 of the Constitution[7] for the legislature to authorise the President to fix the date on which an Act of Parliament is to come into operation. Furthermore, different dates may be fixed in respect of different provisions of an Act of Parliament which authorises a member of the executive to implement legislation.[8]

[10] In *Ex Parte Minister of Safety and Security and Others: In re: S v Walters and Another*[9] Kriegler J said:

> "The national legislative process is concluded by section 81, which reads as follows: 'A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.' For present purposes two features of the section should be noted. First, that it requires prompt publication of the Bill once it has become an Act and,

[6] Section 13 of the Amendment Act reads as follows:

> "This Act is called the Road Accident Fund Amendment Act, 2005, and takes effect on a date determined by the President by proclamation in the Gazette."

[7] Section 81 of the Constitution provides that:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[8] Section 13(3) of the Interpretation Act 33 of 1957 provides that:

> "If any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a Province by proclamation in the Gazette, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act."

[9] [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC).

> secondly, that there are two possible inception dates for such an Act; either upon its publication or on another date determined in the Act itself or in a manner it prescribes. Parliament is thus afforded the power by section 81 of the Constitution not to fix the date of inception of an enactment itself but to prescribe in such enactment how such date is to be determined.
>
> Although the Constitution does not expressly say so, it is clear that this power vested in Parliament to include in an enactment terms for determining its date of inception, includes the power to prescribe that such date is to be determined by the President. The language of section 81 is wide enough to allow such a procedure and there is no objection in principle to a Legislature, in the exercise of its legislative powers, leaving the determination of an ancillary feature such as an inception date to an appropriate person. It is therefore recognised legislative practice to use this useful mechanism to achieve proper timing for the commencement of new statutory provisions. Accordingly this Court has twice accepted the existence and constitutional propriety of the practice without comment."[10] (Footnotes omitted.)

[11] In *Pharmaceutical Manufacturers Association of SA and Another: In re: Ex Parte President of the Republic of South Africa and Others*,[11] Chaskalson P referred to the power of the President to bring law into operation as a power which lies between the law-making and the administrative process. This exercise of public power, it was held, has to be carried out lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power.[12] In *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000*[13] Langa DP reiterated this and went on to say that the functionary best placed to make such determination is

[10] Id at para 70-1.

[11] [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[12] Id at para 79.

[13] [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC).

ordinarily the head of the executive responsible for the implementation of the legislation.[14]

[12] As indicated above, the First and Second Proclamations bear the names of the President and the Minister of Cabinet responsible for the implementation of both the Principal Act and the Amendment Act. But it is the President who has to determine when the provisions of the Amendment Act will come into effect.

[13] The power the President has under section 13 of the Amendment Act, though limited, is an important one. It provides an important link between the law-making and the administrative processes and has to be exercised lawfully and in compliance with the Constitution.[15] The Proclamations were intended to be a step in the legislative process. Being Proclamations bringing a statute into force, they had to be couched in clear and unambiguous language.

[14] It is accepted by all the parties that the Second Proclamation was issued to correct a bona fide error which had been made in the First Proclamation and that the President had become aware of that error before 31 July 2006, the date on which the sections mentioned in that Proclamation were to come into operation. The First Proclamation reflected sections 4, 6, 10, 11 and 12 of the Amendment Act as the sections which were to come into operation on 31 July 2006, instead of sections 1, 2, 3, 4 and 5 of the Amendment Act.

[14] Id at para 23.

[15] *Pharmaceutical Manufacturers* above n 11 at para 79.

[15] It should however be noted that Mr Kruger does not directly attack the validity of the Second Proclamation in his application to this Court and does not seek an order that it be declared invalid, hence the application for direct access to this Court by the Fund.

The issues at hand

[16] The issues that fall to be determined are:

(a) Whether this Court should confirm the High Court's declaration of invalidity in respect of the First Proclamation which, it is common cause, refers to the incorrect provisions of the Principal Act;

(b) the status of the Second Proclamation; and

(c) the consequences of a declaration of validity or invalidity in respect of the Second Proclamation.

[17] Before I deal with these issues, I shall first deal with three other matters that arise in this case, namely: the applicant's application for condonation, the application for direct access to this Court by the Fund and the question of Mr Kruger's locus standi in these proceedings.

Condonation

[18] The applicant applied for condonation for the late filing of the record. The record was filed only one court day late. The applicant offers two reasons for this:

first, there was a delay in the preparation of the record because the High Court file was lost and second, the courier service employed by the applicant mislaid the documents and failed to send them to Johannesburg timeously.

[19] The circumstances as presented by the applicant coupled with the lack of prejudice suffered by any of the respondents by the late filing of the full record are sufficient to grant the condonation.

Standing of the applicant

[20] The first and second respondents denied that Mr Kruger had standing to bring the application in the High Court. They argued that he had neither a direct nor a substantial interest in the litigation. This challenge was not pursued in this Court, correctly so in my view.

[21] Section 38 of the Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[22] This provision introduces a radical departure from the common law in relation to standing.[16] It expands the list of persons who may approach a court in cases where there is an allegation that a right in the Bill of Rights has been infringed or threatened to include anyone acting in the public interest or on behalf of another person who cannot act in their own interest.[17]

[23] In *Ferreira*[18] O'Regan J explained why a generous and expanded approach to standing is necessary in constitutional litigation. She said:

> "Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation."[19] (Footnotes omitted.)

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[16] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 14. See also para 17.

[17] Above [21].

[18] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[19] Id at para 229.

Section 38, however, is not of direct application in this case as it does not concern a challenge based on a right in chapter 2 of the Constitution. Nevertheless, in my view, we should adopt a generous approach to standing in this case. In so doing, I am mindful of the fact that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. Such an approach to standing will facilitate the protection of the Constitution.

[24] Mr Kruger asserts locus standi on two grounds: a direct and personal interest and as a person acting in the public interest.[20] Although Mr Kruger may not have established standing on either basis under the restricted rules of standing operative at common law, I am persuaded that an expanded understanding of what constitutes a direct and personal interest should be adopted in this case.

[25] As an attorney in a specialist personal injury legal firm who works regularly in this field, Mr Kruger has a direct and professional interest in the validity of the Proclamations. A legal practitioner is an officer of the court. Where the practitioner can establish both that a proclamation is of direct and central importance to the field in which he or she operates, and that it is in the interests of the administration of justice that the validity of that proclamation be determined by a court, that practitioner may approach a court to challenge the validity of such a proclamation. In this case, Mr Kruger has shown that he is a personal injury attorney and that the validity of the

[20] Above [21].

Proclamations is of central importance to his field of practice. Moreover, he has established that significant legal uncertainty has arisen because of the contents of the First Proclamation and the publication of the Second Proclamation. The effect of this uncertainty is clearly adverse to the proper administration of justice. A personal injury attorney must be able to understand and engage with the legislative scheme on which he or she and his or her clients rely in order to seek compensation. The uncertainty created by the issue of the two Proclamations and their effect on Mr Kruger's ability to manage his clients' affairs are reason enough to grant standing to the applicant.

[26] In recognising the applicant's standing in this case, I emphasise that it arises because of the need for legal certainty and the administration of justice. Legal practitioners must not assume that they will be allowed to bring applications to this Court for a declaration of invalidity based purely on financial self-interest or in circumstances where they cannot show that it will be in the interest of the administration of justice that they do so.

[27] It is not necessary, given this conclusion, to decide whether a litigant, when raising a constitutional challenge not based on chapter 2 of the Constitution is entitled to act in the public interest. That question can stand over for another day.

The Fund's application for direct access

[28] The Fund applies for direct access to this Court to obtain certainty about the status of the Second Proclamation, and more particularly, whether it lawfully brought sections 1 to 5 of the Amendment Act into operation on 31 July 2006.

[29] The application is governed by Rule 18 of this Court's Rules,[21] read with section 167(6)(a) of the Constitution.[22] The legal principles that are applicable in the granting of an application for direct access to this Court are fully set out in the judgment of Ngcobo J in *Zondi*.[23] This Court has discretion whether to grant direct access. It will only do so in exceptional cases and when it is in the interests of justice in the light of the facts of each case.[24] There are compelling reasons why the application by the Fund for direct access to this Court should be granted.

