IN THE NORTH GAUTENG HIGH COURT,
(REPUBLIC OF SOUTH AFRICA)

Case number: 10654/09
Date: 31/03/2010

IN THE MATTER BETWEEN:

LAW SOCIETY OF SOUTH AFRICA	First Applicant
SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS	Second Applicant
THE QUADPARA ASSOCIATION OF SOUTH AFRICA	Third Applicant
THE NATIONAL COUNCIL FOR PERSONS WITH PHYSICAL DISABILITIES IN SOUTH AFRICA	Fourth Applicant
NONTLE JENNICA WILLEM	Fifth Applicant
BRENDA FLANAGAN	Sixth Applicant
LISHA GOVENDER	Seventh Applicant
JOHN QONDILE NTSHIZA	Eighth Applicant
MCEDISI DAKELA	Ninth Applicant
JERONICO MERVYN JANSEN	Tenth Applicant
DIVAN GERBER	Eleventh Applicant

AND

THE MINISTER OF TRANSPORT	First Respondent
THE ROAD ACCIDENT FUND	Second Respondent

JUDGMENT

FABRICIUS AJ

1.

This is an application in which the Applicants seek a declaratory order that certain sections of the Road Accident Fund Act of 1996 as amended by the Amendment Act 19 of 2005 are inconsistent with the Constitution, and therefore invalid, as well as a declaratory order that certain regulations are invalid for a number of reasons. Before I deal with the relevant notice of motion, I need to address preliminary issues.

2.

APPLICATION FOR POSTPONEMENT:

This application (which comprises some 6 000 pages) was set down for

hearing from 1 to 3 March 2010. On 24 February 2010 a separate substantive application for a postponement was sought by the First Respondent herein, on the basis that a number of affidavits had not been filed timeously, and further that the replying affidavit of the Applicants raised new matters. As far as the first objection was concerned, I was of the view that there was no real prejudice to any of the parties. As far as the second complaint was concerned I was of the view that no substantial new issues had been raised in the replying affidavit, but if this was so, such issues could be addressed by further affidavits which I would receive during the actual hearing. I was also of the view that so much time, effort and costs had been spent / incurred in preparation of the actual hearing, that everyone, including the Court, would be prejudiced if a postponement were to be granted, albeit on the basis that the hearing would recommence a month later (if this could be arranged between all the parties). I was further of the view that there was a substantial public interest in the application and its outcome, and that the application ought to be resolved as soon as practically possible. I took an overall approach therefore that a postponement would not be in the interest of justice and I therefore refused the application with costs.[1]

1 Shilubana & Others v Nwamitwa 2007(5) SA 620CC

3.

INTERVENING APPLICATION:

Having filed the necessary affidavits, the Minister of Finance and the Minister of Health sought to intervene in the proceedings in the application that was heard on 1 March 2010. On behalf of the Minister of Finance a lengthy affidavit was filed by the Deputy Director-General for Public Finance in the National Treasury.[2] The deponent referred to the role of the Treasury, the Public Finance Management Act[3] and the role of the National Treasury, as well as section 213 of the Constitution which deals with the National Revenue Fund. The deponent also referred to the Road Accident Fund, and more particularly to section 5 thereof, which deals with its financing amongst others by way of a levy. He stated that for the 2009 / 2010 year, the general fuel levy was expected to contribute R30,1 billion, or about 5% of total tax revenue. The RAF levy was expected to raise about R12 billion in 2009/10. He contended therefore that in the light of the statutory provisions the National Treasury had a direct and substantial interest in

2 Vol 9 p3065 to 3100 of the record

3 Act 1 of 1999

ensuring or preserving the provisions which would have the effect of either maintaining the effective management of the resources of the RAF, or, ensuring efficiency in the expenditure of revenue raised through a compulsory contribution by road users in the form of a fuel levy. The affidavit then dealt with the Applicants attack on the relevant provisions of the Act, and continued by stating the position of the National Treasury towards the Applicants claim. The history of the third party system and the criticism thereof was dealt with, as well as the intention of "the new system".[4] The Applicants case was also criticized in the affidavits and it is clear that the views of the Treasury (the Minister of Finance) had been sufficiently set out having regard to its actual interest in the proceedings, or the outcome of the proceedings. The Minister of Health also filed an affidavit.[5] The Minister stated that essentially the matter before me was one between the Law Society of South Africa on the one hand, and the Minister of Transport and the Road Accident Fund on the other. However, he said, some of the declaratory orders sought, impacted on the work and policies of the Department, and it is clear that he referred to the relief sought in respect of a number of impugned regulations. The Minister then dealt with the complaints by the Applicants in the

4 See vol 9 p3094

5 Vol 10 p3112 to 3127

context of the alleged invalidity of the particular regulations, referred to certain facts including correspondence, and made certain submissions thereon. It is clear that both the Minister of Health and the Minister of Finance brought this application to intervene either in terms of Rule 12 of the Uniform Rules of Court, or the common law. It is clear that Rule 12 does not create a right of joinder, but makes joinder subject to the Court's discretion, which must of course be exercised judicially, and once it has been shown that:

1. The Applicant was especially concerned in the issue;

2. The matter is of common interest;

3. The issues are the same;

It is clear that the test of the direct and substantial interest in the subject matter of the action is the decisive criterion. A mere allegation to this effect is insufficient, and there must at least be *prima facie* proof of the interest and the right to intervene.[6]

6 See Civil Procedure in the Superior Courts, LTC Harms, Lexis Nexis at B-111 and the authorities referred to therein

4.

On behalf of the Minister of Finance lengthy heads of argument were filed which dealt with the legal basis for intervention, but also set out certain facts which I had to take into account relating to the so-called “new system”, and the Minister’s interest in the consequences should the main application be upheld. Similarly, lengthy heads of argument were filed on behalf of the Minister of Health. The argument dealt with the basis for the application for intervention, and the Minister’s views on the facts giving rise to Applicants’ attack on certain of the regulations published in terms of the Road Accident Fund Act. It is clear that neither the Minister of Finance nor the Minister of Health sought any relief in these proceedings. Neither the Treasury nor the Department of Health was liable to be joined in a constitutional challenge to an Act of Parliament for which neither was responsible. I was also of the view that neither section 213 nor 216 of the Constitution nor the provisions of sections 5, 6 and 11 of the Public Finance Management Act, nor section 5 of the Road Accident Fund Act required that the Minister of Finance be cited as a necessary party to any litigation. It is clear that the Minister of Transport is the Minister administering the relevant legislation, and

there is no dispute about that.[7] On behalf of the First Applicant it was argued that neither of the Ministers had a sufficient legal interest to intervene, and that if their contentions regarding their interests in the proceedings were sustainable, at least the Minister of Finance would have been a party to virtually every challenge to statutory provisions. The executive, and the true administrator of the impugned provisions, namely the Minister of Transport, was before Court, and it was further contended that different Ministers could not have inconsistent interests in the current proceedings. A successful intervention would be severely prejudicial to the Applicants, and any delay in the proceedings could not be satisfactorily cured by a costs order. On the other hand, should leave to intervene be refused, neither of the Respondents nor the Applicants for intervention would suffer any real prejudice, in that the main Applicants did not oppose the introduction of such further affidavits as the Ministers would seek to file, and, as a result, they would be able to place such evidential material before me for consideration. Accordingly, the interests of justice required that such applications for intervention be refused. I considered the applications for intervention, their legal basis and the facts raised therein, and decided having regard to all of the mentioned considerations, that I

7 See City of Tshwane v Cable City (232/08) [2009] ZASCA 87, the as yet unreported judgment of the Supreme Court of Appeal dated 10 September 2009. The Constitutional Court refused an application for leave to appeal on 3 December 2009 under Case Nr. ZACC34

ought to refuse the applications. Accordingly I did so, but made an order that the affidavits of the Ministers would be received as evidence, and that no order as to costs would be made.

5.

THE RELIEF SOUGHT:

During argument the Applicants' notice of motion was amended, and an amended written notice that was handed to me was after argument was further amended, and put before me by way of a letter dated 5 March 2010 from Applicants' attorneys. This amended notice of motion indicates in bold the clarifications of relief sought, and also certain deletions of the original notice. For purposes of this judgment I deem it appropriate to quote the amended notice of motion *in toto* (up to and including the relief sought).

AMENDED NOTICE OF MOTION[8]

TAKE NOTICE *that the applicants intend to make application for an order in the following terms:*

1. *Declaring that section 21 of the Road Accident Fund Act 56 of 1996 is inconsistent with the Constitution and invalid, to the extent that it has been substituted by section 9 of the Road Accident Fund Amendment Act 19 of 2005.*[9]

2. *Declaring that:*

    1. *the proviso to section 17(1) as read with section 17(1A)(a) of the Road Accident Fund Act is inconsistent with the Constitution and invalid;*[10] *and/or*

    2. *section 17(4)(c) of the Road Accident Fund Act is inconsistent with the Constitution and invalid;*[11] *and/or*

8 The text reflects (marked in bold) clarifications of relief sought; deletions are also marked

9 First to Fourth Applicants' Heads of Argument, paras 65 – 118, p30 - 53

10 First to Fourth Applicants' Heads of Argument, para 54, p25

11 First to Fourth Applicants' Heads of Argument, paras 239 – 250, p99 - 104

3. *section 17(4B) of the Road Accident Fund Act is inconsistent with the Constitution and invalid.*[12]

3. *Declaring that Regulation 3(1)(b) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act and is therefore invalid, in that it prescribes a method of assessment that was promulgated without prior consultation with medical service providers, alternatively without proper regard to views and advice expressed by medical service providers.*[13]

4. *Declaring that Regulation 3(1)(b) of the Road Accident Regulations, 2008, is not authorised by the Road Accident Fund Act and is therefore invalid, in that it prescribes a method of assessment which is not reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.*[14]

5. *Declaring that Regulation 3(1)(b) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act and is therefore invalid, in that it prescribes a method of assessment and a procedure for*

12 First to Fourth Applicants' Heads of Argument, paras 159 – 197, p71 - 86

13 First to Fourth Applicants Heads of Argument, paras 295 – 312, p121 - 128

14 First to Fourth Applicants Heads of Argument, paras 265 – 283, p110 - 117

lodging claims which unreasonably impede road accident victims' ability to enforce their statutory right to compensation.[15]

6. *Declaring that Regulations 3(1)(b)(ii) and (iii) of the Road Accident Regulations, 2008, are not authorised by the Road Accident Fund Act and are therefore invalid, in that the First Respondent has impermissibly purported to define what constitutes a "serious injury" in terms of the Act.*[16]

7. *Declaring that Regulations 3(1)(b)(ii) and (iii) of the Road Accident Fund Regulations, 2008, are not authorised by the Road Accident Fund Act and are therefore invalid, in that they exclude road accident victims who have suffered serious injury from the right to claim compensation for non-pecuniary loss.*[17]

8. *Declaring that Regulation 3(3) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act and is therefore invalid, in that it prescribes a procedure for lodging claims for non-pecuniary loss which conflicts with sections 24 and/or 17 of the Road Accident Fund act and/or*

15 First to Fourth Applicants Heads of Argument, paras 265 – 283, p110 - 117

16 First to Fourth Applicants Heads of Argument, paras 257 – 264, p107 - 110

17 First to Fourth Applicants Heads of Argument, paras 263, p109, paras 265 – 283, p110 - 117

which unreasonably impedes road accident victims' ability to enforce their statutory right to compensation.[18]

9. *Declaring that Regulations 3(4) to 3(13) inclusive of the Road Accident Fund Regulations, 2008, are inconsistent with the Constitution and invalid on the grounds that they deprive victims of road accidents of access to courts and the right to a fair trial to which they are entitled in terms of section 34 of the Constitution.*[19]

10. *Declaring that Regulation 3 of the Road Accident Regulations, 2008, is not authorised by the Road Accident Fund Act and is therefore invalid, in that it was promulgated without prior consultation with the Minister of Health alternatively it was promulgated without due regard to views and advice expressed by the Minister of Health.*[20]

11. *Declaring that Regulation 5(1) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act, and invalid on the grounds*

18 First to Fourth Applicants Heads of Argument, paras 198 – 214, p86 - 91

19 First to Fourth Applicants Heads of Argument, paras 2119– 158, p53 - 71

20 First to Fourth Applicants Heads of Argument, paras 313 – 321, p128 - 133

that the liability of the Road Accident Fund under section 17(4B)(a) of the Road Accident Fund Act as set out therein is irrational and arbitrary, and was not prescribed after consultation with the Minister of Health, alternatively was prescribed without due regard to the views and advice expressed by the Minister of Health.[21]

12. ~~*Declaring that Regulation 5(1) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act, is arbitrary and irrational and invalid on the grounds that the liability of the Road Accident Fund under section 17(4B)(a) of the Road Accident Fund Act is incapable of being calculated thereby and/or it is incapable of implementation as a method of computing road accident victims' statutory compensation.*~~

13. *Declaring that Regulation 5(2) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act and invalid on the ground that it impermissibly delegates to the Road Accident Fund the power to determine the tariff for emergency medical treatment applicable under section 17(4B)(b) of the Road Accident Fund Act.*[22]

21 First to Fourth Applicants Heads of Argument, paras 313 – 321, p128 - 133

22 First to Fourth Applicants Heads of Argument, paras 331 – 337, p137 - 139

14. *Declaring that Regulation 5(2) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act, and invalid on the ground that it impermissibly purports to define what constitutes emergency medical treatment for the purposes of section 17(4B)(a) of the Road Accident Fund Act and/or it unreasonably limits the ambit of emergency treatment.*[23]

15. *Declaring that the tariff set out in Notice R. 771 and published by the Road Accident Fund in the Gazette on 21 July 2008 ("the emergency medical tariff"), is not valid as the tariff for emergency medical treatment applicable under section 17(4B)(b) of the Road Accident Fund Act, on the ground that it was not negotiated between the Road Accident Fund and health care providers contemplated in the National Health Act, 2003.*[24]

16. ~~*Declaring that the tariff set out in Notice R. 771 and published by the Road Accident Fund in the Gazette on 21 July 2008 ("the emergency medical tariff"), is not valid as the tariff for emergency medical treatment applicable under section 17(4B)(b) of the Road Accident Fund Act, on the ground that it is not reasonable and does not properly have regard to the cost of such treatment and/or the ability of the Fund to pay.*~~

23 First to Fourth Applicants Heads of Argument, paras 322 – 337, p133 - 139

24 First to Fourth Applicants Heads of Argument, paras 322 – 330, p133 - 137

17. ~~*Declaring that the tariff set out in Notice R. 771 and published by the Road Accident Fund in the Gazette on 21 July 2008 ("the emergency medical tariff"), is not valid as the tariff for emergency medical treatment applicable under section 17(4B)(b) of the Road Accident Fund Act, on the ground that it unreasonably limits or prescribes the emergency treatment which may be provided in an emergency.*~~

18. *Declaring that Regulation 6(1) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act, and invalid on the ground that it impermissibly purports to restrict the ambit of section 24(1)(b) of the Road Accident Fund Act and impermissibly limits where a claim for compensation may be sent by registered post or delivered by hand* ***[i.e. lodged]*** *in compliance with section 24(1)(b).*[25]

19. *Declaring that Regulation 6(1) of the Road Accident Fund Regulations, 2008, is not authorised by the Road Accident Fund Act, and invalid on the ground that it prescribes a method of assessment and a procedure for lodging claims*

25 First to Fourth Applicants Heads of Argument, paras 215 – 221, p91 - 93

which unreasonably impedes road accident victims' ability to enforce their statutory right to compensation.[26]

20. *Declaring that Regulation 6(2) of the Road Accident Fund Regulations, 2008, is inconsistent with the Constitution and invalid in that it that affords the Road Accident Fund the right to interrogate a third party and/or deprives victim of road accidents to the right to be equal before the law and to a fair trial to which they are entitled in terms of sections 9 and 34 of the Constitution and/or it is not authorised by the Road Accident Fund Act.*[27]

21. *Declaring that Regulation 6(2) of the Road Accident Fund Regulations, 2008, is inconsistent with the Constitution and invalid on the grounds that it is arbitrary and irrational and unreasonably impedes road accident victims' ability to enforce their statutory right to compensation.*[28]

22. *Declaring that the Forms RAF 1 prescribed in Regulation 7 of the Road Accident Fund Regulations, 2008, ~~are~~ **is** invalid in that **it** ~~they~~:*[29]

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26 First to Fourth Applicants Heads of Argument, paras 215 – 221, p91 - 93

27 First to Fourth Applicants Heads of Argument, paras 222 – 230, p93 - 96

28 First to Fourth Applicants Heads of Argument, paras 222 – 230, p93 - 96

29 First to Fourth Applicants Heads of Argument, paras 231 – 238, p96 - 99

1. ***is*** ~~*are*~~ *not authorised by the Road Accident Fund Act; and/or*

2. ***is*** ~~*are*~~ *arbitrary and irrational; and/or*

3. ***is*** ~~*are*~~ *incapable of implementation; and/or*

4. *unreasonably impede**s** road accident victims' ability to enforce their statutory right to compensation; and/or*

5. ***does*** ~~*do*~~ *not achieve or promote the object of the Road Accident Fund Act.*

23. *Declaring that Form RAF4, is invalid in that it:*[30]

1. *is not authorised by the Road accident Fund Act; and/or*

2. *is arbitrary and/or irrational; and/or*

3. *is incapable of implementation; and/or*

30 First to Fourth Applicants Heads of Argument, paras 231 – 238, p96 - 99

4. *unreasonably impedes road accident victims' ability to enforce their statutory right to compensation; and/or*

5. *does not achieve or promote the object of the Road Accident Fund Act.*

24. *Regulations 3; alternatively 3(1)(b), 3(3), 3(4) to 3(13) inclusive; 5(1) and 5(2), 6(1) and 6(2), the Forms prescribed in terms of Regulation 7**(1)** of the Road Accident Fund Regulations, 2008, and Form RAF4 are hereby reviewed and set aside.*[31]

25. *The emergency medical tariff is herby reviewed and set aside.*

26. *The orders in paragraph**s** 1 ~~alternatively~~ **and** paragraph 2, ~~and in paragraph 3~~ are referred to the Constitutional Court for confirmation.*

27. *Further or alternative relief.*

28. *The First Respondent is ordered to pay the costs of this application and, if*

31 First to Fourth Applicants Heads of Argument, para 60, p28

the Second Respondent opposes this application, it is ordered to pay such costs jointly and severally with the First Respondent"

6.

THE ABOLITION OF CERTAIN COMMON LAW CLAIMS (SECTION 21 OF THE ROAD ACCIDENT FUND ACT OF 1996 AS SUBSTITUTED BY SECTION 9 OF THE AMENDMENT ACT 19 OF 2005: PRAYER 1):

Section 21 as substituted reads as follows:

"21. Abolition of certain common law claims.

1. *No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie –*

(a) *against the owner or driver of a motor vehicle; or*

(b) *against the employer of the driver.*

2. *Subsection (1) does not apply-*

(a) *if the Fund or an agent is unable to pay any compensation; or*

(b) *to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than the third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle."*

7.

Before I deal with this and the other prayers, I need to address the issue of standing. With reference to its written constitution the First Applicant averred that it had an interest in the matter for a number of reasons, in that many of its members practiced in the area of road accident litigation, and represented the vast majority of persons who claimed compensation from the RAF. The rights of their clients and would-be clients were profoundly affected by the 2008 amendments and the relevant regulations. The Law Society therefore brought this application because of the impact of these amendments would have on the rights

of such accident victims, who are, and would be the clients of the members of the Law Society. It also acted in its own interest, it alleged, and in the interest of those persons who cannot act in their own name. It also acted in the public interest in that the RAF system was a very important compulsory insurance scheme administered by the State. It was therefore in the public interest that it should serve its intended purpose, namely to provide adequate compensation to persons who have been the victims of road accidents. It further alleged that it acted for legal practitioners, some 20 000 attorneys in over 9 000 firms, who were affected by the statutory framework applicable to road accident compensation.[32] The Law Society then further alleged that it acted herein for "tens of thousands of indigent road accident victims, who instruct Law Society members to recover compensation from the RAF." Many of these could not bring the proceedings themselves, because they were badly disabled, lived in remote areas or were disadvantaged by poverty.

8.

The Second Applicant alleged that it brought the application in its own right by

32 See record, vol 1, p26

virtue of its authorised objects, but also acted on behalf of its members and in the public interest.

9.

The Third Applicant has members from all walks of life, including a large number of quadriplegics and paraplegics who live in all regions of South Africa, and who belong to all race groups. It alleged that it had an interest in this application because the relevant amendments of 2008 would directly affect the interest of certain of its affiliated members. It also represented the interest of persons who would become disabled in road accidents in future, and whose “right” to adequate compensation would be affected.

10.

The Fourth Applicant alleged that it brought this application in its own right by virtue of its authorised objects, and also acted on behalf of its members, and in the public interest. Its constitution promoted the best possible legislative dispensation for persons with physical disabilities, and it sought the elimination of

all legislative measures which hinder integration and independence of persons with physical disabilities. It actively sought out and assisted newly disabled persons including victims of road accidents. This included persons who would become disabled in the future. The other Applicants are persons who joined the proceedings having been granted leave to do so by an order of this Court. In Court, only the Eleventh Applicant was separately represented, and the other Applicants made common cause with the First Applicant. In its answering affidavit[33] First Respondent vigorously denied the Applicants' *locus standi,* and particularly that of the First Applicant whose interests allegedly was purely financial. First Respondent alleged that the present litigation was driven purely by financial self-interest, and particularly the fact that payments for legal costs for the year ending 31 March 2009 were R1,6 billion. It also gave figures for the other years back to 2005, and stated that those amounts, which run into billions, merely reflected the party-and-party portion of the total legal costs under the previous dispensation. The total legal costs incurred i.e. attorney-client costs would never be known, because it was a subject of private contractual arrangements between attorneys and claimants. The CEO of the Road Accident Fund had estimated that

33 Vol 5, p1566

the contingency fees for the year ending 31 March 2009 were R4,3 billion. First Applicant or its members had never disputed such an allegation by providing details of how much the attorney-client component was, and no evidence was ever given to any statutory commission about this fact. First Respondent also noted that a previous Commission had already remarked that (obviously) many of the persons who gave evidence in those proceedings had a vested and pecuniary interest in the retention of the then existing system. The Satchwell Commission had stated that it was not the function of a system of road accident compensation to prop up a legal profession in order that it may "do good" for the benefit of democratic or constitutional values.[34] I agree with that view. First Respondent therefore suggested that the current litigation was only driven by the financial interests of lawyers, and especially members of the First Applicant. It denied that the First Applicant was acting, or could be acting in the interest of indigent persons and the public interest. However, it accepted that changes brought about by the Amendment Act and the regulations would impact on the financial interests of First Applicant members, and on those of some of their clients. However, it noted that First Applicant did not explain why the present challenge was brought "in the abstract", and in the absence of evidence regarding the manner in which

34 See Vol 5, p1568, par 116, footnote 326

real clients were affected. It was therefore undesirable for me to pronounce upon an important matter such as the present one in the context of an abstract challenge, and with reference to speculative allegations about how the new system would work. It also challenged First Applicant's *locus standi* herein on the basis that First Applicant had not explained why it had elected to challenge the present legal reform which did not impact directly on the attorneys' profession, or the practice of law, but merely impacted on the financial interests of its members and some of its clients. It further denied that Applicant had presented a balanced view of the Amendment Act and averred that it in fact had ignored the primary interest of the public, which was a sustainable road accident compensation scheme. There were also other challenges to the *locus standi* of the other Applicants, including some relating to their constitution and their right to litigate. The First Respondent's resistance to First Applicant's *locus standi* was tempered somewhat during argument. It is of course undoubtedly so that the members of First Applicant are probably likely to have a financial interest in the outcome of this application, and it is probably also correct that potential victims of road accidents will consult attorneys that will accordingly be affected by the Amendment Act. It is also correct that the First Applicant has not relied on any specific concrete case or a particular client who has been or is likely to be

affected by the amendment. In that particular context the application is “abstract”, but in my view the challenge to the Amendment Act and the relevant regulations is real, in that it undoubtedly has affected, and will affect victims of road accidents since the amendment came into effect on 1 August 2008, and in future. Ultimately, of course I must apply section 38 of the Constitution of the Republic[35] which deals with the enforcement of rights, and states that anyone listed in that section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and that the Court can grant appropriate relief including a declaration of rights. The persons who could approach the Court were those acting in their own interest, acting on behalf of another person who could not act in his or her own name, anyone acting as a member of, or in the interest of a group or class of persons, anyone acting in the public interest and an association acting in the interest of its members. The Constitution in this context refers to an allegation that a right in the Bill of Rights either has been infringed or so threatened. The section was obviously intended to be of much broader or wider effect than for instance Rule 12 of the Uniform Rules of Court that I have already dealt with. The majority of the Constitutional Court[36] stated that whilst it is important that the Court should not be required to deal with

35 Act 108 of 1996

36 Ferreira v Levin N.O. & Others 1996(1) BCLR 1 Paragraph 165

abstract or hypothetical issues, it could see no good reasons for adopting a narrow approach to the issues of standing in constitutional cases. To the contrary, it should rather adopt a broad approach to standing. This would ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.[37] Apart from that I have also considered the fact that constitutional invalidity, or the allegations of such, requires an objective approach by a Court with reference to the facts of the case.[38] I am also of the view that a generous approach to standing is essential to the maintenance of the Rule of Law as envisaged by the Constitution, and in any event for constitutional legitimacy. I believe I am justified in holding that any indigent, poor and other disabled persons who are physically and financially unable to launch or conduct these proceedings can act herein, and, that the present challenge by the First Applicant is a reasonable and effective challenge to legislation which does or will, directly or indirectly, affect thousands of persons who have been or will in future be affected by the present legislative scheme. Accordingly I decline to dismiss the Applicants' application on the ground of lack of *locus standi.*

37 See also National Coalition for Gay and Lesbian Quality & Others v Minister of Home Affairs & Others 2000(1) BCLR 39 (CC)

38 See Chief Direko Lesapo v North West Agricultural Bank & Others 2000(1) SA 409 CC and Ferreira v Levin *supra* Paragraph 26

11.

I now deal with the contentions advanced by the parties in the context of the abolition of the common law claim in the light of section 21 of the Act.[39]

12.

THE LAW PRIOR TO THE 2008 AMENDMENTS:

Before the commencement of the 2008 amendments, victims of road accidents retained their common law right of action against wrongdoers. Since 1 May 1997 claims have been regulated by the Road Accident Fund Act 56 of 1996, which repealed the proceeding 1986 and 1989 Acts. This Act has been altered by the Road Accident Fund Amendment Act 19 of 2005 which came into operation on 1 August 2008, but which also stated that a cause of action which arose prior to that date must be dealt with as if this Act had not taken effect. The injured person, in terms of the statutes, is referred to as a "third party". This is a person who has suffered loss or damage as a result of any bodily injury to herself or himself, or

39 For First Applicant's contentions see Vol 1, p35

the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle. The liability of the Road Accident Fund is Aquilian in nature, and it is necessary for the Plaintiff to make allegations relating to wrongfulness, negligence and causation. The onus would be on a Plaintiff to establish that a reasonable person in the position of the Defendant:

1. Would foresee the reasonable possibility that the conduct (whether an act or omission) would injure (another person) or property and cause that person patrimonial loss;

2. Would take reasonable steps to guard against such occurrence; and

3. That the Defendant failed to take such reasonable steps.[40] Whether a reasonable person would have taken steps to guard against foreseeable harm, involves a value judgment taking into account the degree or extent of the risk created, the gravity of the possible consequences, the utility of the wrongdoers' conduct and the burden of eliminating the risk.[41]

40 See Kruger v Coetzee 1996(2) SA 428(AD);
Minister of Safety and Security v Van Duivenboden 2002(6) SA 431 (SCA)

41 See Cape Metropolitan Council v Graham 2001(1) SA 1197 (SCA)

The common law claim was however “truncated” as Applicants put it, whilst victims however retained the right to be fully compensated for their past hospital and medical expenses, such future expenses, loss of earnings – past and present, or, where applicable, diminution of their earning capacity, and general damages for pain, suffering, loss of amenities of life, disfigurement and disablement.

13.

THE ABOLITION OF THE COMMON LAW CLAIMS:

It would be practical if I briefly set out the new amendment scheme in outline before dealing specifically with section 21 of the Act. The new scheme departs from its predecessors substantially, and it is common cause that collectively the provisions introduce a system based on the following features:

1. Compensation under the common-law for loss not compensated by the Road Accident Fund, is abolished;

2. Compensation for general (non pecuniary) loss is excluded, unless the loss qualifies as “serious injury” in terms of the prescribed guidelines;

3. Compensation for special (pecuniary) loss is limited to either R160 000,00 per annum (in respect of loss of earnings or support) or a prescribed tariff (in respect of emergency and other hospital and medical care). In their heads of argument, First to Fourth Applicants made the following submissions:

13.3.1 The flawed rationale is to protect the wrongdoer, in preference to the victim;[42] It purports to introduce a move away from a “compensatory system”[43] to a protectionist system. It seeks to protect wrongdoers from the consequences of their conduct and to guard “investment and economic growth”[44] against “the cost burden” of rehabilitating and compensating road accident victims. Parliament thus opted for a scheme which prioritizes the financial interest of

42 See record, Vol 5, p1516 – 1517, par 36.4

43 See record Vol 9, p3089, par 42

44 See record Vol 9, p3093, par 51

motor owners and drivers over their victims. The justification therefore is that a mere moment of inattention "should not give rise to lifelong punishment meted out in the form of compensation payable to the victim who suffers lifelong misery because of the driver's negligence."[45] The Applicants submitted that the 2008 amendments are unconstitutional on numerous separate grounds i.e. on account of numerous procedural irregularities, the impermissible abolition of the common-law claim, unlawfully ousting access to Courts, and on various miscellaneous grounds which were argued. It was also submitted that the alleged procedural irregularities would normally vitiate the impugned provisions, but because of the public issues at stake I was asked not to resolve the matter only on a procedural basis, but to deal with the substantive issues first.[46]

13.4.2 In the founding affidavit the First Applicant's deponent submitted that the abolition of the common-law claim, except

45 See record, Vol 9, p3097, par 60

46 First to Fourth Applicants heads of argument, p30, par 64

where section 21(2) applies, is in breach of the right of road accident victims to security of the person, the right to an appropriate and effective remedy for breaches of that right, and the obligation of the State to respect, protect, promote and fulfill those rights. It is submitted that abolishing victims common law claims, while simultaneously reducing their compensation, unreasonably and irrationally deprived them of their right to obtain effective relief in violation of section 38 of the Constitution. He also submitted that no adequate justification had been advanced for this, and in particular submitted that deprivation or limitation of these rights was not justifiable in an open and democratic society based on human dignity, equality and freedom. During argument it appeared that Applicants relied in this context on sections 12(2) and 38 of the Constitution, as well as section 25 thereof, although this was not dealt with in the founding affidavits. Applicants submitted that the abolition of the common-law claim patently entails the abrogation of an established right anchored in the

Constitution. That being so, it was argued, on the wording of the Constitution itself,[47] that it requires to be justified. This the Respondents' affidavits allegedly failed to do, and I will deal with this submission in a proper context hereunder.

14.

THE FIRST RESPONDENT'S ANSWERING AFFIDAVIT:[48]

The First Respondent noted, apart from what I have already said above, the changes brought about by the Amendment Act, noted that it also obviously extended the liability of the Fund by abolishing the R25 000,00 limit on the claim of a passenger against the Fund, in respect of damages caused by the negligence of the driver or owner of the vehicle in which the passenger was travelling. As far as the limit for past and future loss of income or support was concerned (the limit of R160 000,00 per year as per section 17(4)(c)), it should be

47 See Section 36(1) of the Constitution and on the highest authority;
See State v Makwanyane 1995(3) SA 3191 (CC) at par 102

48 See Vol 5, p1486 to 1844. This affidavit comprises some ten affidavits in total and is dated 15 January 2010

noted that this amount is adjusted quarterly in order to counter the affect of inflation. With effect from 31 October 2009, the amount was set at R175 887,00.[49] It was submitted that the Amendment Act and the regulations must be viewed in an historical context, inasmuch as debates about the fairness, efficiency and sustainability of the statutory system of compensation for loss or damage caused by motor vehicle accidents, span across many decades in South Africa. As elsewhere in the world, statutory intervention in respect of road accidents, was necessitated by the large and increasing number of deaths and injuries on the roads, and the inability of claimants in many instances to extract compensation from wrongdoers who are improvident, or just do not have the means to pay compensation. The first principal Act was the Motor Vehicle Assurance Act 29 of 1942 as amended, which came into effect on 1 May 1946, and has been under review ever since. Over the decades, the Government appointed no less than 9 Commissions to review the system, including its funding, management and levels of compensation. Because of the nature of the Applicants' challenge to the present legislation (i.e. as infringing upon a number of human rights as well as being irrational), I deem it necessary to briefly deal with the relevant legislative history.

49 See Government Gazette 32655 of 30 October 2009. From 31 January 2010 the new amount would be R176 535,00.

1. **Motor Vehicle Insurance Act 29 of 1942:**

This act was amended a number of times and was subject to 4 Commissions of Enquiry. Under this Act, the Motor Insurer's Association of Southern Africa was formed which undertook to meet unsatisfied judgments obtained against owners and drivers of uninsured vehicles. In response to the liquidation of a number of insurers and malpractices to the detriment of the public, the Motor Vehicle Accident (MVA) Fund was established in 1965, which acted as a re-insurer of those companies which undertook compulsory MVA insurance.

2. **The Compulsory Motor Vehicle Insurance Act 56 of 1972 (as amended):**

2.1. The 1972 Act shifted the requirement for insurance from the owner or driver to the vehicle itself. It also provided cover, for the first time, for loss occasioned by an uninsured or unidentified motor vehicle. It provided for prescription of claims, excluded liability of the Fund under certain specified

circumstances, and increased the benefits for passengers. It was the subject of two commissions of enquiry, one of which called for an investigation into the possibility of entered a no-fault system of compensation, which by then had been introduced in some foreign countries. One such a Commission also contained a (minority) recommendation to fund the system through fuel levies.

2.2. The third principal Act was the Motor Vehicle Accident Act 84 of 1986, which introduced the fuel levy to fund the system of compensation.

2.3. The Fourth principal Act was the Multilateral Motor Vehicle Accident Fund Act 93 of 1989 (as amended). This Act made provision for a uniform compensation system, between the Republic and the so-called former other TBVC States. Another enquiry, the Melamet Commission of Enquiry, was appointed in 1992, when an actuarial deficit of approximately R1 billion was

reported.[50] The Commission found widespread inefficiencies in the system which were supported by an audit of the Auditor-General. Specific areas of abuse which were highlighted included:

(a) unneccessary delays by attorneys in lodging claims;

(b) overstated or fraudulent claims and overstated legal costs. It was found that these practices were not prevented or controlled by the agents or the Fund.

2.4. The Fifth principal Act was the Road Accident Act, 56 of 1996 (as amended). This Act terminated the use of agents, as they were not protecting the financial interest of the Fund. A decision was taken to equip the Fund to handle all claims. The Road Accident Fund Commission of Enquiry (RAFC) was appointed in terms of the Road Accident Fund Commission Act 71 of 1998

50 See the Department of Transport's draft policy paper on the restructuring of the Road Accident Fund, Vol 8, p2567 ("DoT 20")

and brought out a report in 2002.[51] This is also referred to as the "Satchwell Commission".

2.5. I have mentioned that as a result of the nature of the Applicants challenge, I need to decide whether the Amendment Act of 2005 infringes any of the Applicants human rights, albeit in their stated capacity as envisaged by section 38 of the Constitution, as well as whether or not the amendments to the Act itself are irrational. I deem it therefore expedient at this stage to briefly deal with the differentiation aspect that First Respondent claims resulted from the earlier legislation, and which became constitutionally unacceptable, and therefore resulted in Government's intention to remove arbitrary forms of differentiation from the system. After the South African Constitution Act come into force on 27 April 1994, and in the light of the justiciable Bill of Rights that it contained, the differentiation between passengers and others became

51 The Report of the Road Accident Commission Fund is not annexed to the papers before me. See Vol 5, p1513, footnote 64. Various findings and recommendations of the Commission are however referred to in the Respondent's answering affidavits

vulnerable to legal challenge. It therefore became imperative, so it is alleged, to amend the legislation in order to give effect to constitutional requirements regarding:

(a) expenditure which is efficient, effective and economical;

(b) the prohibition of their irrational differentiation; and

(c) access to social security and health care.

2.6. However, lack of affordability stood in the way of speedy reform and it is clear that in the year end of 1995 the deficit was some R4,183 billion.[52] First Respondent therefore states[53] that the challenge was to design a system of compensation which would not only be economically viable, but would also channel

52 See Tsotetsi v Mutual & Federal Insurance Company Ltd 1997(1) SA 585 (CC) in which the Court dealt with the income and expenses of the Fund in the years 1993 to 1995 regarding the cash flow aspect. The lack of cash is merely the symptom of the real problem, which is that the Fund had not been "fully funded" for decades, in that its projected income, including income from investment, never matched its projected expenditure. There is in fact no direct relationship between its income (the fuel levy) and its liabilities.