[30] First, the Fund is a juristic person established by the Principal Act.[25] The Act's purpose is to provide to victims of motor vehicle accidents the "greatest possible protection".[26] The Fund's priority in bringing the application is to defend the validity

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[21] Rule 18(1) states:

> "An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief."

[22] Section 167(6)(a) reads:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court".

[23] *Zondi v MEC, Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2006 (3) SA 1 (CC); 2005 (4) BCLR 347 (CC) at paras 12-5.

[24] *Concerned Land Claimants' Organisation (Port Elizabeth) v Port Elizabeth Land and Community Restoration Association and Others* [2006] ZACC 14; 2007 (2) SA 531 (CC); 2007 (2) BCLR 111 (CC) at paras 18-9.

[25] Above n 3.

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

of the Second Proclamation and, if it were held to be invalid, to obtain certainty about its status.

[31] Secondly, the victims of accidents are obviously prejudiced by the uncertainty surrounding the status of the provisions of the Amendment Act. It is not disputed that the Fund, its Board, its Chief Executive Officer (CEO) and its entire staff have been operating on the understanding that sections 1 to 5 of the Amendment Act have been in force since 31 July 2006. It is thus in the interest of all that certainty be achieved as soon as possible.

[32] Thirdly, the First and Second Proclamations are closely related to one another in time and in purpose. They were issued in the same month and year and were both published to make it public that certain provisions of the Amendment Act would be coming into operation on a specified date.

[33] Finally, the application for direct access raises issues closely related to those already before this Court in the confirmation proceedings. It cannot be in the interests of justice to require the Fund to begin fresh proceedings in the High Court seeking the declaratory order that it seeks by way of direct application in this Court.

[34] In *Fourie*[27] this Court granted direct access to an applicant who challenged the validity of a statute that was not before the Court because—

> "[t]he direct access application fills a gap in the Fourie case referred to by the High Court, this Court and the SCA. The common law in relation to marriage has been overtaken by statute in a great number of respects. To deal with it as if the Marriage Act did not exist would be highly artificial and abstract. The overlap between the issues raised and their strong interconnectedness requires them to be dealt with in an integrated and comprehensive fashion. There would be grave disadvantages to all concerned if the issues raised were to be decided in a piecemeal way."[28]

The circumstances in the application for direct access by the Fund are exceptional. It is in the interests of justice that the validity of the two Proclamations be considered together.

The legislative background

[35] A brief analysis of the Principal Act, the Amendment Act and the two Proclamations is necessary before I deal with the issue of validity.

The Road Accident Fund Act 56 of 1996 (the Principal Act)

[36] The Principal Act provides for the establishment of the Road Accident Fund.[29] Sections 2 to 16 of this Act are, in the main, administrative in that they create the machinery by which the Fund is administered. The Fund is controlled, managed

[27] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

[28] Id at para 42.

[29] Above n 3.

and administered by its Board, CEO and staff. Broadly, sections 17 to 25 of the Principal Act are substantive in the sense that they prescribe the rules according to which the victims of motor vehicle accidents are compensated.

The Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act)

[37] The Amendment Act made wide-ranging amendments to both the administrative parts (sections 2 to 16) and substantive parts (sections 17 to 25) of the Principal Act. As noted above,[30] section 13 of the Amendment Act, read with section 13(3) of the Interpretation Act 33 of 1957 permits the President to stagger the implementation of the amendments provided for in the Amendment Act, by putting them into operation on different dates.

The two proclamations

[38] A reading of the two Proclamations suggests, and this was common cause between the parties, that the President intended to stagger the implementation of the Amendment Act by first putting into effect the amendments to the administrative provisions of the Principal Act contained in sections 1 to 5 of the Amendment Act. The President mistakenly referred to sections 4, 6, 10, 11 and 12 of the Amendment Act: sections of the Principal Act which were to be amended by sections 1 to 5 of the Amendment Act.

[30] Above [8]-[9].

[39] The relevant parts of sections 1 to 5 of the Amendment Act as published in the Government Gazette read as follows:

> "**Amendment of section 4 of Act 56 of 1996, as amended by section 1 of Act 15 of 2001**
>
> **1.** Section 4 of the principal Act is hereby amended—
>
> . . . .
>
> **Amendment of section 6 of Act 56 of 1996**
>
> **2.** Section 6 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection . . . .
>
> **Amendment of section 10 of Act 56 of 1996, as amended by section 1 of Act 43 of 2002**
>
> **3.** Section 10 of the principal Act is hereby amended—
>
> . . . .
>
> **Amendment of section 11 of Act 56 of 1996**
>
> **4.** Section 11 of the principal Act is hereby amended
>
> . . . .
>
> **Amendment of section 12 of Act 56 of 1996**
>
> **5.** Section 12 of the principal Act is hereby amended—
>
> . . . .".

[40] Each of the five sections in the Amendment Act has a heading in bold letters which identifies the section of the Principal Act which is to be amended. In the next line, and in line with where each of the five section numbers of the Amendment Act appear, the section of the Principal Act which appears in the heading appears once, more, albeit in less bold letters. There is nothing which draws the attention of the reader to the numbers which identify the five sections.

[41] A proper determination of the validity of the two Proclamations requires a brief analysis of the relevant sections of the Amendment Act and of the Principal Act which are listed in the two Proclamations.

Section 4

[42] Section 1 of the Amendment Act added two new subsections to the Principal Act, namely, sections 4(4) and 4(2)(i) of the Principal Act. The new subsections provide that the Fund may enter into agreements with other parties including other organs of state, for purposes of the implementation of the Principal Act.

Section 6

[43] Section 2 of the Amendment Act amended section 6(1) of the Principal Act by shifting the Fund's financial year-end from 30 April to 31 March of every year.

Section 10

[44] Section 3 of the Amendment Act amended section 10 of the Principal Act which concerns the constitution and operation of the Board of the Fund.

Sections 11 and 12

[45] Sections 4 and 5 of the Amendment Act deleted section 11(1)(a)(iv) of the Principal Act (which related to matters on which the Board of the Fund could make recommendations to the Minister) and amended section 12(1)(a) and (b) of the

Principal Act. This latter section relates to the qualification, experience and appointment of the CEO of the Fund.

[46] The issuing of the First Proclamation would have resulted in its coming into operation on 31 July 2006, importing an arbitrary selection of one of the administrative amendments (section 4 of the Principal Act) and four of the substantive amendments (sections 6, 10, 11 and 12 of the Principal Act) made by the Amendment Act.

[47] In the Second Proclamation, published on 31 July 2006, the President purports to "amend" the First Proclamation by amending the incorrect reference to sections 4, 6, 10, 11 and 12 of the Amendment Act with a reference to sections 1, 2, 3, 4 and 5 of the Amendment Act.

[48] In these circumstances, the mistake made by the President is self-evident. He made a genuine and bona fide mistake. It is common cause that he intended the First Proclamation to bring the administrative amendments made by sections 1 to 5 of the Amendment Act into operation from 31 July 2006. He failed to do so only because the First Proclamation incorrectly identified those provisions. It is logical that they should be the first amended provisions of the Principal Act to be brought into operation and it is reasonable to infer that that was the intention of the Minister of Transport who is responsible for the administration and implementation of the

Principal Act. The provisions could have been brought into operation immediately as they were capable of being implemented without much difficulty.

Validity of the First Proclamation

[49] All parties accept the contention that the First Proclamation was objectively irrational because the provisions of the Amendment Act (sections 4, 6, 10, 11 and 12) which it purported to put into operation were an arbitrary selection on account of a mistake by the President.

[50] This acceptance is well-founded. Section 4, listed in both the First and Second Proclamations, belongs to the cluster of the administrative amendments which are listed in the Second Proclamation. The effect of the First Proclamation, if taken literally, was to put into operation an arbitrary selection of one of the administrative amendments (section 4) and four of the substantive amendments (sections 6, 10, 11 and 12) made by the Amendment Act. Furthermore, it would have made no sense if the President had mentioned that he had listed section 4 in the First Proclamation as the only provision of the Amendment Act which would come into operation on 31 July 2006. Section 4 by itself would achieve little and it would be arbitrary and irrational to have it as the only section capable of implementation on the face of the First Proclamation.