53 Vol 5, p1500, par 16

available resources on a more equitable basis towards all road users. Economic viability and equitability were however not the only long-term goals, as a new system of compensation for road accident victims had to be integrated in a clear comprehensive social security system. The Commission of Enquiry remarked in 2002 that a case could be made out in South Africa for an integrated system of compensation that offers life, disability and health insurance cover for all accidents and diseases,[54] as a fault based, common-law system of compensation for road accident victims could not easily be alligned with a comprehensive social security model. The idea was therefore to replace such common-law system with a set of limited no-fault benefits, which would form part of the broader social security net of public financial support for the poor and disabled. The Cabinet therefore decided to publish for consultation a draft no-fault policy.[55] Applicants counsel suggested that I ignore this

54 See Vol 5, p1501, footnote 9

55 See Government Gazette Nr. 32940 of 12 February 2010 which invites the parties to submit within 60 days of this date representations or comments of the "Draft Policy on the restructuring of the Road Accident Fund as compulsory social insurance in relation to the Comprehensive Social Security System"

document, in-as-much as only the unconstitutionality of the present system was before me, and that Government's stated intention for the future was in law irrelevant. In as much as Applicants have also alleged that the present legislative scheme is irrational, I have to disagree, and I will deal with this topic further hereunder when I separately discuss the challenge to the legislation based on irrationality.

2.7. First Respondent stated that it would take a considerable time for the new system to be designed and legislated. Something had to be done in the interim about the financial crisis which was developing. "Temporary measures" were therefore accepted, and these would introduce greater equity while also ensuring the viability of the system.

2.8. First Respondent accepted[56] that the wisdom of the policy choice to abolish the common-law claim was a matter for debate, and was open to legitimate difference of opinion. The

56 Vol 5, p1580, par 140

RAFC, for example, was divided on the issue of whether the common-law claims should be retained or not.[57] It was however argued that the wisdom of the policy was not before this Court, and that the question was whether the abolition of the common-law right violated the Constitution. I agree with this contention.

3. **First Applicant's supplementary affidavit:**[58]

3.1. This affidavit was filed subsequently to the Respondents' filing the relevant Uniform Rule 53 record, if I can refer to it as such. It is necessary, for the determination of what the Applicants case actually is, to refer to First Applicant's "conclusion on the abolition of the common-law claim" in the supplementary founding affidavit. First Applicant stated the following:

> *"59. Victims who have now been "non-suited" under the RAF Act may have substantial common-law claims*

57 See DoT 4, Appendix H at p50

58 See Vol 3, p0852

against the wrongdoers who caused their injuries. As I have pointed out in the founding affidavit, in some 40% of cases the vehicle owner or operator or employer holds liability insurance.

60. This real possibility of compensation has now been destroyed by the abolition of the common-law claim. Most poor road accident victims have been deprived of this right under law, and in return they have received nothing. I submit that this in breach of the Government's constitutional duty to respect, protect, promote and fulfill the right to security of the person; it constitutes unfair discrimination against road accident victims who are poor; it constitutes unfair, indirect racial discrimination against black people; and it is irrational and unreasonable."

3.2. As far as the challenge to section 21 of the Act is concerned

(abolition of certain common-law claims) I understand Applicant's case to be based on the following:

(a) the abolition offends against section 9(1) and 9(3) of the Constitution (the right to equality);

(b) it offends against section 12(2) of the Constitution (the right to security of the person);

(c) it offends against section 25 of the Constitution (the right to property);

(d) it offends against section 34 of the Constitution (the right to access to Courts).

3.3. The section is also irrational and unreasonable. This argument also applies of course to prayers 2.1, 2.2 and 2.3 of the amended notice of motion which deals with sections 17(1),

17(4)(c) and 17(4B) of the Act respectively. The right to property in terms of section 25 was relied upon by the Eleventh Applicant, who otherwise also associated himself with the approach of the first four Applicants.

15.

THE APPROACH OF THE COURT: (IN THE CONTEXT OF THE CHALLENGE THAT SECTION 21 INFRINGES CERTAIN HUMAN RIGHTS):

The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the Constitutional enquiry, the relevant questions are: what is the purpose of the impugned provision, what is its effect on Constitutional rights and is the provision well-tailored to that purpose? Of course, in that context, section 36 of the Constitution applies.[59]

59 See South African National Defence Force Union v Minister of Defence 1999(4) SA 469 CC at 480, par 18

16.

DOES SECTION 21 OFFEND AGAINST THE APPLICANTS' RIGHT TO EQUALITY? (SECTION 9 OF THE CONSTITUTION):

1. In the founding affidavit the First Applicant does not rely on section 9 of the Constitution directly. Rather it alleges that the fact that the legislature has substantially reduced, and in some instances entirely removed, the right to compensation which they have always had, is in breach of the right of road accident victims to security of the person, the right to an appropriate and effective remedy for breaches of that right, and the obligation of the State to respect, protect, promote and fulfill those rights. It also unreasonably and irrationally deprives victims of their right to obtain effective relief, in violation of section 38 of the Constitution.[60] A further submission is then made that the affect of the Act is to deny the victims of road accidents the right of access to such services, because it impedes and obstructs the access to health care services where these are not provided under the Act. It was

60 See par 52, 53 and 75 of the First Applicant's founding affidavit, vol I, p37 and 46

then submitted that for all of these reasons section 21 of the Act is inconsistent with the Constitution and accordingly invalid.[61] It is noticeable that no reliance is placed on an infringement of section 9 of the Constitution, be it section 9(1) or 9(3) or (4).

2. The Second Applicant does not refer to any right contained in the Bill of Rights at all, apart from fairly obscurely stating that “abolition of victims common-law claims will impose particular hardship on seriously injured victims who cannot purchase “top up” disability insurance because they are children, students, young workers, have HIV or because they cannot afford it.” This is of course partly a factual matter which I will refer to later when I deal with the other prayers sought in the amended notice of motion.

3. The Third Respondent similarly makes no reference to any right contained in the Bill of Rights at all, but seems to base its attack on the amended legislation as a whole, by saying that State facilities do not provide the care and services which the vulnerable members that it represents, need. Further, it is concerned about the reduction of compensation, and the

61 See par 76 to78 of the founding affidavit, vol I, p47

consequences which such would have for quadriplegic or paraplegic persons.[62]

4. The Fourth Applicant similarly makes no reference to any right contained in the Bill of Rights at all.[63] I am aware of cause that all Applicants have associated themselves with the course of action set out by the first two Applicants. It is only in First Applicant's supplementary founding affidavit, in the context of the abolition of the so-called common-law right, that First Applicant alleges that *"…it constitutes unfair discrimination against road accident victims who are poor; it constitutes unfair, indirect racial discrimination against black people…"*[64]

62 See Third Applicant's founding affidavit, vol I, p163, par 20, 21 and 23

63 See Fourth Applicant's founding affidavit, vol I, p176

64 See First Applicant's supplementary founding affidavit, vol 3, p870, par 60

5. In its heads of argument[65] First Applicant submitted that the abolition of the common-law claim patently entailed the abrogation of an established right. That being so, its required to be justified, which Respondents' affidavits allegedly failed to do. The submission is then made that section 21 is not rational, which is a separate challenge to constitutionality which I will deal with hereunder. In the context of irrationality the submission is made that the effect on poor and vulnerable renders the abolition of the common-law claim unreasonable. Again, the challenge as to the reasonableness or otherwise of the abolition of the common-law claim is something that I will deal with when I turned to the challenge relating to irrationality of the abolition. It is after those submissions that the counsel for the First Applicant then submits[66] that "the demonstrably, discriminatory effect of the current scheme is yet a further basis for striking the amended scheme down on account of being irrational. A scheme like the present, which discriminates against certain individuals, must be founded on a rational relationship between differentiation and a legitimate Government purpose. The Respondents failed to establish such relationship." Again, that part of First Applicant's argument relates to the irrationality of the Scheme, which in my view is a separate challenge that I will deal with.

65 Some 146 pages

66 First Applicant's heads of argument, p45, par 94

6. In the context of the challenge to the constitutionality of section 21, I could find no reference in First Applicant's heads of argument to section 9 of the Constitution. section 9, was only referred to in the context of Regulation

6(2) and which I will deal with later.[67] During argument Applicants' counsel did not rely on section 9 of the Constitution in the context of the alleged unconstitutionality of the abolition of the common-law claim. In this context, the provisions of section 9 of the Bill of Rights was accordingly also not dealt with by counsel for the Respondents. I must emphasize "in the present context" in as much as I will deal with any alleged discriminatory effect when I deal with the irrationality argument, and the impugned regulations. On behalf of the First Respondent it was submitted in its heads of argument[68] in as much as Applicants rely on discrimination under section 9 of the Constitution, they are not permitted to do so directly, and were obliged to bring their challenge within the four corners of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. It was submitted that the Constitutional Court had held that a litigant cannot circumvent legislation enacted to give effect to a constitutional right (section 9(4)) by attempting to rely directly on the constitutional right.[69] Although the MEC for Education decision referred (paragraph 40) to the

67 See First Applicant's heads of argument, p94, p223. Prayer 20 of the notice of motion deals with Regulation 6(2)

68 See First Respondent's heads of argument, p35, Section F, parr 70 and 71

69 See MEC for Education, KwaZulu-Natal & Others v Pillay 2008(1) SA 474 CC and Mazibuko & Others v City of Johannesburg & Others 2010(3) PCLR 239 CC

fact that the Constitutional Court had decided that in the context of Administrative and Labour Law, it must be remembered that the same Court[70] held that there was considerable force in the argument that if this approach were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and other legislation. Although "discrimination" as defined in the Act means any act or omission including a policy or a law amongst others, I have some doubts whether the Act was intended to give the Equality Court the power to declare an Act of Parliament or a section thereof unconstitutional, on the grounds of discrimination. The powers and functions of the Equality Court as per section 21 of that Act do not seem to provide for that: to the contrary, it seems to deal with conduct or omissions or practices that can be interdicted if they impose burdens or disadvantages on any person on one or more of the prohibited grounds. For present purposes however, I do not intend to finally pronounce on that issue. In my view, for the other reasons listed above, I cannot find that section 21 of the Amendment Act is unconstitutional because it infringes the provisions of section 9 of the Constitution. However, as I said, I intend dealing with the alleged discrimination resulting from this section when I deal with the impugned provisions of section 17 of the Act, and some of the regulations made

70 See South African National Defence Force Union v Minister of Defence 2007(5) SA 400 CC at 419 with reference to Minister of Health & Another v New Clicks South Africa (Pty) Ltd 2006(2) SA 311 CC

under it. I must however add at this stage, for the sake of clarity, that even the previous legislative dispensation, had the effect of substantially discriminating between victims of accidents (in the sense of differentiation).

17.

FREEDOM AND SECURITY OF THE PERSON (SECTION 12 OF THE CONSTITUTION):

17.1 The First Applicant also alleged that the abolition of the common-law right amounts to a breach of a road accident victim's right to security of the person.[71] Nothing else of substance was submitted in this context. Its written heads of argument did also not take this challenge any further. Mr Gauntlett SC, on behalf of the first four Applicants, however relied on the provisions of section 12(2), and submitted that the abolition of the common-law right amounted to an abrogation of an existing right which was unjustifiable, and that the provisions of section 36 of the Constitution therefore became applicable. When reading the founding affidavit I had serious doubts as to whether section 12 and more particularly 12(2) of the Constitution, could by any means of the imagination, be applicable to the

71 See Vol I, p37, par 53 and p46, par 75

present facts and to the Constitutional challenge. I say this because in First Respondent's answering affidavit the following appeared:

"141.1 The right to freedom and security of the person (section 12). This right is relied upon by the Applicants in the founding papers. First Respondent accepts that section 12, which protects freedom and security of the person, read with sections 7(2) and 38 of the Constitution, means that the State is obliged to afford an appropriate remedy to the victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence."[72]

17.2 During argument however, First Respondent's counsel informed me that this concession was not relied upon any further, and that he had informed Applicants senior counsel of that stance at some prior stage. I mentioned to

72 See First Respondent's answering affidavit, vol 3 p1580, par 141.1

counsel that a Court was not bound by an incorrect legal concession, and First Respondent's counsel then referred me to the relevant authority.[73]

17.3 In that case the Constitutional Court held that it was not bound by a legal concession if it considered the concession to be wrong in law. To me the reasoning behind that dictum is obvious: it would be absurd if I were to hold that a section in an act is unconstitutional or inconsistent with the Constitution on the basis of a concession made. I was later given further authorities (upon my request), and I was referred to the fact that Second Respondent had also made the admission relating to the applicability of section 12 of the Constitution.[74] In my view this is a mere confirmation, (as usually happens) by one deponent of the allegations made by another party. However, I was then asked to apply the principle laid down by the Appellate Division, which is to the effect that a judicial officer in civil proceedings must resolve the dispute on the issues raised by the parties and confine the enquiry to the facts placed before it.[75] This is so in ordinary civil proceedings, but I do not agree that it applies when a constitutional

73 Matatiele Municipality & Others v President of the RSA & Others (No. 2) 2006(5) SA 47 CC at par 67

74 See Second Respondent's answering affidavit, vol 9, p3041, par 291 to 292

75 See Director of Hospital Services v Mistry 1979(1) SA 626 (AD) at 635F - H

issue is raised before the Court. The reason should be obvious, as I have said. The test for that enquiry is on the one hand objective, and on the other hand a Court cannot declare a statutory provision consistent or inconsistent with the Constitution merely on the basis of concessions wrongly made.

17.4 In my view section 12.2 of the Constitution does not apply, nor was it intended to apply, to victims of motor vehicle accidents in the context of the State being obliged to afford “an appropriate remedy” to such victims.

For this reason I do not uphold the complaint that section 21 of the Amendment Act is unconstitutional in that it infringes the provisions of section 12(2) of the Constitution.

18.

THE RIGHT OF PROPERTY (SECTION 25):

Applicants do not rely on an infringement of this right in the present context,

except the Eleventh Applicant, whose attorney submitted that the abolition of the common-law right removes a proprietary right of victims of accidents, and it is given "nothing in return". In this context Eleventh Applicant's attorney relied on the provisions of section 25(1) and suggested that if an existing right was removed, such legislation had to be reasonable. I will deal with this latter submission hereunder under the heading of "Irrationality". At this stage however, I find that the relevant Amendment Act does not affect any right to property, and that section 25 of the Constitution is not applicable. My question as to when this alleged right would vest in a person, and what the nature of the right would be in the context of the Constitution, and the present dispute, was left unanswered.

19.

THE RIGHT TO ACCESS TO HEALTH CARE SERVICES (SECTION 27 OF THE CONSTITUTION):[76]

The First Applicant's submission was that the effect of the Act – which defines and limits the compensation which a victim may claim in respect of medical and

76 See First Applicant's founding affidavit, vol 1, p46, par 76

hospital expenses – is to deny the victims of road accidents the right of access to health care services, because it impedes and obstructs their access to such services where these are not provided under the Act. In my view there may be an argument about this topic in the context of prayers 2.1 to 2.3 of the amended notice of motion, but there is no merit in an argument relating to section 21 of the Amendment Act. The abolition of the common-law right does not *per se* mean that any person's right to have access to health care services, is unlawfully infringed. The Constitutional Court has in any event held, in the context of section 27 of the Constitution that all that can be expected of the State, is that it acts reasonably to provide the relevant services on a progressive basis. It must also be kept in mind in that context, that it is necessary to recognize that a wide range of possible measures could be adopted by the State, to meet its obligations. The Courts are therefore ill-suited to adjudicate upon issues which could have multiple social- and economic consequences for their community. The Constitution contemplates rather a restrained and focussed role for the Courts, namely, to require the State to take measures to meet its Constitutional obligations, and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at re-arranging budgets. Section 27(1) of the Constitution does not give rise to a self-standing and independent positive right, enforceable irrespective of the considerations mentioned in section 27(2).[77]

77 See Minister of Health v Treatment Action Campaign (2) 2002(5) SA 721 CC

Accordingly I am of the view that section 21 of the Act does not infringe upon any right within the parameters of section 27 of the Constitution.

20.

ACCESS TO COURT (SECTION 34 OF THE CONSTITUTION):[78]

Prayer 9 of the amended notice of motion specifically relies on this right, but in the context of Regulations 3(4) to 3(13) of the Road Accident Fund Regulations of 2008. The First Applicant's founding affidavit is silent on the possible question whether or not the abolition of the common-law right infringes the provisions of section 34 of the Constitution. The topic was not dealt with in any of the affidavits in this particular context. During argument however, it was suggested by Mr Gauntlett SC, that on the present facts, section 21 of the RAF Act offended against the provisions of section 34 of the Constitution *per se*. The argument was

78 "Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum"

not developed much further than the mere suggestion in the context of section 21, but I can reasonably presume that it is based on the wording of that section, which abolishes a person's right to sue the particular wrongdoer in the certain circumstances. I cannot accept that the relevant common-law right cannot be removed by Parliament if it acts lawfully in the context of the Constitution. Nothing in the Constitution calls for the retention of all common-law rights of action, and it is obvious, simply by reference to some examples, that substantial common-law rights have been removed by the Compensation for Occupational Injuries and Diseases Act,[79] the Labour Relations Act,[80] and the Basic Conditions of Employment Act.[81]. I will deal with the Constitutional Court decision in Jooste[82] when I deal with the argument of irrationality, and prayer 9 of the amended notice of motion.

21.

THE IRRATIONALITY ARGUMENT:

As an alternative to the argument that section 21 of the RAF Act was

79 Act 130 of 1993

80 Act 66 of 1995

81 Act 75 of 1997

82 See Jooste v Score Supermarket Trading (Pty) Ltd 1992(2) SA 1 CC at par 20 to 22

unconstitutional for the reasons mentioned above, Mr Gauntlett SC on behalf of the First Applicant argued that section 21, inasmuch as it abolishes the relevant common-law claim, is irrational and unreasonable. The affidavits before me contain literally hundreds of pages of facts that I allegedly need to consider in this context, arguments surrounding those facts, annexures giving rise to those facts, and alternatives that the Government should reasonably have considered or enacted. A detailed analysis of all those facts placed before me in this context would take up another few hundred pages. I do intend however dealing with the most important considerations in this regard, and my failure to deal with part of those, or all of them, must not be regarded as an indication that I have not read the affidavits, nor considered the facts before me. I must also add that Mr Gauntlett SC correctly stated that if there were any conflicts of fact apparent from the affidavits, I needed to follow the approach expounded in the Plascon-Evans decision.[83] In essence this means that I need to consider the facts in the Applicants affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent. This is of course the correct approach in the usual proceedings on notice of motion. I am however not quite convinced that this

83 See Plascon-Evans Paints v Van Riebeeck Paints 1984(3) SA 623 AD at 634

is the correct approach in constitutional litigation, and in the present context, where I need to look at the relevant legislation, and what gave rise to it and why. It seems to me that in such an instance a Court would be obliged to look more closely at the facts alleged by the State, than would otherwise perhaps be the case. In the context of the rationality argument however, it seems to me that the relevant facts are largely common cause. What is in issue would be the inferences or conclusions that I need to make arising from those facts.

22.