[51] The other sections listed in the First Proclamation deal with varied topics:

(a) section 6 introduces a new section which substitutes section 17 of the Principal Act. It deals with the liability of the Fund to the victims of motor vehicle accidents;[31]

(b) section 10 deals with the amendment of a section of the Principal Act relating to the period of prescription of claims by victims in motor vehicle accidents;[32]

(c) section 11 concerns regulations promulgated under the Principal Act; [33] and

(d) section 12 is a transitional provision.[34]

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[31] Section 6 provides:

> "The following section is hereby substituted for section 17 of the principal Act:
>
> 'Liability of Fund and agents
>
> 17(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; and
>
> (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
>
> be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself 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: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.'"

[32] Section 10 provides that:

> "Section 23 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:
>
> '(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.'"

[33] Section 11 provides that:

> "The following section is hereby substituted for section 26 of the principal Act:
>
> '26(1) The Minister may make regulations regarding any matter that shall or may be prescribed in terms of this Act or which it is necessary or expedient to prescribe in order to achieve or promote the object of this Act.'"

[34] Section 12 provides that:

[52] It follows that the First Proclamation is objectively irrational because the provisions of the Amendment Act which it purported to put into operation were an arbitrary selection. Under the doctrine of objective invalidity, the First Proclamation should be regarded as having been a nullity from the outset.[35] It was invalid ab initio and therefore has no effect in law.[36] Furthermore, if the First Proclamation were to remain in effect, it would create a number of legal and practical problems.

[53] First, it would not be possible to determine what injuries entitle a third party to claim compensation for general damages, for the following reasons:

(a) section 6 of the Amendment Act substitutes section 17 of the Principal Act. Section 17(1) as amended provides that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a "serious injury";

(b) section 11 of the Amendment Act substitutes section 26 of the Principal Act. It authorises the Minister to make regulations regarding "injuries which, for the purposes of section 17, are not regarded as serious injuries"; and

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> "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."

[35] *Ferreira v Levin* above n 18 at paras 25-30. See also *Gory v Kolver NO and Others (Starke and Others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 39; *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 20; *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC) at paras 12-4; *Prince v President, Cape Law Society* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at paras 36-7.

[36] *Ferreira v Levin* above n 18 at para 28.

(c) regulations have not been made determining what constitutes a "serious injury".

The result is that it is impossible for an attorney to advise a client as to whether he or she may claim compensation for non-pecuniary loss as a consequence of injuries suffered in an accident.

[54] Second, it is not possible to determine at what rate the medical expenses will be reimbursed by the Fund:

(a) section 6 of the Amendment Act introduces section 17(4B) into the Principal Act. This provides that the liability of the Fund for medical expenses shall be limited to a tariff prescribed by legislation and regulation.

(b) no such tariff has been prescribed.

The result is that it is impossible for an attorney to advise a client as to what medical expenses he or she may claim from the Fund. It may even be that no expenses may be claimed.

Validity of the Second Proclamation

[55] Both the Minister and the Fund asked that this Court find and declare that the Second Proclamation lawfully brought the administrative amendments in sections 1 to 5 of the Amendment Act into operation on 31 July 2006.

[56] Counsel for the Minister and the Fund argued that, had the President used the words 'I hereby re-proclaim' instead of 'I hereby amend' in the Second Proclamation,

the validity of the Second Proclamation would not be in dispute as that could have been regarded as one continuous act by the President for the following reasons.

[57] First, it would be patent that the President was rectifying a mistake he had made in the already published First Proclamation and that the 're-proclamation' was issued to give effect to his true intention of bringing into operation the correct sections of the Amendment Act.

[58] The second is that he would bring into operation the sections which he had initially intended to. This would not be ultra vires in terms of section 13 of the Amendment Act.

[59] Third, this would not do harm to nor prejudice anyone as it would result in the bringing into operation of those sections of the Amendment Act on the fixed date of 31 July 2006, which had been the intention from the beginning.

The powers of the President and the rule of law

[60] Counsel for the applicant urged that in order for the President to correct an error made in an issued proclamation, recourse would have to be had to a court of law or parliament. It would not, so the argument went, fall within the powers of the President to correct such an error without having the invalid proclamation set aside. In my view, this question needs to be answered in the light of the provisions of section

13 of the Amendment Act,[37] read with section 81 of the Constitution.[38] The power conferred by these provisions is a narrow one: to issue a proclamation determining the date upon which legislation will be brought into force. The question is whether, properly construed, those provisions empower the President to withdraw a proclamation issued in error, if the withdrawal is done before the relevant legislation comes into force.

[61] In my view, the provisions in question necessarily imply a power to withdraw. To read them otherwise would be to require the President, when seeking to correct an error, to approach this Court to declare invalid a proclamation issued in error even if the proclamation has not yet had any direct legal effect. Where the President has issued a proclamation in error, and this proclamation has yet to come into force, it is appropriate that the power to issue such proclamation includes the power to withdraw it. The power to withdraw accords with the nature of the power to issue and publish proclamations of this sort and the lawful exercise of this power will not be harmful to the rule of law. However, in my view, the President does not have the power to amend a proclamation issued in error where the original proclamation was void from its commencement, as in this case. I cannot see that a nullity can be amended. It can of course be withdrawn as I have reasoned above.

[62] Counsel for the Minister argued that the status of the Second Proclamation be judged on its substance and not its form. While I support in general the principle that

[37] Above n 6.

[38] Above n 7.

substance should take precedence over form, that principle must yield in appropriate cases to the rule of law.

[63] On the facts of the present case the President could lawfully have withdrawn the First Proclamation once he had realised his mistake as long as he did so in unambiguous terms, and before 31 July 2006. It would impose an undue burden on the President to have required him to apply to court to have the incorrect proclamation set aside even when the proclamation had not yet come into force.

[64] However, that is not what happened here. Instead, the President issued the Second Proclamation in which he purported to "amend" the invalid First Proclamation. The President cannot have the power to amend a nullity as I have said above.[39] Moreover, the Second Proclamation did not withdraw the First Proclamation; nor on its face could the legal position with regard to the Amendment Act be determined. No commencement date is to be found in the text of the Second Proclamation. One has to rely on the doctrine of incorporation by reference and consider the text of the void First Proclamation to give the Second Proclamation meaning. Thus, to ascertain the full ambit of the substance of the Second Proclamation a reader would have to refer to the invalid First Proclamation. In my view, this is undesirable. The Second Proclamation thus lacked clarity and this is inconsistent with the rule of law.[40]

[39] Above [61].

[40] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 108-9.

[65] The power entrusted to the President under section 13 of the Amendment Act had to be carried out lawfully and consistently with the Constitution. Two of the values on which our country is founded are the supremacy of the Constitution and the rule of law.[41] It follows from this that when executive officials are required by law to publish in proclamations decisions taken by them in terms of legislation, and where such decisions will have legal consequences, they should be communicated in clear language so that those who are affected can know what it is that they should do in order to comply with the law.[42]

[66] The public should not have to depend on lawyers to interpret the meaning and import of words in proclamations in order for them to know whether a particular piece of legislation passed by Parliament has taken effect. The issue and publication of the two Proclamations in the present matter was meant to let the public know that specific sections of the Amendment Act would come into force on 31 July 2006 and this meant that there should have been no doubt in the minds of the public as to which sections of the Amendment Act would come into effect.

[67] The doctrine of legality requires that the two Proclamations should neither be vague nor uncertain and this cannot be said to be the case in respect of the Second Proclamation. The President should have, in the circumstances, withdrawn the First Proclamation clearly, expressly and unambiguously in the Second Proclamation.

[41] Section 1(c) of the Constitution.

[42] *Affordable Medicines* above n 40 at para 109.

[68] Accordingly, I conclude that the Second Proclamation is invalid.