Before dealing with that, I deem it necessary to briefly refer to the doctrine of separation of powers that our present Constitution reflects. The judiciary functions separately from other branches of the Government, and it is the role of the Courts to ensure that the limits to the exercise of public power are not transgressed. There is no exact or fine line between the three branches of the State, but it is beyond doubt that an independent judiciary is crucial to a State based upon the Rule of Law.[84] It cannot be disputed that the exercise of all legislative power is subject to at least two constitutional constraints. Legislation must not infringe any

84 See SA Association of Personal Injury Lawyers v Heath & Others 2001(1) SA 883 CC at 898 and the cases referred to in footnotes 46 to 48 thereat

of the fundamental rights enshrined in the Bill of Rights. These rights may, however, be limited by a law of general application and, as I have said, the provisions of section 36(1) then apply.[85]

The other constitutional constraint is that there must be a rational connection between the legislation and the achievement of a legitimate Government purpose. The idea of the Constitutional State based on the Rule of Law presupposes a system whose operation can be rationally tested.[86] Parliament can also enact legislation that differentiates between groups and individuals, but in this context it is then required to act in a rational manner. The Constitutional Court put it as follows: *"Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in a measure be unconstitutional."*[87] The rationality test, and its ambit, was at the heart of the well-known Pharmaceutical Manufacturers' decision of the Constitutional Court.[88] Although the decision was concerned with the conduct of the President (the executive), the rationality test was clearly also applicable to the exercise of legislative power, and the Affordable

85 See Affordable Medicines Trust v Minister of Health 2006(3) SA 247 (cc)

86 See Affordable Medicines Trust v Minister of Health *supra* at p278

87 See New National Party of South Africa v Government of the Republic of South Africa and Others 1999(3) SA 191 CC

88 The Pharmaceutical Manufacturers of South Africa: In re ex-parte President of the RSA 2000(2) SA 674 CC at 708 to 709

Medicines Trust decision of the Constitutional Court makes that clear.[89] It is abundantly clear from the decisions of the Constitutional Court, that I cannot do the following in the present context:

1. I cannot say that the decision of the legislature to enact the Amendment Bill and especially section 21, is unreasonable;

2. I cannot say that it is not desirable;

3. I cannot say that it ought to be improved, and suggest or order such improvements in any specific context;

4. Although I can show (as I have), compassion and understanding of the plight of certain individuals, I cannot legislate for them;

5. I cannot draw a budget for the legislature or order it how to spend public funds.

89 See at 278, paragraph 74 to 75

23.

1. What I can do however, and must do, is to consider whether or not the legislative scheme is rational, having regard to the question whether or not a legitimate Governmental purpose is achieved thereby. If there is no rational connection between the scheme and such purpose, I can declare to be unconstitutional (subject to confirmation by the Constitutional Court of course).

In this same context the Constitutional Court has said the following: *"As the Lawrence case makes plain,*[90] *the Court sought to achieve a proper balance between the role of the Legislature on the one hand, and the role of the Courts on the other. The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of that power to review legislation, court should strive to preserve to the Legislature its rightful role in a democratic society."*[91]

90 S v Lawrence; S v Neval; S v Selberg 1997(4) SA 1176 CC

91 See Affordable Medicine's Trust v Minister of Health *supra*, at paragraph 86

24.

FIRST APPLICANT'S CASE IN THE CONTEXT OF IRRATIONALITY:

In its founding affidavit it was submitted that the abolition of the common-law claims, while simultaneously reducing the compensation, unreasonably and irrationally deprives them of their right to obtain effective relief, in violation of section 38 *(sic*) of the Constitution.[92] It was also alleged that the "compensation scheme" is inconsistent with the Constitution as it is "deprivative" of common-law rights, it is not rational, it is arbitrary, and it is unreasonable in its effect.[93] The allegations in the context of irrationality or arbitrariness are made in relation to certain parts of section 17 of the Act and/or the regulations promulgated there under. Second Applicant, in its founding affidavit referred to "the unfairness and the one-sidedness of the Act and the regulations…"[94]

25.

I will as briefly as I can (but without losing the essential meaning of First

92 See founding affidavit, p37, par 53

93 See founding affidavit, p47, par 77

94 See Second Applicant's founding affidavit at p109, par 24.1

Applicant's argument) deal with the submissions made in its heads of argument and in Court: in the written argument[95] it submits that it is not rational to take away a right of recourse on the basis that the current system is unaffordable. What follows essentially summarizes the argument of First Applicant in this particular context: even if the existing benefits (prior to the amendments) were unaffordable, and the scheme was therefore no longer viable, (which is also challenged) this premise cannot serve as a justification for the abolition of the right of recourse against others. It is contended that the less the State gives, the stronger the entitlement for a victim to make good his or her loss against the violator. There can also be no adequate justification that the wrongdoer has to be protected disproportionately to the victim. The "crude" limit of R160 000,00 to claims for loss of income or support is clearly arbitrary. It operates regardless of the circumstances of a particular victim. It wholly disregards the victim's earning capacity and duty to provide support to dependants. The wrongdoer's capacity to compensate is likewise disregarded. The irrationality of imposing a categorical limitation of R160 000,00 is further borne out by the flawed rationale. The expressed rationale in that context is that would-be victims can insure themselves against losses beyond the R160 000,00 limit. The evidence however clearly

95 P32 from par 68

shows that this is unresearched, and also an unverified premise based on erroneous data, and assumptions based thereon. Children are unable to either obtain, or obtain adequate insurance in this context. It is also equally factual erroneous to say that the poor were subsidizing the rich under the previous scheme, and that a limitation would therefore prevent the perpetuation of this social injustice. The R160 000,00 limitation is therefore non-existent on a factual substratum premise, and any decision based thereon is devoid of any rationality. The scheme is also invalid because it reduces and exclude numerous entitlements to victims who would otherwise have benefited, but does so without substituting them with satisfactorily benefits. Although certain restrictions to victims' rights may be validly imposed by an act of parliament, such restriction must provide for a proportionate benefit, in the absence of which it would be invalid for being irrational. In contrast to the Jooste decision[96] where a number of novel benefits were introduced by the relevant statutory compensation scheme, the current scheme created a large class of injuries for which no compensation can be claimed, and it would have particularly negative consequences for the poor, children and students, young workers, people who suffer from chronic conditions like HIV/AIDS, obesity, diabetes and heart conditions, and those in

96 *Supra,* footnote 82

high risk professions. This group of victims allegedly comprise at least 43% of road accident victims. This expansive group was particularly exposed since they were not eligible for private insurance. No new benefits were given, and with reference to the Jooste-decision it was then submitted that this Court was competent to enquire into the "impugned provisions substantive constitutional compatibility." The argument was therefore that I must be satisfied that a comprehensive scheme has struck an appropriate balance between entitlements created, and common law rights abolished. This was not substituting my policy choices for that of Parliament, so it was argued, but a constitutionally mandated exercise to ascertain whether the rights protected by the common law as sacrosanct, and by the Constitution as fundamental, were abolished in such a balanced way as to satisfy the constitutional requirement of rationality. The Jooste-decision was therefore clearly distinguishable, and the present scheme was not only haphazard and unbalanced, nor comprehensive and thus inherently flawed. Furthermore, the inherent irrationality resulting in the section 20(1) "scheme" could also not be justified in terms of section 36 of the Constitution. It was also contended that "the Courts are constitutionally compelled to act as final arbiter where financial issues are involved".[97]

26.

97 See First Applicant's heads of argument, p38, footnote 102 and Brand, 2008, TSAR 89 at 97 – "Financial Constitutional Law – a new concept. Reference was also made to Executive Council, Western Cape Legislature v President of the Republic of South Africa, 1995(4) SA 877 CC at par 100

This argument was substantially repeated in Court and a more colloquial summary of First Applicant's case would be: *"What is given is not proportional to what was taken away."* In the context of the submission, however widely it was formulated, that the Court must act as the final arbiter also where financial issues were involved, I must immediately refer to section 27(2) of the Constitution, which clearly does not support this wide contention, in that the State is only obliged to take reasonable legislative and other measures to achieve the right to have access to health care services "within its available resources". In my view it is clear, and never seriously contended otherwise, that socio-economic rights do not form the basis of Applicant's challenge in these proceedings. It follows that whether or not the present legislation is "reasonable or not" is irrelevant in law. In any event, if a Court were to test legislation for reasonableness, it would never reach the end of its enquiry, nor would it act with its confined sphere of power that I have already referred to.

27.

The complaints, and the basis for such by the Applicants is wide ranging, and I may say in this context that the affidavits before me comprise almost 4 500 pages (without the annexures). It is impossible even to give an approximate summary of

all the allegations made therein, but it is also not necessary. I propose to refer to the Second Respondent's argument, and then to the most pertinent facts upon which they rely, and thereafter to decide whether or not the new "scheme" is rational, having regard to the stated Government purpose. (I must add that Mr Gauntlett SC agreed that I can decide the issue on the Respondent's version of the facts). In First Respondent's answering affidavit[98] the principal rationale for the abolition of the common-law claim by the Amendment Act was as follows:

1. The compensation payable under the Act remains fault-based (see however Government Gazette 32940 of 12 February 2010 which deals with the no-fault scheme envisaged). Road accident victims are entitled to

98 See Vol 5 at p1577, par 134 and further

compensation only if, and to the extent that the loss was due to someone else's fault. They are paid compensation under the Act in lieu of the claim they would otherwise have had at common law against the wrongdoer. The substitution of a statutory claim for the common-law claim is to the advantage of claimants insofar as they now have a debtor with a "deep pocket". They would otherwise have been at risk of having a good common-law claim against the debtor who cannot afford to pay. This is a significant risk. The substitution of the risky common-law claim with a statutory claim against the public fund, is a significant advantage.

2. The trade-off is in the first place that the compensation payable under the Amendment Act is limited. The limitations are designed to ensure that the basic needs of all are met from public funds but to limit the overall cost of the scheme.

3. The second element of the trade-off is that the victims' common-law claim is abolished to afford immunity from liability to drivers and owners. They are afforded this immunity because they are the funders of the scheme through

> the fuel levies they pay. If they were not afforded this protection, they would have to pay both the cost of the scheme and the cost of liability insurance to cover themselves against the risk of claims by the victims of road accidents.

The First Respondent therefore believed that these considerations constituted a powerful rationale for the abolition of the common-law claim. It was, in short, a legitimate State objective to require motorists to fund the compensation payable to the victims of motor vehicle accidents under the Act, and in return to give them immunity against claims for damages by those victims. It was then alleged that this rationale appeared in one form or another in the position adopted by Government in the White Paper process and in the report of the Melamet Commission.[99]

28.

Contrary to Mr Gauntlett's SC submission that I need not consider the "past", or

99 See First Respondent's answering affidavit, vol 5, p1578, par 136, footnote 342 and Annexure "DoT25" at p58

even the “future”, I propose to do so, and especially the former, in as much as I would have a clearer understanding as to whether or not a consistent rationale is apparent, having regard to First Respondent’s reasoning in the answering affidavit. The relevant Parliamentary process involves the publishing of what is called “the final White Paper”.[100] It sets out the position of the Government in the relevant context with great detail, but at the same time recognised that amendments to the then existing system would not fully integrate it into the envisaged social-security system, and accordingly called for a Commission of Enquiry with the mandate to make recommendations regarding an equitable, reasonable, affordable and sustainable system of compensation.[101] This final White Paper gave a number of explicit reasons for the intended abolition of the common-law claim, amongst others referring to the statutory precedent that existed under the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993. The Satchwell Commission was divided on the issue of whether the common-law claim should be retained or not.[102] First Respondent accepts that the wisdom of the policy choice to abolish the Common-law claim is a matter for debate, and is open to legitimate difference of opinion. The wisdom of this policy

100 See First Respondent’s answering affidavit, vol 5, p1507, par 31 and further.

101 See Annexure “DoD4”, vol 6, p1977 (Government Gazette 18658 of 4 February 1998)

102 See First Respondent’s answering affidavit, vol 5 at p1580, at paragraph 140 and footnote 344

is however not before this Court, and the only question is whether or not the abolition of the common-law right violates the Constitution.

29.

First Respondent then made the following further contentions:

1. In the previous system the rich obtained much more value in the form of insurance, whilst paying the same fuel levy as the poor. The rich obtained insurance for any amount of loss of earnings / earning capacity; insurance for any form of medical treatment that they could somehow justify; and the rich could motivate for substantial amounts of general damages with reference to quite “frankly nebulous concepts” such as a loss of amenities or enjoyment of life;

2. While contributing the same fuel levy, the poor obtained much less because the could claim less (if anything) for loss of earnings / earning capacity; they were less likely to institute large claims for medical expenses because they could not afford to pay for the treatment upfront, and they

were less likely to obtain the same quantum of general damages as the rich, having regard to the consistency and the quality of treatment in respect of general damages;

3. The previous system therefore produced perverse results, because it resulted in the poor subsidizing the rich, and it had to be changed to remove discrimination against the poor.[103] It is contended that the Amendment Act now seeks to assist the poor rather than to discriminate against them. It is also constitutionally legitimate to differentiate between the victims of road accidents, and the victims of other forms of crimes. In any event, it is legitimate for the State to devise a special scheme to deal with injury and death as a result of motor vehicle accidents, and it is not for a Court to set aside a law which it considers to be ineffective or because there are other or better ways of dealing with a problem. As long as a law is objectively rational, a Court cannot interfere with it simply because it disagrees with it, or considers the power to make law to be exercised inappropriately. It is also not the task of a Court to second-guess the

103 See the Satchwell Commission report and its opinion quoted in First Respondent's answering affidavit, vol 5, p1642 - 1643, par 326 and 327

wisdom of policy decisions made by elected bodies. The Courts are not allowed to make policy choices under the guise of rationality review. The following submission is then made and I prefer to quote it:[104] *"It is clear that the Act passes muster under this test. Injury and death as a result of motor vehicle accidents constitute a particular and very significant socio-economic phenomenon. It is legitimate for the State to devise a special scheme to deal with it. The Act creates such a scheme. It is legitimate for the scheme specifically to address losses suffered as a result of bodily injury and death caused by motor vehicle accidents, without also dealing with losses of other kinds or due to other causes. Within the context of such a scheme, it is also legitimate for the State to require motorists to fund the scheme on the one hand, and to afford them immunity against liability for injury or death arising from the use of their vehicles on the other. The differentiation made by the abolition of the common-law claim is a rational and consequently defensible one under section 9(1) …The matter is akin to the abolition of the common-law claim of injured workers against their employers under section 35(1) of the Compensation for Occupational Injuries and Diseases' Act ("COIDA")."*

104 See First Respondent's answering affidavit, vol 5, p1648, par 350

30.

Before continuing with First Respondent's reasoning I deem it appropriate to refer in more detail to the Jooste-decision. This case concerned an action for *inter alia* general damages by the employee (Jooste), which she alleged were a direct result of the negligence of one or more employees of the employer during the course and scope of their employment. The employer took the point that Jooste's claim was barred by section 35(1) of the mentioned Compensation Act. Jooste then met that plea with a replication that section 35(1) was inconsistent with the (1993) Constitution, in that its provisions violated the right to equality before the law, and to equal protection of the law, and the right not to be unfairly discriminated against, the right of access to Courts and the right to fair labour practices. The Constitutional Court unanimously rejected the challenge. Stated in essence, the contention amounted to the conclusion that the nature of the balance achieved by the Legislature throught the Compensation Act tilted somewhat in favour of the employer, while requirements of policy and the nature of the relationship between the employee and the employer indicated that a

different balance was appropriate. Accordingly, a section 35(1) was not rationally related to the purpose of the legislation. Whilst mentioning that Courts in other countries such as the United States of America, Canada and Germany have found similar legislation neither irrational nor arbitrary, the Constitutional Court said the following in paragraph 17: *"But that argument fundamentally misconceives the nature and purpose of rationality review and artificially and somewhat forcibly attempts an analysis of the import of the impugned section without reference to the Compensation Act as a whole. It is clear that the only purpose of rationality review, is an enquiry as to whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this enquiry whether the scheme chosen by the Legislature could be improved in one respect or another. Whether an employee ought to have retained the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter or policy. It involves a policy choice which the legislature and not a Court must make. The contention represents an invitation to this Court to make a policy choice under guise of rationality review; an invitation which is firmly declined. The Legislature clearly considered that it was appropriate*

to grant to employees certain benefits not available at common law. The scheme is financed through the contributions from employers. No doubt for this reasons the employees' common-law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contacted by employees in the course of their employment."

Although there are certain differences between the facts of that case and the present, the mentioned reasoning in my view remains applicable and has found approval in other jurisdictions as well.[105] In the context of a denial of right of access to a Court, the Constitutional Court decided that that section did not deny such access, but that such denial already followed from the removal of the right to claim common-law damages. I have already mentioned that nowhere does the present Constitution call for the retention of all common-law claims of action which existed at any stage. To my mind the contrary is true and this is clear merely by reference to sections 8(3)(b) and 39(3) of the Constitution. I have read

105 See Jooste, p12, footnote 31

the affidavit by Dr R Campbell in the context of the lack of any, or proper and adequate, health care facilities for spinal cord injury patients. If I could I would sell all fighter-planes and expensive Government vehicles and with the proceeds provide for health care facilities in rural areas for all I would. My personal views in this particular context are of course irrelevant, but I mention them having regard to the said affidavit (assuming the facts therein are correct) and what was submitted in First Respondent's heads of argument, namely that "the Courts are constitutionally compelled to act as final arbiter also where financial issues are involved". The article of Brand[106] suggests *"that there is indeed room for the recognition and development of a new distinct part of constitutional law in South Africa, namely financial constitutional law".* He suggest that financial constitutional law would consist of five elements, namely, economic and fiscal considerations; constitutional allocation of functions and division of financial resources; financial and fiscal legislation; policy consideration; and justifiability of the financial Constitutional league of provisions. This was not an academic debate, but according to the author, close to the heart of the new Constitutional system in South Africa.

106 Vol 3, p1260, See footnote 97 *supra*

I have little doubt that the author (who relies on the development in German Constitutional Law) is correct at the very least in the context of sections 26 and 27 of the Constitution. In this application however we are not dealing with socio-economic rights. The relevant affidavits of the parties also did not present the case on that basis. It was also not sought to place the application in the context of whatever rights may be flowing from the provisions of section 10 of the Constitution, namely the right to human dignity. I mention that in passing because of the recent decision of the German Constitutional Court[107] which dealt with the payment of social security amounts for children (amongst others), and in the context of the right to dignity, held that the Government was obliged to pay a subsistence minimum that was in line with human dignity, and it therefore had to assess all the expenditure that was necessary for one's existence, consistently in a transparent and appropriate procedure according to the actual needs of the persons i.e. in line with reality. This is not such a case, but I have little doubt that at the appropriate stage such issues will be raised, and will have to be considered in the light of all the relevant facts that will have to be available to the Court.

107 BVerfG, 1BvL 1/09 of 9 February 2010

31.

On behalf of First Respondent it was also submitted that the following considerations in the context of rationality need to be considered:

1. It was not unfair to require high-income earners to acquire top-up accident insurance. Many would already have such insurance to cover themselves in respect of other forms of accidents or harm. The risk posed by high-income earners were shared by many millions of poor South Africans who contributed to the Fund through the fuel levy, but who could claim little or no compensation for loss of income or support. The insurance afforded to the rich by the system was cheap only because the millions of poor people (who posed little risk to the system) subsidized the rich;

2. Liability insurance would always be more expensive than accident insurance, and cannot be tailored by the motorist to suit his or her needs;

3. Default may consist of a moment's inattention and, in many instances, it would be unfair to publish a wrongdoer with a financial ruin;

4. It is unfair that the victim without means is unable to claim from a wrongdoer with means and that the latter cannot claim from the former;

5. The retention of the common law would increase the cost of doing business in South Africa.[108] The affidavits, not surprisingly, then contain numerous allegations and counter allegations with factual debates and disagreements about the availability of "top-up" insurance for the young, the students and those with certain disabilities. The debate concerned essentially the question to which extent such insurance was available, affordable and in existence. It would be beyond the scope of this judgment if I had to enter into this debate in greater detail. I conclude however from the relevant affidavits that personal liability insurance is available, that it is limited to some extent for certain classes of people, but that it will also develop in future to take account of the demands of the market place.[109]

32.

I do not believe that any of the mentioned deficiencies of the "new scheme" can

108 See Generally Vol 5, p1579, 1526, 1588, 1540, and 1530 respectively.

109 See the affidavit of S Swanepoel, Vol 5, p1711 as example in this context

lead me, as invited, to the morass of re-arranging budgets and taxes in the present context, and I again refer to the dictum of the Constitutional Court that is relevant here: *"The Courts are not constitutionally equipped to make the wide-ranging factual and political enquiries necessary… for deciding how public remedies should most effectively be spent. There are many pressing demands on the public purse. As was said in Soobramoney: 'The State has to manage its limited resources in order to address all its claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.'"*[110] In the as yet unreported decision of the Constitutional Court in Poverty Alleviation Network[111] the following was said: *"As this Court observed in Pharmaceutical Manufacturer's Association a Court cannot interfere with legislation simply because it disagrees with its purpose or believes that it should be achieved in a different way. Unless it can be shown that the objective is arbitrary, capricious or manifest naked preferences, it is irrelevant to this enquiry whether the scheme chosen by the Legislature could be improved in one respect or another'. Indeed, lawmaking is a function of Parliament alone".* It is not the function of the Courts to review laws for reasonableness in the present context.[112]

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110 See Minister of Health & Others v Treatment Action Campaign supra, at par 37

111 Poverty Alleviation Network & Others v President of the RSA & Others [2010] ZA CC5, judgment delivered on 24 February 2010, at par 71.

112 Bel Porto School of Governing Body & Others v Premier Western Cape, and Another 2002(3) SA 265 CC, at parr 45 to 46

33.

Having regard to First Respondent's reasoning, I asked counsel what the position would be if I were to find that one or other of the stated reasons for the introduction of the new system was in fact the irrational / unjustifiable / unfounded. In that context I was then referred to a decision[113] which was the basis for the argument that if one irrational reason appeared, the relevant statutory provision could be impugned. There was no further debate on this in Court and I was thereafter asked by First and Second Respondents to admit a further brief written argument, which I did. It was then submitted that the relevant dicta appearing in the Rustenburg Platinum Mines decision were distinguishable in the present context, and that the reasoning that appeared therein was inappropriate because considerations in Administrative Law do not necessarily apply in the context of a Constitutional challenge to a statute. It was pointed out that the Constitutional Court had made it quite clear that constitutional review of legislation was very

113 See Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA 2007(1) SA 576 (SCA)

different from judicial review of administrative action.[114] It was also argued that the motives for those waiting for – or introducing the legislation was irrelevant, in that the Court is concerned with the actual purpose of the legislation and hence its rationality, and not the motives of the legislators.[115] Also, as stated, the standard of rationality involved the application of an "objective enquiry"[116] In reviewing whether or not legislation is rational, the enquiry is not whether the legislative measure is reasonable or proportional but only whether or not there is a rational connection between it and the achievement of a legitimate Government purpose.[117] For the Applicants to succeed in their irrationality attack, they must demonstrate that the impugned provisions serve no legitimate Governmental purpose.

In reply the First to Fourth Applicants submitted a further written argument, and persisted in the submission that:

1. Respondents cannot now escape (as they tellingly now contrive to do) the

114 See Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others 2008(5) SA 171 (CC) at par 73

115 See Poverty Alleviation Network *supra* at par 73

116 See Pharmaceutical Manufacturers' Association *supra* at par 86

117 See Affordable Medicines Trust *supra* at parr 74 and 83

official statement of the purposes of the 2008 amendments which they themselves choose to put up as evidence before me;

2. Government purposes behind its own “transitional scheme” are not to be equated with the motives behind statements of individual legislators;

3. Several of these purposes are simply indefensible as being legitimate current Governmental objectives – particularly in traducing the fault principle, protecting wrongdoers and hand-wringing over the cost to them of insuring against the supposed “moment of inattention” which devastates an innocent life;

4. They cannot be disregarded, on the absurd reasoning that establishing any single legitimate Governmental objective will blind the Court to other indefensible purposes mixed with it as equally “primary”,

5. If it is not clear that the legislative provision would have been adopted in the absence of the recorded repugnant purposes, it cannot stand, in the light of sections 1 and 8 of the Constitution,

6. In any event, the rationality enquiry cannot be undertaken without regard for proportionality;

7. On the Respondents own papers, the purposes behind the abolition of the right of recourse at common law lies in what the Respondents accept is a single “transitional scheme”, comprise a mixed group which do not pass the test articulated in Patel.[118] This debate was unleashed because when I put the relevant question to counsel I had in mind the Government purpose relating to the “moment of inattention” as one can logically accept, merely by reading the Law Reports, that many moments of inattention have resulted in many tragic consequences. The same reasoning however applies also to many moments of reckless conduct, or even intentional conduct, which is frustratingly clear on one’s way home, and noticing how just about every rule of traffic is repeatedly and consistently ignored by certain drivers. In my view however, even if I find that this “moment of inattention” is totally unacceptable reasoning, and therefore irrational, I cannot find that this would defeat the whole of the Government purpose expressed in the “new scheme”

118 See Patel v Witbank Town Council 1931 TPD 384

34.

In the light of the above therefore I cannot hold that the enactment of section 21 of the Amendment Act is irrational. In the premises, therefore I refuse to declare that section 21 of the Road Accident Fund Act, 56 of 1996 as substituted by section 9 of the Road Accident Fund Amendment Act 19 of 2005, is inconsistent with the Constitution on the grounds of its irrationality. (Prayer 1).

35.

IS THE PROVISO TO SECTION 17(1) READ WITH SECTION 17(1A)(a) OF THE ACT INCONSISTENT WITH THE CONSTITUTION AND INVALID? (PRAYER 2.1):

The relevant sections read as follows:

*"17. **Liability of Fund***

(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;

(c) *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.

(1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974).”

36.

APPLICANT’S ARGUMENT:

The effect of this amendment is that the obligation of the Fund to compensate a third party for non-pecuniary loss (general damages) shall be limited to compensation for a serious injury. “Serious injury” is not defined. It is however an injury “as contemplated” in subsection (1A). It is difficult to ascertain from the First

Applicant's founding affidavit on which basis the proviso to section 17(1) is allegedly inconsistent with the Constitution. The same applies to the founding affidavits of the other Applicants, and also to the First Applicant's heads of argument. Neither was there any coherent argument presented in Court in this particular context, and it is difficult therefore to discern on which possible basis the proviso should be declared unconstitutional. Persons with non-serious injuries cannot claim general damages for pain and suffering and loss of amenities of life for instance, but they can still claim medical expenses and loss of earnings. I can only presume that the attack is that a common law right has been removed, but to that extent I have dealt with argument in the context of section 21 of the Amendment Act. Accordingly the relief sought in paragraph 2.1 of the amended notice of motion is refused.

37.

IS SECTION 17(4)(c) OF THE ROAD ACCIDENT FUND ACT INCONSISTENT WITH THE CONSTITUTION? (PRAYER 2.2):

The section reads as follows: *"Where a claim for compensation under subsection (1)… includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding*

(i) R160 000,00 per year in the case of a claim for loss of income; and

(ii) R160 000,00 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support."

These were the amounts at the time the Amendment Act came into force, and are in terms of section 17(4A), subject to quarterly adjustment to avoid the affects of inflation. They presently stand at R176 535,00.

38.

The First Applicant has argued that "this is an especially irrational aspect of the new scheme". They submit that the mere fact that the common-law claim – which has provided for full compensation to the extent that compensation was unavailable under the previous regimes – is excluded simultaneously with the introduction of an absolute limitation on the only remaining recourse, is strikingly irrational. They submit that the scheme thus reduces the amount recoverable from the RAF while completely removing the residual top-up remedy under the

common law. The explanation for this double attenuation of victims' remedies is that it is necessary to save funds. Yet, the common law claim clearly has no adverse bearing on the RAF's funds. To the contrary, the wrongdoer's ability to bear the burden of his or her negligence could alleviate the financial pressure on the RAF. In any event, the evidence shows that the RAF has broken even for the last four years. In this light the imposition of a cap is demonstrably not necessary, and clearly disproportionate. The amount of the cap is unjustifiable. It was set to operate without any regard to the actual loss of an individual victim. First Applicant further submits that there is no evidence of a recent analysis of how this limit relates to the purpose it is intended to serve. Nor is any evidence provided on what competing financial priorities the Department of Transport and Treasury may have or how tax payers' money is appropriated. That the Minister of Transport fails to do so is significant in the light of the Minister of Finance imputing much of the financial woes of the RAD to maladministration and mismanagement.[119]

The submission is that not only does the "crude" amount imposed completely disregard the victims' situation, but it also ignores the wrongdoer's ability to pay

119 Reference is made in this context to volume 9, p3094 at par 52

compensation. This is particularly inexplicable in the light of the evidence that 40% of motorists are insured against third party claims. In addition, the claimed escape valve for locking all victims in under a R160 000,00 cap is an equally irrational construct. The evidence allegedly clearly establishes that the possibility that victims can buy top-up insurance – to compensate for Parliament's abolition of victims' common law top-up claim against the wrongdoer – is no viable alternative.[120] It is also submitted that not only is it demonstrably unworkable to expect innocent victims to shoulder the burden of indemnifying themselves against losses caused by negligent drivers, it is also utterly unfair to do so. It's unfairness is so striking in the context of the common sense of fairness in developed societies around the world (as developed through the millennia), that it cannot be said that any reasonable Legislator could reach this result after having applied its mind properly. Thus shifting the burden to victims to insure themselves in order to protect wrongdoers against liability for their negligent conduct – and purportedly protecting the RAF funds – is clearly irrational. It was submitted that the Respondents did not respond meaningfully to the issues identified above – indeed, they confirm that future earnings by children and young victims are uninsurable.[121] First Applicant also suggests that the contention on behalf of First

120 In this context reference is made to vol 1, p40, par 60 and vol 11, p3556 to 3557, parr 29 – 31

121 In this context the reliance is placed on vol 5, p1726 to 1727, parr 43 to 44

Respondent that claims for over R160 000,00 constitutes only 1% of all claims[122] is insightfull. Because these are extremely limited, a categorical exclusion of compensation for the additional loss suffered in such instances cannot be justifiable. Further, the contention that the losses of this pre-limited group of would-be insured drivers are readily uninsurable evidences a complete lack of understanding of the insurance market. The smaller the group, the less viable the policy. Such failure to comprehend the true position in the insurance market confirms the measures irrationality. First Applicant then suggested alternatives such as alleviating the RAF's financial position by curbing costs on the acquisition of defence equipment,[123] by capping the common law claim, by codifying the common law principle governing contingency allowances, and by reinforcing and refining the existing common law principle that the law of delict should strike a balance between the interest of the victim, the wrongdoer and society. The failure to consider alternatives is particularly inexplicable when regard is had to the disproportionate effect on children and young victims. According to statistics, they comprise half of the population of seriously injured victims, and the earning capacities are usually completely destroyed by the serious accidents.[124] Reliance

122 See vol 5, p1586, par 153

123 See vol 11, p3473, par 27

124 In this context reliance is placed on vol 1, p42, parr 63 to 64

is then also placed on international law obligations to ensure that a child-sensitive and child-centered approach to social security is adopted. Considering therefore that the best interest of child victims could be ensured by a mere extra cost of R1,28 per litre on the fuel levy (constituting a 2% increase only, which on average amounts to an additional R19,68 per year per motorist),[125] the decision is utterly irrational. Similarly, as a matter of fact too, they argue that the imposition of the R160 000,00 on claims for loss of earning capacity and loss of support, has to be satisfied on the basis of irrationality as well.

39.

It is noted that nowhere have the Applicants suggested what the actual amount instead of the R160 000,00 (now R175 887,00) should be.

40.

I have already dealt with the irrationality argument and the irrelevant authorities in the context of Prayer 1.

125 See vol 11, p3474, par 31; vol 11, p3552, parr 21 to 22

41.

The Second Respondent's answering affidavit,[126] although understanding the position to be that the primary responsibility of responding to the merits of the Applicants' constitutional attack on the provisions of the Amendment Act, rests on the Minister of Transport, relies on certain background facts, statistics and reasoning in the context of the relevant amendments. The views and recommendations of the Satchwell Commission are dealt with in some detail, and its reasoning[127] and it is practical in this context to refer to one of such views relied on: *"It is not reasonable to expect a developing country such as South Africa to provide unlimited benefits or compensation to road users. The lack of moderation in the system that allows for and perpetrates disparities of wealth between road users cannot meet the standard of reasonableness. The absence of any relationship between the fuel levy and the compensation to which a victim may be entitled is not economical and is therefore unaffordable. A system of compensation without limits or boundaries is unreasonable. The absence of a*

126 See vol 9, p2920 and further

127 See vol 9, p2928 at par and further

congruence between the fuel levy, risk and cover is inequitable, unaffordable, unreasonable and unsustainable."[128]

42.

Other problems identified by the Commission were overspending on minor or negligible injuries, disproportionate spending on non-financial loss compared with actual losses, and the failure of the financing basis to connect revenue and the scheme's liability to pay claims. The commission also found that a fault-based delictual system failed to meet the needs of the public and in this case noted as follows: *"The current system fails to ensure access to timeous and effective health care and rehabilitation, to provide protection against impoverishment and to offer solace for suffering. The cost of access to an implementation system diverts compensation funds from their true purpose. Where funds are directed towards road accident victims they are frequently expended upon non-catastrophic and non-life changing injuries. A significant portion of compensation funds is expended on the illusionary premise that money can restore happiness."*[129] The Commission also noted certain practical difficulties facing an injured person attempting to claim damages, and said that the practical and procedural problems such as access to legal advice, lack of evidence, uncertainty

128 See vol 9, p2931, footnote 4

129 See vol 9, p2933 and the Commission Report 2002, vol 1, chapter 14, par 14.106, p371

about whether the evidence proves fault, difficulties in the medical prognosis, and delay in the settlement process all contribute to reducing both the chances of recovery of damages and the amount of damages recovered. In the same vain it noted that the delict liability insurance system is so unpredictable and unreliable, that no injured person can be sure of receiving compensation and plan his personal finances accordingly. Quite apart from the legal uncertainties associated with the concept of negligence and causation, they are very considerable practical difficulties to be overcome in proving a claim. Most accidents, particularly road accidents, occur so quickly and unexpectedly that to establish with any degree of certainty precisely what caused the accident is seldom easy. Even if there were witnesses present and were prepared to come forward, the fallibility of the human brain in grasping accurate detail in a moment and the time lapse between accident and trial, are such that the evidences is often not reliable.[130]

43.

It was therefore the view of the RAF that the delict pay system has failed to meet

130 See vol 9, p2934, par 24.3

the needs of users of South African roads, in that it was not only complex and arbitrary, but also time consuming, expensive, open to abuse and wasteful. It was also fraught with practical difficulties, and the outcome was unpredictable and unreliable. It was particularly so in the context of unlimited compensation for injuries. The Amendment Act was a transitional measure pending the introduction of a more comprehensive change to the system, including the possible move to a no-fault system. Parliament recognised however that the RAF could not survive with the pre-amendment Act in place, while debates, discussions and legislative processes around the no-fault system occurred. The pre-amendment Act system was unaffordable, inequitable, unreasonable and unsustainable as well as highly discriminatory and likely unconstitutional in view of the stark difference between the treatment of mostly poor passengers and others. That was the reason for the introduction of the Amendment Act as a transitional measure, and it pointed out the inequities in the pre-amendment system which are again relevant to the irrational argument and the so-called “capping” argument: The most glaring inequities were then said to be the following:[131]

131 See vol 9, p2936, par 28

1. For certain categories of claimants, including certain drivers, compensation was unlimited;

2. In stark contrast certain passenger claims were capped at a maximum of R25 000,00;

3. Claims of foreigners were treated identically to claims of South Africans, despite the minimum contribution that they would make to the RAF via the fuel levy;

4. The complete exclusion of various claimants, such as members of the same household or persons who were responsible in law for the maintenance of the driver;

5. The problem of unreasonable cross-subsidization was especially acute, as the delictual system required that a victim be placed in the position they would have been in but for the accident, educated employed persons with entrepreneurial or professional careers, and who were financially

successful, will have suffered, and would be able to prove greater financial loss than the unemployed, the poor and the less advantaged. These however pay the same fuel levy as the rich. Preference was then made to international research that has shown that the poor are at greater risk of being injured or killed in motor vehicle accidents, and they are also the hardest hit by the financial pressure resulting from such injuries.[132] Certain examples were then given of this unreasonable cross-subsidization with reference to amounts paid to victims way above R10 million. A further example of the inequity of the cross-subsidiaries of rich foreigners by poor South Africans was illustrated by a recent claim where a Swiss national claimed an excess of R4,4 billion from the RAF after being injured in South Africa whilst on holiday. This claim was settled for approximately R500 million, with the RAF paying R69,5 million of the settlement amount. The balance was paid by the RAF's re-insurers from whom cover had been purchased by the RAF. The number of foreign visitors had increased substantially over the last years, and another major influx was expected during the FIFA World Cup.

132 See vol 9, p2938, par 31

44.

South Africa provided automatic cover at the same unlimited level and at the same premium to foreigners, as they provided to citizens. However, foreign jurisdictions do not reciprocate by providing South Africans with automatic cover against injury or death as a result of road traffic accidents.

45.

Second Respondent then referred to the compensation that was paid during the 2009 financial year. It is worthwhile repeating the figures:

1. R4,9 billion was paid out as general damages. This represents 57% of the compensation paid (excluding legal fees);

2. Medical payments, at R0,85 billion for the year represented 9,9% of the compensation paid;

3. Loss of income and support payments at R2,83 billion for the year represented 33% of compensation paid;

4. Funeral costs, at R0,026 billion for the year represented 0,3% of compensation paid.[133] I have mentioned that the vast majority of personal injury claims paid by the RAF are for less than R50 000,00 i.e. of the claims finalised by the RAF in 2009, excluding supplier claims, 92% were below R50 000,00. This is of course a relevant figure in my view, having regard to the alleged unconstitutionality of the R160 000,00 capping. This occured in 2008 as well, and the Second Respondent's reasoning then was that most of these claims of less than R50 000,00 relate to matters where less severe injuries have been sustained. It was not unusual in these claims for only general damages to be claimed, indicating that no medical treatment was required, and no time was required or would be required of work due to the injuries. The RAF was thus utilizing its scarce resources to pay claimants who had not suffered serious injuries. This was inappropriate, given that the focus should be on treatment and rehabilitation of injuries so as to

133 See vol 9, p2943, par 40

restore the injured back to physical and economic life, rather than compensate the victim for short term discomfort.