Consequences of invalidity

[69] The applicant, the Minister and the Fund concur in the assertion that were it to emerge that the Second Proclamation did not validly bring sections 1 to 5 of the Amendment Act into operation on 31 July 2006, the consequences would be devastating.

[70] The Minister, the Fund, its Board, its CEO, its entire staff, the courts and claimants have since 31 July 2006 operated on the understanding that sections 1 to 5 of the Amendment Act were in force.

[71] The Minister affirms that he, the Board, the Chair, the Vice-Chair and members of the Board and the CEO of the Fund have acted under the amended administrative provisions since 31 July 2006 and says that the implications of a finding that sections 1 to 5 did not come into force on that date would wreak havoc with the control, management and administration of the Fund.

[72] The Fund gives details regarding the complications that would arise in the event of this Court holding that sections 1 to 5 of the Amendment Act did not come into force on 31 July 2006.[43]

[43] The Fund submits that the following complications would arise. First, all of the members of the Fund's Board were appointed by the Minister of Transport on 1 August 2006, in accordance with the procedure prescribed by

[73] In terms of section 172(1)(a) of the Constitution, a law which is inconsistent with the Constitution must be declared invalid. Both the First and Second Proclamations must therefore be declared invalid. This Court has the further power in terms of section 172(1)(b) of the Constitution to make any order that is just and equitable. In my view, given the evidence placed before this Court by the Minister and the Fund, it would be appropriate to ensure that the President issues a new proclamation bringing the correct provisions of the legislation into force with effect from 31 July 2006. Although it is unusual to bring legislation into force so that it has

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the amended version of the Principal Act. If sections 1 to 5 of the Amendment Act did not come into force on 31 July 2006, all the members of the Board would have been unlawfully appointed.

Secondly, and as a consequence of the unlawful appointments of the Board members, all the decisions of the Board taken since 1 August 2006 would arguably be invalid. The Board has adopted no fewer than 93 resolutions since then. They include resolutions approving various strategic plans, quarterly reports and financial statements; revising the Fund's policies; entering into reinsurance agreements with local and international reinsurers; entering into commutation agreements with international reinsurers; entering into insurance contracts to provide cover for directors and officers of the Fund; approving the settlement of a number of different claims in excess of R5 million each; approving the purchase of a new enterprise resource planning solution to the value of approximately R60 million; approving the purchase of a new claims management system to the value of approximately R90 million; approving salary increases for staff at management level and salary agreements with the South African Transport & Allied Workers Union; determining and approving a new executive structure for the Fund; approving contracts for the appointment of a new executive team for the Fund, including executive appointments of the CEO, Chief Financial Officer, Marketing & Communications Executive, Human Resources Executive, Information Technology Executive and Business Development Executive; and approving amendments to the Fund's delegation of authority structure.

Thirdly, if sections 1 to 5 of the Amendment Act did not come into force on 31 July 2006, it would also raise significant doubt over decisions taken by the Fund's executives since that date. All of the present incumbents, save for the CEO, were appointed by the Board subsequent to 31 July 2006. If the Board itself was not lawfully constituted, then arguably all of these appointments were invalid, as were all decisions made by such appointees.

Fourthly, the delegation of authority under which all of the Fund's executives acted (including the CEO) would arguably be invalid as these delegations were adopted by the Board after 31 July 2006. This is particularly concerning in respect of decisions taken by the CEO. The Act, as amended, requires the CEO to be responsible for managing the "day to day affairs of the Fund". This would mean that the CEO has made countless decisions concerning the Fund during the relevant period, including giving approval for all settlements with claims of more than R3 million.

In the circumstances, the Fund submits that if the Second Proclamation did not validly bring sections 1 to 5 of the Amendment Act into force on 31 July 2006, it would cause chaos and severely prejudice the Fund, the claimants who rely on it and other entities which have contracted with it.

The Fund accepts that there may be a way for courts to hold particular resolutions, decisions or contracts to be valid, notwithstanding the apparent illegalities and lack of authority described above. However, it argues that even this process would cause massive uncertainty and flux in the road accident sector. It would cause the Fund great expense in defending each decision challenged on this basis.

retrospective operation, it is entirely appropriate in this case as it will ensure that all the conduct of the Fund which relied on the two Proclamations since 31 July 2006 will not be void on the grounds that the Proclamations themselves have been declared invalid.

[74] The President should be given 30 days to issue the new proclamation. In the meantime, this Court should ensure that no disruption to the administration of the Fund should occur by providing that the Fund shall continue to act as if the relevant sections of the Amendment Act had validly been brought into force and that everything that has been done by the Fund since 31 July 2006 which relied on the provisions of the new legislation shall be deemed not to be invalid on the ground only that the two Proclamations have been declared to be invalid. If the meaning of the Second Proclamation had been clear, the mechanism to achieve this end would have been the suspension of the declaration of invalidity as contemplated by section 172(1)(b)(ii) of the Constitution. However, as the meaning of the Second Proclamation is not clear, I do not think that route can be followed.

[75] Accordingly, it will be just and equitable to order that the Fund may continue to act as if sections 1 to 5 of the Amendment Act were brought into force lawfully on 31 July 2006, and to provide that anything done under those provisions from 31 July 2006 to the date 30 days after the issue of this order shall not be invalid on the ground that the provisions of the Amendment Act were not in fact brought into force on 31 July 2006.

Costs

[76] In this Court all parties sought clarity. It would be remiss to award a costs order which hinders the public's access to the courts in order to gain clarity. It is appropriate to support the costs order made in the High Court because at that stage of the proceedings there was no need for the respondent to oppose the application.

[77] In this Court, the applicant sought an order requiring the first and second respondents to pay the costs of the application. The second respondent argued that it would not be appropriate to make any order for costs against him in this Court because he no longer opposed the application for confirmation.

[78] Although the second respondent did not oppose the application in this Court, costs should still be awarded against him. The opposition at the lower court level impacted the course that this litigation has had to take. Thus, while the confirmation would nonetheless have had to come to this Court, it is still appropriate to order that the applicant's costs be paid by the first and second respondents.

[79] The third respondent applied for direct access. This was granted. The costs of the third respondent should thus be borne by it.

Order

[80] In the circumstances, the following order is made:

(a) The applicant's application for condonation of the late filing of the record is granted.

(b) The application for leave to appeal is granted.

(c) The application for direct access by the third respondent is granted.

(d) The order handed down by the Pretoria High Court on 14 June 2007, declaring that Proclamation R27 of 2006 is null and void and of no force and effect, is confirmed with effect from 31 July 2006.

(e) Proclamation R32 of 2006 is declared to be invalid with effect from 31 July 2006.

(f) The President must issue a Proclamation bringing sections 1, 2, 3, 4 and 5 of the Road Accident Fund Amendment Act, 2005 (Act No. 19 of 2005) into effect, with effect from 31 July 2006, within 30 days of the date of this order.

(g) Notwithstanding the declarations of invalidity contained in paragraphs (d) and (e) of this order, the Fund may continue to act for 30 days from the date of this order as if sections 1, 2,3,4 and 5 of the Amendment Act were brought into force on 31 July 2006.

(h) Notwithstanding the declarations of invalidity contained in paragraphs (d) and (e) of this order, everything that has been done by the Fund since 31 July 2006 on the basis that sections 1,2,3,4 and 5 of the Amendment Act were brought into force on 31 July 2006 shall—

    (i) not be invalid on the ground that the First and Second Proclamations have been declared to be invalid in this order; and

(ii) be deemed valid as if sections 1,2,3,4 and 5 of the Amendment Act had been lawfully brought into force on 31 July 2006.

(i) The first and second respondents are ordered to pay the costs of the applicant in both courts, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

Langa CJ, O'Regan ADCJ, Kroon AJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J and Van der Westhuizen J concur in the judgment of Skweyiya J.

JAFTA AJ:

[81] I have read the judgment prepared by my colleague Skweyiya J. Regrettably I disagree with the conclusion which he has come to regarding the invalidity of both Proclamations. Proclamation R32 was issued in order to correct the error in Proclamation R27 which came into operation at midnight on 30 July 2006. When read together, the two Proclamations convey and put into force the President's correct decision in relation to bringing into operation certain sections of the Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act). I come to this finding for reasons which now follow.

[82] The facts are set out in the judgment of Skweyiya J. For ease of reading, I will refer only to facts which are relevant to my reasons and findings. In 2005, Parliament enacted the Amendment Act. This Act was signed into law by the President on 23 December 2005. It was published on 5 January 2006. However, it did not come into operation upon being assented to by the President or upon publication in the Government Gazette.[1] Section 13 of the Amendment Act provides that it will come into force "on a date determined by the President by proclamation in the Government Gazette."

[83] In July 2006, the President decided to bring into operation certain sections of the Amendment Act which did not require that measures be put in place before implementation of the Act. The sections which the President decided to bring into operation dealt with administrative matters. They were sections 1, 2, 3, 4 and 5 of the Amendment Act which amended sections 4, 6, 10, 11 and 12 of the Road Accident Fund Act 56 of 1996 (the Principal Act).

[84] But when Proclamation R27 was drafted in order to carry out the President's decision, it referred erroneously to sections 6, 10, 11 and 12 instead of sections 1, 2, 3, 4 and 5 of the Amendment Act. However, it correctly referred to section 4 of that Act. The Proclamation was published on 19 July 2006 with this error. The President had determined 31 July 2006 as the date on which sections 1, 2, 3, 4 and 5 of the

[1] Section 81 of the Constitution outlines the process by which an Act of Parliament is put into operation. For the full text of the section see [107] below.

Amendment Act would come into operation. The Proclamation purported to bring into force on that date sections 4, 6, 10, 11 and 12.

[85] Before 31 July 2006, the President became aware that Proclamation R27 did not correctly reflect his decision in that it referred to four incorrect sections, namely, sections 6, 10, 11 and 12. In order to rectify this error the President issued Proclamation R32, which was published on 31 July 2006. Evidently, the latter was intended to amend the former, insofar as it referred to the wrong sections. Both Proclamations are fully set out in Skweyiya J's judgment.

In the High Court

[86] On 31 July 2006, the applicant instituted a review application in the Pretoria High Court, seeking an order declaring Proclamation R27 to be null and void and of no force and effect. At the time he instituted the application, he was not aware that the President had sought to rectify the error by amending Proclamation R27. It was pointed out in the answering affidavit, filed on behalf of the second respondent, that the President had issued Proclamation R32 so as to amend the first one. In reply, the applicant contended that the law did not authorise the President to rectify the error in Proclamation R27 by issuing a Second Proclamation. He contended that the error could only be corrected by an Act of Parliament or an application to court for a review of the impugned Proclamation.

[87] The applicant persisted in his challenge on the ground that Proclamation R27 had been erroneously issued. He formulated his challenge in the following terms:

> "The Proclamation [R27] was issued in error. What the President actually intended was to bring into operation sections 1, 2, 3, 4 and 5 of the amending Act, which respectively amends sections 4, 6, 10, 11 and 12 of the principal Act.
>
> The Department of Transport, which operates under the direction of the Minister of Transport, has acknowledged that the Proclamation was issued in error. It has stated that the Proclamation will be withdrawn, and a new Proclamation will be issued in its place.
>
> I submit that the President does not have the power to withdraw a Proclamation which he has issued, bringing an Act or a section of an Act into operation. The result is that Proclamation R27 of 2006 continues in effect, notwithstanding any notice of its purported withdrawal.
>
> The consequence of the erroneous bringing into operation of sections 4, 6, 10, 11 and 12 of the amending Act is that parts of the principal Act are incapable of operation."

[88] The President did not file opposing papers in the High Court. But the Minister of Transport filed an affidavit deposed to by Ms Nonkululeko Msomi, the Deputy Director General: Transport Regulation and Public Entity Oversight Division. She disputed that Proclamation R27 was issued in error and contended that it was properly issued even though it contained the error of referring to wrong sections. She explained:

> "Although the Proclamation was correctly issued, it referred to wrong sections of the amending Act which were to be put into operation, and should have referred to sections 1, 2, 3, 4, and 5 of the amending Act. As a result of this error of having referred to incorrect sections of the amending Act, a second Proclamation was issued,

> namely, Proclamation No.R.32 of 2006 which corrected the erroneous reference to sections 4, 6, 10, 11, and 12 referred to above and in that Proclamation the correct reference of the sections that were put into operation was made, namely, 1, 2, 3, 4, and 5 of the Amendment Act of 2005."

[89] The High Court (per Preller J) held that the applicant had the requisite locus standi to challenge the validity of Proclamation R27. It also upheld the applicant's argument to the effect that this Proclamation was erroneously issued by the President. Regarding Proclamation R32, the High Court found that the President had no authority to issue the Second Proclamation, the effect of which was to amend the first one. It reasoned:

> "Because new laws often require regulations and the taking of other administrative steps in order to operate effectively, the practice has developed over many years for Parliament to leave it to the executive to decide when everything necessary is in place for a new law to function. In such case there is a provision in the Act which empowers the President to bring the Act into operation (and nothing more) by proclamation when the time is ripe. The provision certainly does not empower the President to later revoke the proclamation if he no longer likes the Act, thereby effectively repealing it.
>
> Taking this argument to its logical conclusion would mean that the President would have the power to revoke by proclamation any Act that he or his predecessors have previously brought into operation by publishing a proclamation to that effect in the *Gazette*. One can hardly imagine the consequences if e.g. the statutes protecting land tenure, the labour legislation or even the Criminal Procedure Act should be revoked in terms of this hypothetical extended power. Such a regime will simply be government by decree which is the antithesis of the Rule of Law which is one of the cornerstones of our Constitution.
>
> My conclusion is therefore that the President's power to bring an Act into operation by way of a proclamation does not include the power to either amend or revoke that proclamation."

[90] Following the above reasoning and findings, the High Court issued the following order:

> "1. It is declared that Proclamation R27 of 2006 is null and void and of no force and effect.
>
> 2. The second respondent is ordered to pay the applicant's costs.
>
> 3. The order in paragraph 1 above is referred to the Constitutional Court for confirmation in terms of Section 172(2)(a) of the Constitution."

The issues

[91] This Court must be satisfied that the declaration of invalidity was properly made before it can confirm the High Court's order. The first issue for consideration is whether the entire Proclamation R27 was invalid ab initio. If it was not, the next issue will be whether the President had the power to rectify the error in Proclamation R27 by issuing Proclamation R32 which sought to amend the First Proclamation. I address these issues in turn. Before doing so, however, I must mention that in this Court, counsel for the Minister did not persist in the argument that the applicant lacked locus standi. I am willing to accept that the applicant's nature of practice constitutes sufficient interest for him to have locus standi in this matter.

Was the entire Proclamation R27 invalid from the outset?

[92] The answer to this question lies in the consideration of the ground on which the applicant relies in challenging the validity of Proclamation R27. This Proclamation is

attacked on the sole ground that it refers to sections which the President did not intend to put into force. It is common cause that the President had decided to put into force sections 1 to 5 of the Amendment Act. But the Proclamation referred to sections 4, 6, 10, 11 and 12 instead of sections 1, 2, 3, 4 and 5. Section 4 was the only section to which a correct reference was made. Insofar as reference was made to the other sections, it did not reflect the President's true decision; otherwise the Proclamation was correct in all other respects.

[93] I have difficulty in accepting that the error, which is limited in extent, has the effect of nullifying the entire Proclamation R27. In determining the validity of the Proclamation it is important to recall that it is not the President's decision that is under attack here but the incorrect recordal of that decision in the Proclamation. In other words, the Proclamation's validity is challenged on the basis that it does not represent the whole of the President's correct decision. Self-evidently the Proclamation contains good and bad parts. The question that arises is whether the bad part can be severed from the good.