46.

Second Respondent also raised the issue of the ballooning of its liability and the unaffordability of the pre-amendment system with reference to the following facts:

1. By the 2009 financial year end, the RAF's total liabilities were R43,2 billion;

2. The number of factors which contributed to this growth and liability were the increasing accident rates, inflation of medical expenses, increase in the number of claims lodged, and ever increasing and more subjective damages award by the Courts.[134]

3. South Africa has an exceptionally high number of road accident fatalities, even when compared to other developing countries. Between January and December 2008, 14 057 people died on South African roads, averaging 38

134 See vol 9, p2949

people per day. It was estimated that approximately 280 000 people are injured on South African roads every year.

4. There was no fundamental proper connection between the income of the Fund and its expenditure.[135]

5. By allowing unlimited insurance cover with no pricing for risk, the pre-amendment Act position made the system unaffordable. In this particular context, the Satchwell Commission had the following to say: *"(Any scheme)… cannot redeem every insult, remedy each affliction, restore full wellbeing and return the road accident victim to the position… prior to the accident and the injury of fatality. Such responsibility is not consonant with the obligations of the State to other members of society in times of trouble or distress. Full compensation for all loss suffered in road accidents is compatible in either with Government's responsibility towards road users nor with the resources available to Government."*[136]

135 For all of these respects see the RAF's 209 Annual Report, p6 to 11 and 32 to 35. See also vol 9, p3045, a summary of the 5-year review between 2005 and 2009

136 See vol 9, p2952, par 60 and footnote 21

47.

On behalf of the National Treasury[137] it was stated that the pre-amendment system was wholly uneconomic and, in consequence, failed to meet the standards of efficiency, effectiveness and economy in spending funds raised through statute. While the current system, assessed with reference to these standards, may itself prove expensive, the National Treasury contends that it is reasonable and fair as an interim step towards an arrangement that appropriately and in a sustainable manner balances the statutory provisions of benefits, on the one hand, and self-insurance on the other. What could not be countenanced, however, was an increase in the financial burden of the system of compensation for personal injury or deaths without a proper structure for financing it. Nothing in the application amounted by the Applicants provided a sensible solution to the question of how the previous system, if reinstated, was to be funded. Whilst the Treasury contended that the previous system, based as it was upon unlimited liability, was both unfair to the taxpayer and unaffordable to the economy, it did not contend that the system contemplated under the Amendment Act was

137 See vol 9, p3081

necessarily the best system. (Indeed, it passed no comment thereon). It did however contend that it had the virtue of being more efficient and was more capable of more effective control from an expenditure perspective. It therefore contended that in the interest of ensuring efficiency and spending, sound public entity governance, proper financial management and enhancing financial solvency, it was necessary to replace the unlimited liability scheme. This unlimited liability system created an unreasonable burden on tax payers in order to finance a disproportionate structure of benefits to a limited number of beneficiaries. In the light of the stringent fuel restraints on the economy and taking into account the rising unfunded liability of the RAF, there was a material risk that the RAF would be placed in a position where it was unable to meet its obligations if the Amendment Act was struck down. It is interesting to note that it stated that economic modeling by the Treasury showed that increasing the fuel levy would result in slower investment and economic growth. Increases in the fuel levy therefore would have to be considered with great circumspection, having regard to both the associated cost burden, on the one hand, and the intended benefits, on the other, which in turn compete with other compelling claims on the fiscus. As far as the absence of or deficiency in the insurance system is concerned, it noted

that the system of third party compensation had been in place for more than half a century. The insurance industry therefore had no incentive to provide top-up cover in respect of those aspects not covered by the Road Accident Fund. Once the Amendment Act began to gain traction in the marketplace, so it contended, the insurance industry would undoubtedly respond to the vacuum and would provide cover which was specific to the vacuum.

48.

I have referred to the report of GRS Actuarial Consulting[138] which is an annexure to First Respondent's answering affidavit. I note that the envisaged savings on the crucial matters of the 2008 Amendment Act would be in the region of 35%. This is substantial, and it must also be considered against the light of the allegation by First Respondent that the limit introduced by the Act of R160 000,00 for future loss of earnings only affects about 1% of the population who, by virtue of their increased earnings, would be eligible for increased insurance cover. Whilst it stood to reason that children and other persons who do not earn an income could not obtain income replacement disability insurance, such person would be entitled

138 Vol 5, p1757

to obtain cover for personal accident insurance, which would pay upon the occurrence of an accident irrespective of a victim's medical profile, and non-income replacement disability insurance which would pay benefits in the event that the victim was rendered disabled as a result of an insured event. The First Respondent did however admit that in this context and in the overall context when a solution was sought that would bring about a generally equitable, fair, transparent and sustainable compensation system, the Government had to make hard policy choices. I have referred to the various arguments and considerations required to be considered when deciding whether or not Government has acted irrationality in producing a statute that is not rationally related to its intended purpose in the context of prayer 1 above. As I have said, most of those considerations apply here as well. First Respondent explained how the R160 000,00 cap came about.[139] Initially, a global limitation of R600 000,00 was proposed. This initial global limitation was based on information available which demonstrated that between the years 2000 and 2004 only 4,8% of victims could substantiate a loss a claim for loss of income above R600 000,00. This globally amount of R600 000,00 was criticized as having a negative impact on the very

139 See vol 5, p1529, par 49.1

young. It was therefore replaced with an annual limitation based on a working life of 47 years, which translated into a cap of R160 000,00 per year. In the light of the mentioned decisions of the Constitutional Court, I also have to decline First Applicant's invitation to act as the holder of the public purse in the present context. This must be done by Parliament. I cannot say that the R160 000,00 is not rationally connected to a legitimate Governmental objective, nor can I say that it is so arbitrary that I can set it aside. Applicants have also sought to challenge this cap on the basis that it is "unjustifiable", "unfair" and "unreasonable". In the present context it is in my view not permissible to seek to apply these standards. It is not appropriate to review legislation on the basis of reasonableness (certainly not in the present context), because to do so would be to impermissibly encroach on the terrain on the Legislature. Reasonableness has only to do with socio-economic rights that are referred to in the Constitution, and the limitation clause, once it has been found that a legislative provision has encroached on a fundamental right.[140] The Applicants have therefore not made out a case that the imposition of the R160 000,00 cap infringes on their rights as infringed in the Bill of Rights. There is no basis for the rationality review. It is therefore misguided to suggest that the Legislature should have considered other alternatives, or even

140 See New National Party of South Africa *supra* at par 24

those alternatives put forward herein. As I have said, no suggestions to what the R160 000,00 should in fact have been, has been made in these proceedings. Certain “top-up” insurance is indeed available I may add, but I have noted that at present there is no form of disability insurance which will indemnify victims for an increased ability to earn in the future. It is therefore not correct for the First Applicant to state that it is impossible for children and young victims to obtain top-up insurance.[141] It must not be forgotten that the R160 000,00 base amount, is adjusted for inflation periodically for the duration of the claim for future loss of earnings. This means that the victim is entitled to compensation for loss of earnings which takes into account inflation calculated from the base amount being the amount determined in the last Government Gazette issued before the cause of action arose.[142]

49.

As a result I refuse to declare that section 17(4c) of the Amendment Act is inconsistent with the Constitution (Prayer 2.2).

141 See vol 6, p1729, par 53 and vol 5, p1585, par 152

142 See Section 17(4A)(a) of the Amendment Act

50.

IS SECTION 17(4B) OF THE ROAD ACCIDENT FUND INCONSISTENT WITH THE CONSTITUTION? (PRAYER 2.3):

Section 17(4B) reads as follows:

"17(4B)(a) The liability of the Fund or an agent regarding any tariff contemplated in subsections (4)(a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act 61 of 2003), and shall be prescribed after consultation with the Minister of Health.

(b) The tariff for emergency medical treatment provided by health care provider contemplated in the National Health Act, 2-

(i) shall be negotiated between the Fund and such health care providers; and

(ii) shall be reasonable taking into account factors such as the costs of such treatment and the ability of the Fund to pay.

(c) In the absence of a tariff for emergency medical treatment the tariffs contemplated in paragraph (a) shall apply."

51.

The First Applicant only has one ground of attack against this section, namely that it unfairly discriminates against indigent road accident victims. They say that this section now provides that the RAF's liability for future medical treatment, direct claims by health care providers and interim payments are based on the tariffs for health services provided by public health establishments, and because section 17(4B)(a) makes no reference to claims by victims themselves for past hospital and medical treatment, the Uniform Patient Fee Schedule (UPFS) tariff does not apply to such claims. Thus, road accident victims who cannot provide security for hospital costs are discriminated against. The consequences of this discrimination are particularly harsh, so it was argued. The common practice for private hospitals and health care providers was to reject patients who could not provide security for hospital costs. Thus poor victims who are unable to provide security are unable to obtain private medical care even if the RAF was ultimately liable to compensate them for the cost of their treatment. This differentiation does not turn on relevant criteria but rather on the social and financial status of the victim. This is clearly unfair, arbitrary and irrational, and infringes section 9 of the Constitution,

so it was contended. First Respondent argued that this reasoning behind this challenge was manifestly flawed in that the relevant section does not in any way differentiate between classes of people. It also does not have a disparate impact. It merely provides that people are able to claim compensation based on the amount of money they expended on past medical expenses. This section is therefore not discriminatory, and certainly not unfairly discriminatory in the context of sections 9 of the Constitution. Second Respondent in its heads of argument contended that three brief considerations were the answer to this attack:

1. First, Applicants do not contend that it is constitutionally impermissible for the RAF Act to provide that compensation for medical expenses would take place at the said tariff rather than according to the actual medical expenses incurred;

2. While the relief sought by Applicants in Prayer 2.3 is to have the whole of section 17(4B) of the Act declared invalid, the Applicants' attack is in fact limited only to section 17(4B)(a) of the Act – that is the tariff for future non-emergency medical treatment. The Applicants do not impugne the remainder of this section at all;

3. In the course of setting out their attack on section 17(4B)(a) of the Act, the Applicants return to the issue that they addressed in their affidavits, namely the power of the RAF to issue undertakings in terms of section 17(4)(a) of the Act. Yet, there has been no attack on section 17(4)(a) of the Act in these proceedings and accordingly the section must be presumed to be constitutionally valid.[143]

52.

I agree with the contention of the Respondents and accordingly refuse to find that section 17(4B) of the Road Accident Fund Act is inconsistent with the Constitution and invalid. No human right is infringed by this section nor is it irrational in the proper context.

143 S v Dzukuda & Others 2000(4) SA 1078 (CC) at 80 par 5; Ingledew v Financial Services Board in re: Financial Services Board v Van der Merwe & Another 2003(4) SA 584 (CC) at par 20, and Giddey N.O. v JC Barnard & Partners 2007(5) SA 525 CC (at par 18)

53.

THE REGULATIONS:[144]

Prayers 3 to 10 of the amended notice of motion seek a declaration of invalidity on various grounds of parts of Regulation 3. I will deal with each prayer separately although the argument in respect of these regulations will overlap to some extent.

54.

REGULATION 3(1)(b):

An order is sought that I declare this regulation as being not authorised by the Act and therefore invalid, in that it prescribes a method of assessment that was promulgated without consultation with medical service providers, alternatively without proper regard to use and advice expressed by medical service providers. Regulation 3 deals with assessments of serious injuries in terms of section 17(1A)

144 See Government Gazette R770 of 21 July 2008

of the Amendment. Regulation 3(1)(b) is wide-ranging, but in the context of prayer 3 the challenge is that the method of assessment was promulgated without prior consultation by the Minister with medical service providers prescribed by section 17(1A) of the Act. “Medical Service Providers” is not defined in the Act nor in the Regulations. On behalf of the Applicants it was argued that the record of decision shows that the Minister of Transport impermissibly purported to act without prior consultation as required by the Act in each of two respects: not only did he promulgate the method for assessing “a serious injury” without consulting the Minister of Health, but also failed to consult “health care providers”. Section 17, as I have said, does not refer to “health care providers” but to “medical service providers”. The Act defines neither but “health care provider” refers to the relevant definition in the National Health Act No. 61 of 2003. The Act provides an assessment based on a prescribed method adopted after consultation with medical service providers. The method itself is obviously not contained in the Act itself, but in Regulation 3. The Minister of Transport, the First Respondent, may make regulations provided for in section 26 of the Act. This includes regulations regarding the method of assessment to determine whether, for purposes of section 17, a serious injury has been incurred, which injuries are, for purposes of

section 17, not regarded as serious injuries, and the resolution of disputes arising from any matter provided for in the Act. Any regulation made under section 26(1)(A)(a) or (b) must be made after consultation with the Minister of Health.

55.

The attack on Regulation 3(1)(b) as formulated in prayer 3 is one aimed at a factual situation, namely whether the First Respondent failed to consult with the Minister of Health. The mentioned sections of the Act require First Respondent to act "after consultation" with the Minister of Health and medical service providers. The obvious question is what is the nature of the obligation imposed on First Respondent? It has been held that this obligation requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to the views of the other functionary.[145] *"Consult with"* also means *"confer with"* and whether this so happened was again a substantial debate in these affidavits. It would burden this judgment unacceptively if I had to refer to all the correspondence in this context. The allegations on behalf of the First

145 Unlawful Occupiers, School Site v City of Johannesburg 2005(4) SA 199 SCA at par 13

Respondent are set out in First Respondent's answering affidavit and I have considered these.[146] In the context of the consultation process which summarizes the events referred to in First Respondent's answering affidavit, it may be practical to refer to the letter of First Respondent to the then Minister of Health dated 9 June 2008.

"My letters of 13 June 2007, 20 July 2007, our meeting on 10 October, your letter dated 16 October 2007 and my letter of 8 May 2008 refer.

It is my intention to promulgate the sections of the Road Accident Fund Amendment Act dealing with the liability of the Fund as soon as reasonably possible due to inter alia the financial situation of the Road Accident Fund. The Road Accident Fund has indicated that it is losing R6 million per day due to delays in implementing the Road Accident Fund Amendment Act, 2005.

Your concurrence as requested in my letter dated 8 May 2008 would enable the finalisation of the assessment method, which is the major outstanding aspect preventing finalisation of the process of implementation of the Road Accident Fund Amendment Act.

I therefore request your assistance in finalising this process by communicating your concurrence as a matter of urgency."

146 See vol 5, p1558, par 95 and further. The relevant correspondence is contained in a file of extracts of the record of First Respondent and in its answering affidavit is referred to as MRi, especially p1292 to 1293

The Minister of Health replied on 25 June 2008 and stated: *"Your letter dated 8 May 2008 has reference.*

I concur with the implementation of the AMA Guide VI in the short term but request the RAD to explore the development of an assessment tool within the international classification of function framework which is an international approved framework.

My other concern is the disability sector not being involved in the said meetings."

The Minister of Health also made an affidavit[147] and confirmed that the requisite consultations did take place. Inasmuch as the so-called "narrative tests" was concerned, such was not formally put to the Minister of Health as part of the consultation process, but it was added after consultations with medical service providers on 3 April 2008 as an alternative to the AMA Guides. The Minister said that if that had been referred to him he would have concurred with the implementation of the AMA Guides 6th Edition and the narrative tests in the short term.

147 See vol 10, p3111

56.

As far as consultation with medical service providers is concerned, this topic was again debated at great length in the affidavits. First Respondent also dealt with this complaint in great detail.[148] He gave details of the relevant invitations to medical service providers to present their views on the assessment method, wrote letters to various such providers inviting them to attend a meeting, and then ultimately held a meeting on 3 April 2008. A record of this meeting is available and reflects what was debated thereat. In my view the consultation process, as emanates from the minute of the particular meeting and all surrounding correspondence indicates that there was at the very least substantial compliance, if not total compliance with the procedural requirements demanded by the Act.[149]

57.

As a result the granting of Prayer 3 is not justified by the facts in this case, and it is accordingly refused.

148 See vol 5, p1554, par 91 and further and MRi at 1131 and further

149 See Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others 2006(2) SA 311 CC at par 484

58.

IS REGULATION 3 (1)(b) NOT AUTHORISED BY THE ACT AND THEREFORE INVALID, IN THAT IT PRESCRIBES A METHOD OF ASSESSMENT WHICH IS NOT REASONABLE IN ENSURING THAT INJURIES ARE ASSESSED IN RELATION TO THE CIRCUMSTANCES OF THE THIRD PARTY? (PRAYER 4):

Section 17(1A)(a) of the Act requires an assessment method of a serious injury to be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

At this stage it may be appropriate to quote the whole of Regulation 3(1)(b) inasmuch as it is also relevant to other prayers herein:

"3. Assessment of serious injury in terms of section 17(1A)

(1) (a) A third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.

(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method:

(i) *The Minister may publish in the Gazette, after consultation with the Minister of Health, a list of injuries which are for purposes of section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.*

(ii) *If the injury resulted on 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.*

(iii) *AN injury which does not result in 30 per cent or more Impairment of the Whole Person may only be assessed as serious if that injury:*

(aa) *resulted in a serious long-term impairment or loss of a body function;*

(ab) *constitutes permanent serious disfigurement;*

(ac) *resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or*

(ad) *resulted in loss of a foetus.*

(iv) *The AMA Guides must be applied by the medical practitioner in accordance with operational guidelines or amendments, if any, published by the Minister from time to time by notice in the Gazette.*

(v) *Despite anything to the contrary in the AMA Guides, in assessing the degree of impairment, no number stipulated in the AMA Guides is to be rounded up or*

down, regardless of whether the number presents an initial, an intermediate, a combined or a final value, unless the rounding is expressly required or permitted by the guidelines issued by the Minister.

(vi) *The Minister may approve a training course in the application of the AMA Guides by notice in the Gazette and then the assessment must be done by a medical practitioner who has successfully completed such a course."*

The topic relating to the "AMA Guides" has been dealt with to an extraordinary extent, and it is my conscious decision to confine this written judgment to the actual crux of the prayer, without referring each time to the hundreds of arguments, deductions, inferences and examples that appear in the affidavits and their annexures.

59.