Severability

[94] Severability is a tool commonly used to remedy unconstitutional legislative provisions.[2] Under the common law, severance is employed to sever the bad part of a

[2] *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Other*s [2006] ZACC 7; 2006 (8) BCLR 901 (CC) at para 31.

document in order to save it from invalidity.[3] There is no reason against the application of severance to a proclamation which brings an Act of Parliament into force, provided the test for severance is met. This test entails two stages. During the first stage the focus is on determining whether the good can be severed from the bad. If so, then one has to determine whether what remains gives effect, in the present context, to the purpose which the President sought to achieve. In *Coetzee*,[4] Kriegler J outlined the test as follows:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[5] (Footnote omitted.)

[95] The application of severance, as it appears above, does not depend on whether the entire objective is achieved by executing what remains after severance. The question is whether giving effect to the remaining part will achieve the intended objective, albeit partially. In applying the test to the present case, the enquiry is first, whether reference to the incorrect sections 6, 10, 11 and 12 can be severed from the rest of Proclamation R27 and if so, second, whether giving effect to what remains of the Proclamation, would achieve partially the President's objective.

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[3] *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (A) at 268D-F; [1972] 2 All SA 85 (A) at 95; and *Divisional Commissioner of SA Police, Witwatersrand Area and Others v SA Associated Newspapers Ltd and Another* 1966 (2) SA 503 (A) at 513A-C; [1966] 3 All SA 1 (A) at 7.

[4] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

[5] Id at para 16.

[96] There can be no doubt that the wrong sections can be severed from the correct one. Section 13 of the Amendment Act empowers the President to choose the sections he decides to put into force at any given time. The number of the sections to be put into operation falls within his discretion. It can be one or more sections which he identifies for this purpose. The coming into operation of section 4 of the Amendment Act[6] does not depend on the implementation of the severed sections 6, 10, 11 and 12. As a result, putting section 4 into force would achieve the President's objective. In fact it seems to me that this section came into operation on 31 July 2006. According to section 13 of the Interpretation Act 33 of 1957, Proclamation R27 came into operation on the expiration of 30 July 2006.[7]

[97] However, sections 6, 10, 11 and 12 did not, contrary to the view held by the applicant,[8] come into force because they did not form part of the President's decision. The fact that these sections appeared in the Proclamation did not make them part of the sections which the President had intended to put into operation. This is common cause. It is the decision of the President that put section 4 into operation and not the Proclamation which was just a means of executing the President's decision. The

[6] Section 4 reads:

> "Section 11 of the principal Act is hereby amended by the deletion in subsection (1)(a) of subparagraph (iv)."

[7] Section 13(2) provides:

> "Where any law, or any order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under the authority of a law, is expressed to come into operation on a particular day, it shall be construed as coming into operation immediately on the expiration of the previous day."

[8] Above at [87].

power conferred on the President by section 13 of the Amendment Act can only be exercised if the President applies his mind to the relevant issues. He has to consider whether the necessary framework for implementing the Act is in place before putting into force parts of the Act which require the existence of such framework. In this case, the President had decided to put into force those sections of the Act which did not require any measures to be in place. It is this exercise of public power which is required to meet the threshold of rationality.

[98] In invoking the decision of this Court in *Pharmaceutical Manufacturers*,[9] counsel for the applicant argued that Proclamation R27 was invalid because it was irrational and was issued in error. He submitted that the present case "is for practical purposes on all fours with the *Pharmaceutical Manufacturers* case." In my view the present case is distinguishable from that case in two respects. First, in *Pharmaceutical Manufacturers*, the President became aware of the error after the relevant Act had been put into operation. Thus he had no power to withdraw a proclamation which had already become effective and put the relevant Act into force. In the present case, the President became aware and took remedial action before the Proclamation became effective.

[99] Secondly and most importantly, in *Pharmaceutical Manufacturers*, the error influenced the exercise of public power by the President. He was made to believe incorrectly that the regulatory framework necessary for the implementation of the Act

[9] *Pharmaceutical Manufacturers Association of SA and Another In re: ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

was in place before he took the decision to bring it into force. His true decision there was to bring the relevant Act into force. Had he been given the true facts he could not have made the decision and therefore issued the Proclamation. It was in that context that the Court said:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."[10] (Footnote omitted.)

[100] As observed in the above dictum, the requirement of rationality applies to the exercise of public power. In the present case, the President had properly and appropriately exercised the power by deciding to put into operation only those sections which did not require any measures to be put in place before implementation. The error came into existence after the decision had been taken and when it was recorded in the Proclamation. The invocation of rationality in the present circumstances is, in my view, misplaced. The partial invalidity of the Proclamation flows from the fact that it did not reflect the correct decision of the President. It follows that the President's decision, which is not challenged in these proceedings,

[10] Id at para 90.

remains intact. The question that arises at this stage is whether the President could rectify the error in Proclamation R27. This is the issue which I will discuss in turn below.

The concession made by the Minister's counsel

[101] Before I address the question whether the President was empowered to issue the Second Proclamation, I must comment on the concession made by the Minister's counsel to the effect that Proclamation R27 was a nullity from the outset. In their written argument, counsel for the Minister submitted:

> "We accept the essence of the applicant's contentions about the First Proclamation:
>
> 1. It was objectively irrational because the provisions of the Amendment Act which it purported to put into operation, were an arbitrary selection which resulted from an underlying mistake.
>
> 2. It is appropriate for this court to confirm the High Court's order declaring the First Proclamation to be invalid. There is no reason to limit the retrospective operation of the order of invalidity.
>
> 3. Under the doctrine of objective invalidity, the First Proclamation is regarded as having been a nullity from the outset.
>
> 4. It follows that the First Proclamation never brought into operation the provisions to which it erroneously referred. It had no effect in law at all."

[102] The difficulty with the concession is that it departs from the wrong premise, namely, that all the sections to which the First Proclamation refers were incorrect. It overlooks the fact that section 4 had been correctly referred to. As a result it makes no

distinction between the erroneously referred-to-sections and section 4. Its reliance on the doctrine of objective invalidity is mistaken. The doctrine of objective invalidity cannot apply to that part of the Proclamation which was not affected by the error and thus not invalid. In the light of this finding the question that arises is: what is the effect of the concession on the determination of the issue? I proceed to address this question.

[103] Ordinarily a court accepts, without deciding, factual concessions made by the parties because the effect thereof is that the conceded issue is no longer placed in dispute. This rule extends to legal concessions but only to the extent that a court is satisfied that a concession was properly made. If the court is of the view that a legal concession was improperly made, it is entitled to reject it and decide the issue as if it remained in dispute. In *Matatiele Municipality*,[11] Ngcobo J, writing for the majority, said:

> "Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, 'if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it'. Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct in fact is inconsistent with the Constitution. This would be contrary to the provisions of

[11] *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

> section 2 of the Constitution which provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'."[12] (Footnote omitted.)

The President's power to rectify the error in Proclamation R27

[104] When the President became aware of the error in the Proclamation he sought to rectify it. But because the Proclamation had already been published, he deemed it appropriate to correct it by means of issuing a Second Proclamation amending, to the extent necessary, the first one. Both in the High Court and in this Court, the applicant argued that the President was not empowered to amend Proclamation R27 in the manner he did. Relying on *Pharmaceutical Manufacturers*,[13] counsel for the applicant argued that the only options which were available to the President were to institute a review application or approach Parliament to enact an amendment. He submitted that section 13 of the Amendment Act does not authorise the President to amend a proclamation. Were it to be construed as empowering him to do so, continued the argument, the President would be able to repeal provisions in an Act of Parliament by simply amending his original Proclamation which brought such provisions into force. This would, concluded the argument, be a far-reaching and startling power which could cause the law to change from time to time as the President determined.

[105] When taken at face value, the above argument is seductively persuasive. The High Court upheld it and rejected the assertion that the President had amended

[12] Id at para 67.

[13] Above n 9.

Proclamation R27. It reasoned that were the President to have the power to amend, he could "revoke by proclamation any Act that he or his predecessors had previously brought into operation by publishing a proclamation to that effect in the Gazette." If this were to happen, the High Court reasoned, it would constitute "government by decree which is the antithesis of the Rule of Law which is one of the cornerstones of our Constitution."[14]

[106] However, the demise of the above argument lies in its foundation. It is based on the wrong premise, which is that the President sought to amend the Proclamation which had brought into force sections 6, 10, 11 and 12 of the Amendment Act, when this was clearly not the position. These sections were never brought into operation because, as stated earlier, they did not form part of the President's decision and were not intended to come into force. In the present case, the President sought to rectify an error which had no legal force and effect. As mentioned above, only section 4 came into operation on 31 July 2006. To the extent that Proclamation R32 refers to section 4 as one of the substituted sections, it has no legal force. In fact the inclusion of section 4 in Proclamation R32 was irrational and creates an unnecessary confusion. It is indeed meaningless for Proclamation R32 to replace section 4 in Proclamation R27 with the same section 4.

[107] The issue that requires consideration in this regard is whether the President was empowered to rectify the error which arose in the present matter. Reference to

[14] Above at [89].

Pharmaceutical Manufacturers is not helpful to this enquiry because the error we are concerned with here is of a different kind. In determining this issue, the starting point must be the Constitution, which is the genesis of the President's power to bring Acts of Parliament into operation. Section 81 of the Constitution provides:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[108] The constitutional power to bring an Act of Parliament into force can be exercised by the President only if the Act authorises it. In other words, the exercise of the power and the manner of doing it depends on the terms of the Act to be brought into operation. If an Act of Parliament is silent on the issue, it comes into operation automatically upon publication. But a number of Acts of Parliament require antecedent measures to be put in place before they can be implemented. In that event, the practice is for Parliament to authorise the President, once the measures are in place, to bring the Act into force. This is normally done by adding a section to this effect in the Act itself.

[109] In the present case, section 13 of the Amendment Act authorises the President to bring its provisions into force on a date determined by him and it requires him to do this by publishing a proclamation in the Government Gazette. The duty imposed on the President is to bring the Act into force when circumstances are conducive for it to be implemented. The Act confers a discretion on him to determine when circumstances are conducive for bringing the Act into operation and to decide whether

to bring into force the entire Act or only parts of it. Once this determination is made, the President is under the duty to bring the Act or its part into operation. However, he is obliged to discharge this duty by publishing a proclamation in the Government Gazette which sets out his decision. It is in this context that the question whether the President had the power to amend Proclamation R27 must be considered.

[110] Although neither the Constitution nor the Amendment Act confer express power on the President to amend proclamations containing errors such as the present, the power to amend to this limited extent is implied. It is implied because it is necessary for the President to have it in order to properly discharge his duty to bring the determined parts of the Act into operation. The facts of the present case demonstrate this point. It cannot be argued that the President lacks the power to correct proclamations drafted in a manner that does not correctly reflect his decision. To hold otherwise would defeat the very purpose for which the power was conferred on the President.

[111] It is a well-established principle of our law to interpret a provision which expressly confers a particular power as impliedly including in its ambit the authorisation of taking steps reasonably necessary to achieve the main purpose.[15] The latter is taken as being incidental or ancillary to the expressly conferred power. In *Matatiele Municipality* Ngcobo J said:

[15] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 68; *GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape and Another* 1998 (3) SA 45 (SCA) at 51G; *Moleah v University of Transkei and Others* 1998 (2) SA 522 (Tk) at 536I.

> "It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given. The power of Parliament to redraw provincial boundaries therefore includes the power that is reasonably necessary for the exercise of its power to alter provincial boundaries."[16] (Footnote omitted.)

[112] For these reasons, I conclude that the President had the power to rectify the error in Proclamation R27 by issuing Proclamation R32. It follows that, to the extent described above, both Proclamations are valid. The High Court erred in declaring the First Proclamation invalid.

Costs

[113] The general rule applicable to the issue of costs should be followed in this matter. Consequently, each party must bear its own costs.

[114] Accordingly I would make the following order:

(a) The declaration of invalidity made by the High Court is not confirmed.

(b) The order of the High Court is set aside and replaced with the following order:

(i) The application is dismissed.

[16] Above n 10 at para 50.

YACOOB J:

Introduction

[115] This case is concerned with the validity of two Proclamations issued by the President of the Republic of South Africa as head of the National Executive[1] purportedly in accordance with the provisions of section 13 of the Road Accident Fund Amendment Act[2] (the amending Act). The first of these Proclamations was issued on 11 July 2006 (the first Proclamation) and the second, around two weeks later on 28 July 2006 (the second Proclamation). I have read the judgments of Skweyiya J and Jafta AJ and find myself unable to agree with their reasoning and their conclusions. My colleague Skweyiya J analyses and determines separately the validity of each of the two Proclamations whose validity is in issue in this case and concludes that:

(a) each is invalid;

(b) the first Proclamation was invalid ab initio;

(c) the second Proclamation was aimed at validating the first Proclamation;

(d) it did not do so;

(e) both Proclamations are therefore invalid; and

(f) it would be just and equitable to allow the President to correct the defect and to ensure that the first Proclamation is treated as if it had brought the correct legislative provisions into force.

[1] Sections 84, 85 and 101 of the Constitution.

[2] Act 19 of 2005.

[116] Jafta AJ holds that:

(a) the first Proclamation is valid in part and invalid in part;

(b) the part that is valid can and should be severed from the part that is not;

(c) the part that is good can be amended by the President and has been amended by the second Proclamation; and

(d) the second Proclamation validly amended the first.

[117] The approach in this judgment is to read both Proclamations together and to:

(a) find the first Proclamation invalid;

(b) hold that it is not just and equitable for the invalidity to take effect until the date of this judgment;

(c) find that the second Proclamation did not successfully amend the first;

(d) sever those parts of the first Proclamation which are bad; and

(e) read in the amendments intended by the President when issuing the second Proclamation.

[118] The fundamental difference between the judgment of Skweyiya J and this judgment is, in my view, that this judgment expressly focuses on whether it is just and equitable to declare both Proclamations invalid, whereas the judgment of Skweyiya J does not conduct this enquiry but concludes that the first Proclamation was invalid from the date of its publication.

[119] I agree with Skweyiya J that the application for condonation must be granted. So too must the application for direct access made by the Road Accident Fund (the Fund) established in terms of section 2(1) of the Road Accident Fund Act (the main Act).[3] However, I would allow the application on the basis that the validity of the second Proclamation for which the Fund contends is interwoven with the validity of the first and that both Proclamations need to be read and considered together. I nevertheless ultimately conclude that no order should be made pursuant to the application for direct access because there is no need to do so in the light of the order that is motivated in respect of the first Proclamation.

[120] In my judgement, the applicant has standing as an attorney engaged in work aimed at ensuring that people who are injured in motor collisions are properly compensated by the Fund. In doing so the attorney would need to understand the compensation regime, to advise clients and to operate the system in order that clients are properly compensated. A compensation law that is irrationally brought into force would undoubtedly affect this ability.

The Legislation and the two Proclamations

[121] The amending Act amended the main Act. Section 13 of the amending Act provided that the amending legislation would come into force on a date "determined by the President by proclamation in the Gazette". The President, intending to bring

[3] Act 56 of 1996.

sections 1, 2, 3, 4 and 5 of the amending Act into operation, published[4] the first Proclamation on 19 July 2006[5] reading as follows:

> "[I] hereby determine 31 July 2006 as the date on which sections 4, 6, 10, 11 and 12 will come in operation."

[122] It is apparent therefore that the President brought sections 4, 6, 10, 11 and 12 of the amending Act into operation but intended to bring into operation sections 1, 2, 3, 4 and 5 of that Act. It follows that section 4 of the amending Act was rightly brought into operation while the others were not.[6] The basis of this error emerged easily enough: Sections 1, 2, 3, 4 and 5 of the amending Act amended sections 4, 6, 10, 11 and 12 of the main Act respectively. The President in fact had in mind bringing into force the amended sections 4, 6, 10, 11 and 12 of the main Act. Amendments were effected by sections 1, 2, 3, 4 and 5 of the amending Act.[7]

[123] This error was apparently realised before 28 July 2006 and, on that date, the President issued the second Proclamation which reads:

[4] Proclamation R 27, GG 29041, 19 July 2006.

[5] It will be remembered that the first Proclamation was issued on 11 July 2006.