“AMA GUIDES”:

According to the definition section of the Regulations it means “the American Medical Association’s Guides to the Evaluation of Permanent Impairment, 6th Edition, or such edition thereof as a Fund may from time to time give notice of in the Gazette”. I was handed a copy of these guides and they alone comprise some 615 pages. In the founding affidavit[150] the First Applicant makes the following assertion: *“The method of assessment for ‘serious injury’ which the Minister has prescribed consists of the test under the AMA Guides and the alternative test, also referred to as the narrative test. Both tests exclude, by definition, the explicit requirement of section 17(1A) of the Act, i.e. that the method “shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party. The method of assessment which the Minister has prescribed does therefore not comply with the Act.”* First Respondent denied this allegation in the answering affidavit[151] He says that neither the AMA 6 nor the narrative exclude

150 See vol 1, p55, parr 93 and further

151 See vol 5, p1599, par 180

“by definition” the circumstances of the individual. They are required to be considered in terms of both methods, and, even on its own, the AMA 6 is reasonable to ensure that the circumstances of the individual are considered. However, certainly and without any doubt, if used collectively with the narrative, which focuses on the consequences of the injury to the individual concern, the assessment method must be regarded as reasonable, to ensure that the individual circumstances are taken into account. First Applicant alleges that those guides purport only to measure “impairment” which the Guides expressly distinguish from “disability”. Impairment determines only the immediate physiological consequences of an injury, while disability measures the consequence and abilities lost as a result of an injury. First Respondent again denies this allegation, and says that while there is a distinction between “impairment’ and “disability”, this distinction is not relevant for present purposes in that it does not follow that the Legislature intended the assessment method to measure “disability”. It is essentially the First Applicant’s case in the present context that an assessment under the Guides provides a standardized assessment of how an injury limits or impairs bodily structure or bodily function of any person with that injury. No assessment is made to the extent to which a

specific victim is disabled by the injury, i.e. how the injury limits the individual's ability to perform or participate in his or her particular work, home or personal care.[152] First Respondent denies that in the answering affidavit.[153] It is necessary that I refer to the affidavit of Dr M Ranavaya. He is one of the co-authors of the AMA Guides who made an affidavit which was filed on 15 January 2010, and I accepted a further affidavit dated 3 March 2010.[154] His first affidavit can be identified as to its filing date, and not to its own date which I accepted for logistical reasons.[155] As mentioned, the deponent is one of the authors of the 6th Edition and is also one of the editors of those guides. He is also been teaching the AMA Guides to doctors around the world for over two decades and has trained over 10 000 doctors in the skills of impairment assessment and the use of the guides, including doctors Domingo and LeFévre, both of whom made affidavits on behalf of the First Applicant. I intend hereafter as briefly as it is practically possible to deal with certain of the opinions expounded by this deponent. He agrees that the AMA Guide is not a treatise for diagnosis or therapeutics. It is however an internationally recognised standard for evaluation of impairment, which is

152 See founding affidavit, vol 1, p57, par 97

153 See answering affidavit, vol 5, p1607, par 184

154 See additional volume, p4314

155 See answering affidavit, vol 5, p1783 to p1806

defined as a *"significant deviation, loss or loss of use of any body structure or function in an individual with a health condition, disorder, or disease. In other words, it reflects the seriousness of the injury and the percentage of the impairment is the consensus derived estimate of loss of activity to reflects severity or seriousness of given health condition or an injury and the agree of associated limitations in terms of activities of daily living."*[156] He says that the Guides are used wherever a fair, standardized and evidence based comprehensive evaluation is desired to bring uniformity in the assessment of injuries whether they are in the context of workers' compensation or any other personal injuries, including motor vehicle accidents. They are used in various North American States, in Australia, in New Zealand and a number of North European countries. The use of an objective tool such as the AMA Guides that removes the speculation on the part of expert witnesses serves the common law intention of fairly compensating the victim without needless litigation. (Reference is made to Australia in this context). He mentions that what the victim's position would have been "but for" the wrongdoing, is obviously a highly speculative one, leading to endless litigation with parades of experts with their own opinions about pain and suffering. The use of the AMA Guides brings objectivity in the assessment of

156 See vol 5, p1785, par 6

injured parties leading to a fair assessment and less disputes and less litigation. His view in the light of his two decades experience with the use of these guides leads him to say with confidence that 90% of medical practitioners of all nationalities find the AMA Guides a valuable objective evidence based tool that allows them to consistently and uniformly assess personal injuries without having to resort to speculation and compelled to base impairment decisions on the patient's subjective complaints alone. There is no evidence that there are any impairment assessment guidelines in the world that are as comprehensive and as objective as the AMA Guides to the evaluation of permanent impairment. Comprehensive also does not mean complex. The World Health Organization classification should not be used in this context as it is merely a conceptual model and not a guideline in itself. Contextually, the AMA Guides is no more complex than any other clinical assessment school in medicine. It is in fact a medical textbook like any other. Training is neither mandatory nor required, but like any other textbook it requires reading and understanding in the methodology. He accepts however that training is useful and probably essential to properly apply the guides. This can be self-learning or formal training by attending a relevant training seminar. Such training is also not burdensome and any South African

doctor would be able to do the relevant assessments. That is by way of some of the relevant background. In the context of prayer 4 he says that the whole person impairment rating cannot be used to predict an individual's ability to work. This is so because work tasks may be variable and work accommodation can lead to an individual with the impairment being able to perform that same task as before. The guides are not blind to individual circumstances because when considering the medical history of the patient, the doctor has obliged to ascertain the personal data and educational skills, social and personal history, and consider other factors such as cultural background. More over, the functional history is used as a grade modifier within the class of impairment and allows the doctor to assign an impairment rating to a higher or lower percentage within the class based on personal circumstances. These functional history grade modification factors can include consideration of age and circumstances such as absence of the mass transport system and the fact that an injured person may not have access to running water in the house. The same goes for hobbies, for example, the fact that the individual being assessed was a keen long-distance runner prior to the injury. On the face of it, the manner in which the AMA6 allows circumstances of the victim to be taken into account may it be limited; however, it actually has a very

reasonable effect on the outcome. The main advantage of using the AMA Guides is that it provides an objective assessment of injury as a starting point. This objective of the Guides facilitates congruence among the assessment of the same or similar injuries. Objective assessment methodology, such as the AMA Guides, also reduces the transaction cost to all parties involved. A good reading of the AMA 6 would make it clear to the reader that the AMA 6 takes cognisance of the individual circumstances to a greater extent in previous additions as well as provide the degree of validity and reliability to the greatest extent possible. It does not compromise objectivity and consistency, and yet allows the petitioner to consider the personal circumstances of the victim.[157]

60.

He disagrees with the motion that the impact of impairment on individuals will be greater in developing countries than in the so-called first world countries such as the United States. He disagrees because it mixes up the issues of impairment and disability. Human medicine and the anatomy, physiology and pathology is the same all over the globe. Therefore, the percent of whole person impairment

157 See vol 5, p1798, par 37

resulting from injuries would be the same all over the world, but the impact on the activities of the individual could be different. For instance, the same impairment could also have a devastating affect on the victim in the so-called first world but may have little or no impact on a rural citizen in the developing world who walks back and forth for his needs of activities of daily living and does not have to keep up with the complicated cellphone, e-mail and digital living of the first world. He therefore finds a debate about “first and third world” quite ghastly and arbitrary. Certain parts of the United States, according to him, are as rural and inaccessible as any developing country. He also does not agree that the AMA uses a “snapshot” approach which does not account for pain experienced in the past or pain that will be suffered in the future, because the AMA Guides state that in all diagnosis-based impairment categories, the pain and suffering has been accounted for in the impairment rating. Subjective symptoms are taken into account as the subjective symptom is the beginning of the process of diagnosis which is then further corroborated by the objective findings. Additionally, the subjective symptoms also get taken into account through the functional history assessment.

61.

The deponent also disagrees with several issues raised by Dr Le'Fevré. He says that his comments are inaccurate and misrepresent the AMA 6 methodology. He gives details of his objections to Dr Le'Fevré's approach and especially in the context of so-called psychiatric injuries and consequences. In conclusion he points out that the AMA Guides is not a perfect document as by the very nature of human function, which is dynamic, it is impossible to create a perfect document that would work in all circumstances. However, at this point, it remains the best objective in evidence-based methodology to assess the residual impairment of the injuries and are used across the globe from the Northern hemisphere to the Southern, providing fair and equitable assessment for injured persons.

62.

In the March 2010 affidavit, Dr Ranavaya deals with various responses to his previous affidavit, and states that he was surprised when he read some of the highly critical responses to his first affidavit. He appreciated that the key issue

issue before me was the extent to which the AMA 6 and the circumstances of the individual were taken into account when impairment rating is determined. He endeavoured in that affidavit to focus on that issue and to provide context and had to place certain explanations in perspective. He now says that a number of completely new and broad ranging attacks are made on the AMA Guides which have nothing to do with the key issue. He mentions these attacks, and says that Applicants have raised a new matter in that context. He therefore provided a response, but complained about the unacceptedly short period of time. The deponent then goes to great length to answer the critics' context of his first affidavit and deal with the new challenges to the use of the AMA 6. Referring to certain of the arguments he suggest that the true complaint is in fact not that individual circumstances are not taking into account, but that such individual circumstances do not make enough of a difference to the outcome of the assessment.[158] He discusses impact of the grade modifier, the separate rating for mental and behavioral disorders, the use of AMA Guides in the United States, the combination of multiple impairments and concludes that some of the experts that First Applicant relies on have not been involved with the development or even the use of the AMA 6, let alone being an expert therein.

158 See additional file, p4323 par 24

63.

On behalf of First Respondent it was argued in any event that even if it is found that the AMA 6 does not sufficiently take the circumstances of the individual into account, then it should be kept in mind that the assessment method contains a safety net, in the form of a narrative test, which focuses on the circumstances of the individual. The manner in which the narrative test work in Victoria, Australia and how it takes account and indeed focuses on the circumstances of the individual have been fully described in the affidavit by Dr John Bolitho.[159] It is contended that this evidence stands uncontested and that I am entitled to take into account and have regard to the Australian approach on the meaning of the narrative.[160]

64.

Dr Bolitho explained the relevant process in the State of Victoria, dealt with the

159 See vol 5, p1811

160 See Minister of Health v New Clicks *supra*, at par 537, where the Constitutional accepted certain reasoning articulated by the Australian cases which were applicable in our context

narrative tests as being a safety net, demonstrated the differences between the narrative and impairment thresholds, and showed how the narrative tests took an individual circumstance into account, and the conclusion is that section 3(1)(b) provides for an assessment process which is indeed reasonable having regard to the factors that I could practically mention in this judgment.

65.

In considering the arguments, I have not lost sight of the fact that the question whether or not more efficient means could have been applied to provide for a reasonable assessment in the present context, or whether such assessment could be made more efficient, or even adapted, could not in law be the basis for a challenge on the grounds formulated. I therefore agree with the reasoning employed in State v Frames (Cape Town) (Pty) Ltd[161] and accordingly I refuse to grant prayer 4.

161 1995(8) BCLR 981C at 991H

66.

IS REGULATION 3(1)(b) NOT AUTHORISED BY THE ACT AND THEREFORE INVALID, IN THAT IT PRESCRIBES A METHOD OF ASSESSMENT AND A PROCEDURE FOR LODGING CLAIMS WHICH UNREASONABLY IMPEDE ROAD ACCIDENT VICTIMS' ABILITY TO ENFORCE THEIR STATUTORY RIGHT TO COMPENSATION? (PRAYER 5):

Having regard to the relevant allegations in First Applicant's founding affidavit[162] it is difficult to discern on which basis this prayer is actually formulated.[163] Five grounds giving rise to an alleged invalidity are given, but none of them deals with prayer 5, unless one is very imaginative, but even then one can at best refer to prayer 9, which may or may not overlap to some extent with prayer 5. Regulation 3(1)(b) does also not contain "a procedure for lodging claims." It is also not clear which "statutory right to compensation" is contemplated in the context of that prayer. As far as an unreasonable method is concerned, I have referred to the power of the Court in the context of prayer 4, and I apply the same reasoning to

162 See vol 1, p20

163 See vol 1, p48, paragraph 80

this vague prayer. Not surprisingly, First Respondent only dealt with the five grounds referred to in First Applicant's founding affidavit, and obviously then did not address what one imagines prayer 5 could relate to.[164] In the premises prayer 5 is refused.

67.

IS REGULATION 3(1)(b)(ii) AND (iii) INVALID, IN THAT FIRST RESPONDENT HAS IMPERMISSIBLY PURPORTED TO DEFINE WHAT CONSTITUTES A "SERIOUS INJURY" IN TERMS OF THE ACT? (PRAYER 6):

It is clear that regulation 3(1)(b)(ii) refers to an injury that "shall be assessed as serious". Similarly regulation 3(1)(b)(iii) refers to an injury that may be assessed as "serious". The Act does not define "serious injury". The proviso to section 17(1) limits the obligation of the Fund to compensate a third party for non-pecuniary loss to compensation "for a serious injury" as contemplated in subsection (1A). This section in turn provides that *"assessment of a serious injury shall be based*

164 See First Respondent's answering affidavit, vol 5, p1591, par 171

on a prescribed method…" It is wrong to read any of the regulations in isolation. Regulation 3(1)(b)(i) allows the Minister to publish in the Gazette a list of injuries which are for purposes of section 17 of the Act not to be regarded as serious injuries.

68.

First Applicant argued that the regulation defines "serious injury" itself, which it is not authorised to do. It was submitted that the Minister was only empowered to prescribe a method which would ensure that doctors assess injuries by giving proper consideration to the victims' circumstances. Instead, the Minister has purported to take away substantially the assessment function from the skilled practitioner with an a priori definition of "serious injury" limiting it to the categories the Minister has chosen to define. The submission is that the Minister was not authorised to do that. No reason is given for this conclusion. No clear submission was made as to how section 17(1A)(a) was to be applied in practice, and by whom. A "prescribed method" could only be a method prescribed by law

either in the Act or in a regulation. Section 26 of the Act deals with regulations, and amongst others allows him to make such regarding any matter that shall or may be prescribed in terms of the Act, or which is necessary or expedient to prescribe in order to achieve or promote the object of the Act. Section 26(1A) is more specific and allows the Minister to make regulations regarding the method of assessment to determine whether, for purposes of section 17, a serious injury has been incurred. It also allows him, for purposes of section 17 to regulate what is not to be regarded as serious injuries. It is difficult to appreciate on which basis section 17(1A)(a) and section 26(1A) are to be interpreted and applied in practice, if there is no definition or descriptive regulation of what is regarded as being “serious injuries”. Within the parameters of those sections, and of course section 26(1) of the Act, I hold that regulations 3(1)(b)(ii) and (iii) are not invalid, and that First Respondent has not impermissibly purported to define what constitutes a “serious injury” in terms of the Act. First Applicant’s contention was that the Minister may only identify certain injuries as being non-serious *per se*, but that for all other injuries it was within the province of the assessing doctor to make the determination using a method prescribed by the Minister. I do not agree with this submission, and accordingly prayer 6 is refused.

69.

IS REGULATION 3(1)(b)(ii) AND (iii) OF THE REGULATIONS INVALID, IN THAT THEY EXCLUDE ROAD ACCIDENT VICTIMS WHO HAVE SUFFERED SERIOUS INJURY FROM THE RIGHT TO CLAIM COMPENSATION FOR NON-PECUNIARY LOSS? (PRAYER 7):

Section 17(1), in the proviso, provides that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation to a serious injury. Section 17(1A)(a) requires an assessment of a serious injury to take account of the circumstances of the third party. There is no direct reference in the Applicant's founding affidavit to this relief sought.[165] It was put to me that regulation 3(1)(b)(iii) deals with the so-called "narrative test" that I have already referred to herein. The argument seems to be that the requirements for "serious injury" are rigidly defined in the narrative test, and, like the AMA Guides, are focussed entirely on functional loss of impairment, disfigurement and severe mental or behavioral disorders. These conditions are by definition focussed on the

165 See vol 1, p48, par 80 to this prayer

injury itself, and not how the injury affects the victim and his or her personal circumstances, as required by section 17(1A) of the Act. It was submitted that by reason of the Minister incorporating both tests into the method of assessment, the term “impairment” in the narrative test will be and should be construed to mean in the same as in the AMA Guides. This means that only purely functional impairments will be considered with no reference to the victim’s circumstances. There are also a number of “serious injuries” which do not qualify as “serious” under the narrative test, and this argument was raised in the context of a number of orthopedic and neuro-surgical conditions. Accordingly, it was submitted that these regulations are not authorised by the Act and are invalid. The Act, as I have said, provides that persons who have suffered serious injury have a right to claim compensation for general damages. The Minister has by regulation excluded this right. This argument is in my view conclusively refuted by the mentioned affidavits of Drs Ranavaya and Bolitho. The First Respondent, in its answering affidavit[166] explained, as do the mentioned affidavits of the experts (with reference where appropriate to decisions of the Victorian Supreme Court and Court of Appeal, which decisions I ought to take into account), that First Applicant’s argument is

166 See vol 5, p1594 to 1609, parr 176 to 212

misplaced for the following reasons (which again I need to put in summary only):

1. Firstly, the assessment method consists of three parts (the list of non-serious injuries, the AMA 6 threshold of 30% WPI and the narrative tests). While the three parts form part of one assessment method, they are intended to complement each other, and the validity of the method must be determined with reference to all three as a collective (and not separately). The Applicants attack on the assessment method is premised on the assumption that the AMA 6 and the narrative test should comply separately and as stand-alones with the requirements of the Amendment Act.

2. While the AMA 6 and the narrative are part of one assessment method, they present alternative options (or, as it is referred to in the State of Victoria, “gateways”) to the victim to access general damages. The narrative is a “safety net”.

3. In essence this means that as the first step, the medical practitioners are required to ascertain whether the third party’s injury appears on the list of

non-serious injuries. If the injury does not appear on the list, then, as a second step, the medical practitioner is required to apply either the AMA Guides or the narrative tests in order to determine whether the injury is serious. There is clear authority as to how the narrative test is applied in the State of Victoria in Australia.[167] It is contended that First Applicant has ignored how this test is applied in that State and why, and has further made no effort to ascertain why the narrative test was selected to supplement the AMA Guides. This was done precisely because the focus of the narrative is on the consequences of the injury to the individual. Although the two tests form part of one assessment method, they present alternative options to the victims to access general damages. Narrative tests is a “safety net”, as I have said, which victims may invoke, if they believe that the 30% WPI threshold works unfairly in respect of that particular injury. Viewed in this manner, there cannot be the slightest doubt or even serious debate, it is contended, that the assessment method complies with the requirement that it is reasonable to ensure that the circumstances of the individual are taken into account. Put differently: The list of non-serious injuries is a screening

167 See Humphries v Poljak [1992] 2 VR129 by way of example

mechanism which should result in the elimination of most injuries which are obviously not serious. It is an uncomplicated and cheap method to do so. The 30% WPI threshold in the AMA 6 (“the impairment of the whole person”), on the other hand, can be used by those victims who obviously suffered a serious injury, and who wish to substantiate their claim for general damages with reference to an objective medical assessment, and one which has the advantage of minimizing the potential for disputes. The narrative test then presents an opportunity for those who believe that the injury may not be assessed as 30% WPI under the AMA Guides, but that the injury resulted in serious consequences to them, so that they should nevertheless qualify for general damages. First Respondent therefore contends that, viewed as a collective, the 3 part test is the best possible assessment method it could have chosen.

70.

The list of non-serious injuries has not yet been published by the First Respondent but will be published soon for public comment. It cannot simply be ignored when the validity of the assessment method is considered.

71.