[6] In my view nothing turns on the fact that section 4 of the amending legislation was rightly brought into operation.

[7] Reflected in the following table:

Section of amending Act	Section of main Act amended
1	4
2	6
3	10
4	11
5	12

> "[I] hereby, amend Proclamation No. R. 27 of 2006, by the substitution for the reference to section 4, 6, 10, 11 and 12 in the said Proclamation for the reference to section 1, 2, 3, 4 and 5 of the Amendment Act, 2005 (Act No. 19 of 2005)."[8]

[124] The second Proclamation was issued by the office of the President some days before 31 July 2006 when the incorrect sections would erroneously have been brought into force. This Proclamation was however published on the same day as that on which the incorrect sections were brought into force. The second Proclamation was evidently aimed at correcting the errors in the first and both were published at the time the challenge to the validity of the first Proclamation was made before the High Court. It is therefore appropriate to have regard to both Proclamations together in an effort to determine if the office of the President had succeeded in putting right the error which was known to exist. Although all the parties before us conceded that the first Proclamation was invalid it remains nonetheless necessary to examine this question. The answer is not straight-forward but, if it is not in favour of the President, the first Proclamation must be invalid. I proceed to examine this issue.

Amendment of Proclamation by President?

[125] I have already pointed out that the President sought to amend the first Proclamation by the second Proclamation. Two inter-related questions arise. The first is whether and in what circumstances it is competent for the President to amend a proclamation. And the second is whether the President successfully amended the first Proclamation in this case.

[8] Proclamation R 32, GG 29086, 31 July 2006.

[126] I cannot at this stage envisage any substantial objection to the President having the power to amend a proclamation which that office realises is patently erroneous in order to correct the error (and for no other purpose) provided that the amendment is properly effected before the proclamation comes into effect. Neither the Constitution nor the provisions of section 13 of the amending Act precludes this course. Nor would a limitation of this kind be in accordance with good government and administration. Government at all levels must be encouraged to be vigilant at all times and must be given the opportunity to change their decisions if the officials concerned discover that the decisions were patently erroneous. To compel parties to approach a court to set aside a decision that is obviously in error would be inconsistent with that responsiveness with which the Constitution charges all organs of state. The energy as well as the financial and other resources that would need to be expended in order to set aside an obviously incorrect decision when that decision has been corrected before it came into force is counter-productive, overly technical and cannot be justified in our constitutional order.

[127] Different considerations apply when the error is discovered and the correction made after a proclamation bringing an Act into force is published. An amendment by the President in these circumstances could well amount to repeal of legislation. We are not concerned with that situation and it need not be addressed further.

[128] The situation in this case is that the decision to correct was made and the amending Proclamation was signed by the President three days before the first Proclamation came into force, but the second Proclamation was published on 31 July 2006: the same day on which the first Proclamation came into force. If the President did indeed have the power to amend there would have been, in my view, no difficulty about the validity of the amendment had the second Proclamation been published on 29 July 2006. In this regard, it seems to me to place form over substance to make a distinction between, on the one hand, withdrawal of the first Proclamation and the replacement of that Proclamation by another and, on the other hand, the amendment of the first Proclamation by the second. Each approach would produce the same result provided, of course, that the proclamation intended to implement either approach is published before the date upon which the erroneous proclamation comes into operation. It is the timing of the publication that is essential; whether the withdrawal/replacement process or the one of amendment is followed is neither here nor there.

[129] It is however not necessary to decide whether it would have been competent for the President to amend the first Proclamation, had the amending Proclamation been published before the first one. This is because this case must be decided on the footing that the second Proclamation was published after the first.

[130] It cannot be gainsaid that the second Proclamation was not published a day before the first Proclamation came into operation. It was published on the same day.

In these circumstances, it is necessary to determine whether the second Proclamation was published at the same time as the incorrect sections of the amending Act were brought into force, or whether the second Proclamation was published only after the first Proclamation came into operation. In our law, a determination that a provision of a law would come into operation on 31 July 2006 results in the provision coming into force at midnight on 31 July 2006.[9] It follows that the first Proclamation came into force at midnight on 31 July 2006. We know that 31 July 2006 appears as the date of publication in the Government Gazette containing the second Proclamation. But we have no idea whether the Government Gazette was in fact published a little time before midnight or some time after. It would be wrong to assume that the second Proclamation was published either before midnight or at midnight on 31 July 2006. This judgment must proceed on the basis that publication was effected after midnight.

[131] As at midnight on 31 July 2006, therefore, the first Proclamation was in operation and the second Proclamation not. In these circumstances, the first Proclamation was irrational and therefore invalid.

[132] The next question is whether the second Proclamation had the effect of validating the first Proclamation which had come into force in an invalid state. I do not think so. In the circumstances the parties were right in conceding that the first Proclamation was invalid. The fact that the second Proclamation did not amend the first means that it too must be declared invalid.

[9] Section 13(2) of the Interpretation Act 33 of 1957.

Just and equitable order

[133] It is appropriate to consider the just and equitable order that falls to be made consequent upon the declaration of invalidity of both Proclamations. It must be stressed at the outset of this enquiry that it does not follow from a finding of invalidity in relation to any instrument that that instrument is invalid from the moment of its promulgation. Our Constitution undoubtedly places an obligation upon a court, including this Court, to declare both Proclamations inconsistent with the Constitution and invalid.[10] There is however no obligation to declare the Proclamations inconsistent with the Constitution and invalid with retrospective effect. Indeed a court is expressly given the power (and in my view obliged) to make an "order that is just and equitable"[11] including an order limiting the retrospective effect of the invalidity[12] and an order suspending that declaration of invalidity.[13] I emphasise that it is the obligation of this Court to consider whether it is just and equitable that the first Proclamation be regarded as invalid from the date of its promulgation. This Court has held in relation to objective invalidity that—

> "[t]he Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or

[10] Section 172(1)(a) provides that a court "deciding a constitutional matter within its power . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid".

[11] Section 172(1)(b).

[12] Section 172(1)(b)(i).

[13] Section 172(1)(b)(ii).

> became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not.
>
> A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of section 98(5) of the Constitution to postpone the operation of invalidity and, in terms of section 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of sections 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."[14]

[134] This was said in relation to the interim Constitution. Applied to our Constitution the passage means that, like in the interim Constitution, the default position is that laws declared invalid by this Court are to be regarded as invalid from the date of their inception. However like under the interim Constitution, this Court has the power to control retrospectivity and the effects of a declaration of invalidity.

[135] In this case the President sought to rectify an error but did so a little too late. There is no point in declaring the first Proclamation to be invalid ab initio because the consequences would be to frustrate the bona fide effort of the Executive to correct the

[14] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 27-8.

error. It would be just and equitable, in all the circumstances, to give effect to the intention of the Executive and to amend the first Proclamation by a process of severance and reading in. This would be the correct course particularly in the light of the fact that the Fund has for the past two years proceeded on the basis that this was so.

[136] In the result, I would sever from the first Proclamation the phrase "4, 6, 10, 11 and 12" and read in to the Proclamation in the place of the severed phrase the phrase "1, 2, 3, 4 and 5". After this exercise, the relevant part of the Proclamation would read as follows:

> "PROCLAMATION WITH REGARD TO THE COMMENCEMENT OF SECTIONS 1, 2, 3, 4 AND 5
> In terms of section 13 of the Road Accident Fund Amendment Act, 2005 (Act No.19 of 2005), I hereby determine 31 July 2006 as the date on which sections 1, 2, 3, 4 and 5 will come into operation."

[137] For the purpose of clarity I would require the President to ensure that the terms of the first Proclamation that result from the reading in and severance proposed by this judgment are published in the Government Gazette within 14 days.

[138] This being a minority judgment, there is no point in formulating an order.

For the Applicant:	Advocate Geoff Budlender instructed by Kruger & Co.
For the Second Respondent:	Advocate Wim Trengove SC and Advocate Alfred Cockrell instructed by the State Attorney.
For the Third Respondent:	Advocate Wim Trengove SC and Advocate Steven Budlender instructed by Brugmans Incorporated.