With reference to the affidavits of Dr Ranavaya the following needs to be pointed out:

1. The AMA Guides do not merely assess the agree of damage to a body structure or body function without regard to the impact this has on the overall function of the individual. This can be seen from the cursory review of chapters 1 and 2 of the AMA Guides. The whole person impairment resulting from injury after all ultimately reflects the loss of personal function, i.e. mobility and self-care.

2. It is inaccurate to say that the AMA Guides are blind to individual circumstances because when considering the medical history of the patient, the doctor is obliged to ascertain the personal data and educational skills, personal history, and consider other factors such as cultural background;

3. Functional history is used as a grade modifier within the class of impairment, and allows a doctor to assign an impairment rating to a higher or lower percentage within the class based on personal circumstances;

4. While the manner in which the AMA 6 requires the circumstances of the victim to be taken into account may appear limited, compared to, for example, the narrative test, it has actually a very reasonable effect on the outcome. It provides an objective assessment of injury as a starting point. It takes account of the individual circumstances to a greater extent than previous editions and there is complete clarity, from the affidavit of Dr John Bohlito how the narrative tests work in Australia, and what guidance that would give in the local context.[168] First Respondent also points out that it is not possible to predict with certainty the outcome of an assessment under the AMA 6 with reference to hypothetical examples as the Applicants have sought, to do. The AMA 6 allows for significant adjustment of the percentage WPI in various ways with reference to the circumstances of the

168 See the reasoning of Ngcobo J (as he then was) in Minister of Health N.O. v New Clicks SA (Pty) Ltd *supra,* footnote 70 at 537

individual. It is accordingly my view that at best the attack on this regulation is premature, and at worst no case has been made out for the relief sought taking into account, as I do, the opinions of Drs Bohlito and Ravanaya. This prayer is accordingly not granted.

72.

IS REGULATION 3(3) OF THE REGULATIONS NOT AUTHORISED BY THE ACT AND THEREFORE INVALID, IN THAT IT PRESCRIBES A PROCEDURE FOR LODGING CLAIMS FOR NON-PECUNIARY LOSS WHICH CONFLICTS WITH SECTIONS 24 AND/OR 17 OF THE ACT AND/OR WHICH UNREASONABLY IMPEDES ROAD ACCIDENT VICTIMS' ABILITY TO ENFORCE THEIR STATUTORY RIGHT TO COMPENSATION? (PRAYER 8):

Regulation 3(3) reads as follows:

"3(3)(a) A third party whose injury has been assessed in terms of these

Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

(b) A claim for compensation for non-pecuniary loss in terms of section 17 of the Act shall be submitted in accordance with the Act and these Regulations, provided that:

(i) the serious injury assessment report may be submitted separately after the submission of the claim at any time before the expiry of the periods for the lodgement of the claim prescribed in the Act and these Regulations; and

(ii) where maximal medical improvement, as provided in the AMA Guides, in respect of the third party's injury has not yet been reached and where the periods for lodgement of the claim prescribed in terms of the Act and these Regulations will expire before such improvement is reached, the third party shall, notwithstanding anything to the contrary contained in the AMA Guides, submit himself or herself to an assessment and

lodge the claim and the serious injury assessment report prior to the expiry of the relevant period.

(c) The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations.

(d) If the Fund or an agent is not satisfied that the injury has been correctly assessed, the Fund or an agent must:

(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or

(ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in

these Regulations, by a medical practitioner designated by the Fund or an agent.

(e) The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations.

73.

Applicants challenge seems to be limited to regulation 3(3)(b) and (c).[169] It is submitted that regulations 3(3)(b) and (c) are inconsistent with sections 23 and 24 of the Act, although the relevant prayer refers only to section 24 and 17. These regulations allegedly unreasonably impede victims' ability to enforce their claims for general damages. It is said that filing a claim in section 24 is a crucial step in the claims process, because sections 23(1) and (3) of the Act provide that timeous filing of the claim extends the period of prescription to five years. Thus, if a claim is lodged in terms of section 24 within the three year period, prescription is extended to five years. The Minister has however allegedly expanded the

169 See vol 1, p74, par 138 to 140, and heads of argument, par 198

requirements for “lodgment” beyond what section 24 of the Act requires, and has effectively introduced an additional prescription period for claims for serious injury. This is in violation of section 23. This additional requirement in the case of claims for general damages, is not authorised by – and is inconsistent with sections 23 and 24 of the Act. It seems that First Applicant’s case in this context is that the RAF4 form could be lodged at any time of the claimant’s choosing - even if this is long after the period for lodgment of the claim has expired. It is important to note that the RAF Act provides a substantially more generous prescription regime than for example the Prescription Act 68 of 1969. In respect of all claims other than hit-and-run claims, sections 17(1), 23 and 24 of the RAF Act, when read together, require that a claimant lodge his or her claim with the RAF within 3 years of the date on which the cause of action arises. Provided that this is done, the claimant then has an additional 2 years to issue summons against the RAF before the claim prescribes. Regulations 3(3)(b) and (c) do not alter this, it was submitted. All that they provide is that amongst the documents that must be lodged before the 3 year cut-off, is the serious injury assessment report. The purpose of this is to ensure that claims can be assessed and finalised reasonably speedily.[170] Second Respondent submitted that there can be no objection to this.

170 See vol 9, p3032, par 262

Regulation 3(3)(b) and (c) do not expand the requirements for lodgment as the Applicants contend. All they do is to indicate <u>when</u> a serious injury report assessment must be lodged. This question is manifestly a matter that has to be dealt with by the regulations. If these regulations did not prescribe any time limit for the lodging or serious injury assessment reports, claims would drag out, and the RAF would be placed in the position where it has received claims, but could not properly assess and deal with them. These consequences would be at odds with the recognition our Courts have given the importance of reasonable prescription provisions.[171] In the circumstances, it was submitted, regulations 3(3) (b) and (c) deal with matters that are, in the language of section 26 of the Act "necessary or expedient to…. to achieve or promote the object of this Act".

74.

I agree with this contention and accordingly prayer 8 is not granted.

171 See Mohlomi v Minister of Defence 1997(1) SA 124 (CC) at par 11

75.

ARE REGULATIONS 3(4) TO 3(13) OF THE REGULATIONS INCONSISTENT WITH THE CONSTITUTION AND INVALID ON THE GROUNDS THAT THEY DEPRIVE VICTIMS OF ROAD ACCIDENTS OF ACCESS TO COURTS AND THE RIGHT TO A FAIR TRIAL TO WHICH THEY ARE ENTITLED IN TERMS OF SECTION 34 OF THE CONSTITUTION? (PRAYER 9):

In the context of prayer 9, these regulations essentially deal with an appeal tribunal which is constituted in terms of regulation 3(8), consisting of 3 independent medical practitioners with expertise in the appropriate areas of medicines, appointed by the Registrar, who shall designate one of them as the presiding officer. This appeal tribunal will essentially resolve disputes regarding whether particular injuries qualify as “serious”. First Applicant contends that installing such a tribunal, *prima facie* infringes section 34 of the Constitution and that there is also no valid justification for such infringement. Section 34 of the Constitution, does provide, in the context of resolving a dispute by the application of law, where appropriate, for another independent and impartial tribunal or forum

other than the Court. Regulation 3(13) provides that the findings of the appeal tribunal "shall be final and binding". First Applicant contended that the installation of this appeal tribunal purports to oust the Court's jurisdiction, and that only a circumscribed power of review by a Court remains, that the tribunal would not be independent and impartial, that it lacks the necessary expertise, and that there would be no "equality of arms" which would make any hearing unfair.

76.

In my view the jurisdiction of the Courts within the ambit of section 34 is not ousted. The finality clauses are usually interpreted as only excluding or restricting the possibility of an appeal.[172] The Courts are obviously the general constitutionally appropriate forum for resolving legal disputes, but the Constitution itself has recognised that other fora may be appropriate, as long as they are independent or impartial. In my view this particular forum is an appropriate body having regard to the issues it needs to decide. If in any given case an unfairness does occur, the particular affected party in such instance would be able to

172 See De Ville Judicial Review of Administrative Action in South Africa, 2003 at p460

approach a Court for the appropriate relief. First Respondent contended in its answering affidavit[173] that the relevant regulation intended to make it clear that the decision of the appeal tribunal would mark the end of the internal administrative process, and that no further objections or representations would be entertained. The Fund would also be bound by the decision of the appeal tribunal, and at present there is nothing before me to suggest that such a tribunal would not act lawfully and ethically and with integrity. If it did not, its decisions would be able to be reviewed by a Court of law. The claimant would also have the right to object to any appointment made by the Registrar, (Regulation 3(9)(b)) and no doubt an aggrieved claimant, under appropriate circumstances, could raise such objections during the actual hearing. The fact that the Fund is responsible for administrative costs and payment of such members is not *per se* constitutionally objectionable. In the appropriate circumstances it could obtain assistance in deciding legal issues, (Regulation 3(10)) and, as a whole, I cannot find that regulation 3(4) to 3(13) in the context of prayer 9 are unconstitutional because they infringe the provisions of section 34 of the Constitution. Accordingly prayer 9 is not granted.

173 Vol 5 at p1621, par 246

77.

IS REGULATION 3 OF THE REGULATIONS INVALID IN THAT IT WAS PROMULGATED WITHOUT PRIOR CONSULTATION WITH THE MINISTER OF HEALTH, *ALTERNATIVELY* WAS IT PROMULGATED WITHOUT DUE REGARD TO USE THE VIEWS AND ADVICE EXPRESSED BY THE MINISTER OF HEALTH? (PRAYER 10):

The whole of regulation 3 is impugned, and the argument pertaining thereto to a great extent overlaps with, that pertaining to prayer 3. First Applicant contended that the consultation process was perfunctory, factually flawed and critically incomplete. The correspondence that I have referred to in the context of prayer 3 is dealt with, and the submission was that the whole of the consultation process was flawed and its conclusion *fait accompli.* It is alleged that in fact no genuine exchange of ideas on the merits of the proposed method of assessment occurred.

78.

I do not agree that there was no prior consultation. I have referred to the most

important correspondence and the meeting of 3 April 2008, and have considered what occurred thereafter in the context of providing for the narrative test as an alternative to AMA 6 which was added in order to make absolutely sure that the assessment method could not be challenged on the basis that it insufficiently catered for the circumstances of the individual, or that the AMA 6 and the 30% WPI threshold did not provide for injuries which should be regarded as serious.[174] It is in my view also not a requirement that there be an exchange of ideas with the Minister of Health, and I have referred to the views of that Minister as well. Accordingly, I find that there is no merit in prayer 10 and it is accordingly refused.

79.

IS REGULATION 5(1) NOT AUTHORISED BY THE ACT, AND INVALID ON THE GROUNDS THAT THE LIABILITY OF THE FUND UNDER SECTION 17(4B)(a) OF THE ACT AS SET OUT THEREIN IS IRRATIONAL AND ARBITRARY, AND WAS NOT PRESCRIBED AFTER CONSULTATION WITH THE MINISTER OF HEALTH, *ALTERNATIVELY* WAS PRESCRIBED WITHOUT

174 See vol 5, p1667, par 407 and further

DUE REGARD TO THE VIEWS AND ADVICE EXPRESSED BY THE MINISTER OF HEALTH? (PRAYER 11):

This prayer seems to entail the argument that because section 17(4B)(a) of the Act is irrational and arbitrary, regulation 5(1) is therefore not authorised and invalid. Further, it is contended that there was no consultation with the Minister of Health.

80.

Section 17(4B)(a) reads as follows: *"The liability of the Fund or an agent regarding any tariff contemplated in subsections (4)(a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act 61 of 2003), and shall be prescribed after consultation with the Minister of Health."* The same argument as pertains to prayer 1 in the context of irrationality applies and how a Court must deal with it, and I will not repeat it.

81.

In the context of this prayer it seems to be contended that the 2008 amendments which limits the RAF's liability for hospital and medical treatment to the UPFS tariff, while removing victims' common law right to claim compensation from wrongdoers, is arbitrary, unjustifiable and will unreasonably impede victims' right of access to health care services. Reliance is then placed on the view of Dr Edeling and it is submitted that because the UPFS tariff is so low, it would be unreasonable to expect that victims would consistently be able to obtain hospital or medical treatment from the private sector at that tariff. According to Dr Edeling, the UPFS makes no provision for numerous types of treatment which road accident victims needs outside State hospitals and clinics. Poor victims will therefore only be able to receive treatment at State hospitals and clinics, where treatment is either not available or of an unacceptably low standard. If they tried to obtain private care instead, the UPFS tariffs will either be too low to pay for it, or do not make provision for such treatment at all. Reference is then made in that context to overcrowding State facilities, the lack of resources and the overwhelming numbers of HIV/Aids and tuberculosis sufferers. The alleged result

is that the overall standard of medical care in State hospitals and clinics has been dropping dangerously, especially in rural areas. Many accident victims need not only emergency medical care but specialized, long-term and rehabilitative care, both in hospital, and at home, or in long-term care facilities. This cannot be achieved especially in rural areas. Quadriplegic and paraplegic victims suffer the most and require the most intense treatment. Certain services are only available from private health care providers, and, it was contended, it was unreasonable and inhuman, to consign these vulnerable victims to the inadequacies of the State health care system. Reference was then made to certain comments by the Satchwell Commission, and the submission then was that for all of those reasons section 17(4B)(a) of the Act unreasonably and irrationally deprives road accident victims of the right of access to health care, in breach of their constitutional rights. Oblique reference therefore seems to be made again to section 27(1)(a) of the Constitution, although no breach of section 27 rights is directly relied upon in these proceedings.[175]

175 See First Applicant's founding affidavit, vol 1, p90, par 177 to 188

82.

In the context of prayer 11, I have already dealt with the alleged failure to consult with the Minister of Health when I dealt with prayer 10, and I will not repeat that herein. As far as the rationality argument is concerned it is necessary to again refer to the affidavit by the Minister of Health which I admitted in these proceedings. An annexure thereto is an affidavit by Dr Lekalakala, the Director: Hospital Management employed by the Department of Health since 1999. It is necessary in the overall context to refer to certain of his factual contentions. By way of a broad summary his assertions are the following:

1. Applicants do not put their allegations into the proper perspective which is that the development of public health care must be seen not only in the historical context, but also within the applicable legislation;

2. The Constitution (and especially section 27) brought about significant changes to many aspects in our country, including the public health sector, which, prior to 1999 had only been available to those who had the means,

or those that enjoyed benefits directly from Government. The majority of the population was excluded, and denied health care services both from the public and the private sector. Black people had virtually no access to health care facilities in the public sector, let alone the private sector. If they did have such access, health care services they received, were not of the same standard as those afforded to white people. Many of them lived in abject poverty and exposed to life threatening diseases, and yet did not receive the health care they required from the State. Further, black people were denied access to education that would enable them to acquire the necessary knowledge and skill to provide such services for themselves;

3. The Constitution changed all that, and pursuant to section 27(2) thereof, Parliament enacted the National Health Act 61 of 2003, which came into force on 2 May 2005. The object of this Act was to regulate national health and to provide uniformity in respect of health services across the nation. section 3 of this Act records the responsibility of the Minister of Health, as well as those of Health Departments at national, provincial and local level;

4. In this context the provision of health care services in the public sector must be construed, and any relevant provision must be made within the limits of available resources, to everyone in this country, and not only to a select few or a particular section of the population;

5. The deponent annexed a document titled “Modernization of Tertiary Services Plan”.[176] In the context of the new challenges posed to the State by the relevant legislation that I have mentioned, funding remains a major problem, and where they are not enough resources, the State has to make the unenviable task of having to make choices. The executive summary of the mentioned services plan puts it as follows: “The inadequate financing of the health sector has placed the provision of tertiary and quaternary care in the public hospital sector under enormous pressure. Also adversely affected are regional hospitals, which are increasingly becoming financially squeezed between primary health care and tertiary and regional hospitals.” The Department of Health therefore has the responsibility to develop policies which are in line with the Constitution not only for today, but also

176 See his affidavit, vol 10, p3162 and the annexure at 3187 and further

for the medium and long term. It sets out in some detail the guiding policies for the Department, and states that to meet the Constitutional obligations and achieve the quality care goals, the State has to develop appropriate and quality plans, as well as monitor and report on these. Most importantly, the State must have the resources required to honor these obligations. While good progress has been made in developing good policies, programs, quality health sector plans, resource availability in the public health sector, and vast disparities between public and private sectors remain the key challenges which deccelerate progress towards the progressive realization of the right to access to health care services, as well as attaining the excellent quality care;

6. South Africa is undergoing democratic and epidemiological changes. The population is estimated to have increased from 47,3 million in 2006 to 48,6 million in 2008. The country is also facing a quadruple burden of diseases associated with the epidemiological transition namely, communicable diseases associated with poverty, non-communicable diseases associated with lifestyles, trauma, violence, HIV and Aids. He referred to the various

chapters of the Health Care Act, and what is required in terms thereof, and mentioned certain policy implementation structures, levels of care, district health services, regional hospital services, tertiary hospital services, referral patterns, what has been achieved to date in the context of new hospitals, improving quality of care, and also referred to Applicants allegation that the State medical facilities are unable, countrywide, to provide comprehensive medical and rehabilitative care. He says that State medical service has the widest cover for all citizens of the country. In fact, access in rural areas is better than the private sector can assert to possess. The private sector has concentrated in the main urban centers. Unfortunately this is the only scenario for access to the market for profit, as compared to the public sector, which has both a legislative mandate and moral obligation to provide services for all the citizens within the means available. The annual report published by the Department of Health shows that access to public facilities has increased and stands at more than 85% of the population within 5km of a health facility. Rehabilitation services are offered in all of their hospitals, but there are challenges with regard to

recruitment and retention of scarce skills such as clinical psychologists, physio-therapists, occupation therapists, speech therapists etc.[177]

83.

The Modernization of Tertiary Services Plan and the relevant report of June 2001[178] and of June 2001[179] do not convince me that section 17(4B)(a) is irrational or arbitrary within the confines of the power that a Court can exercise in that particular context.

84.

As far as the uniform patient fees schedule is concerned, an affidavit of Ms U le Roux is annexed.[180] She deals with the affidavit of Dr Edeling in some detail and asserts that many of his allegations reflect a lack of understanding of the UPFS tariff structure, and knowledge how it is in fact applied. She gives sufficient detail,

177 See vol 10, p3180, parr 48 to 49

178 See vol 10, p3187

179 See vol 10, p3288A

180 See vol 10, p3290

of a highly technical nature with reference to the actual "Uniform Patient Fee Schedule (revised June 2009)"[181] which essentially indicates that the UPFS in not wholly inadequate and unsuitable for compensation for the medical treatment of road accident victims. It should be borne in mind she says, that most of the Health Department practitioners are employed by Government and receive remuneration. Thus, the intent of charging a professional fee is by no means seen as a cost recovery nor revenue generator. Where private doctors attend to their patients in a public health facility they have the prerogative of applying a professional fee suitable to them, subject that the patient is informed prior to treatment. This practice ensured that the public health institution is then only eligible to bill the facility fee. I have had further regard to the "User Guide – UPFS 2009" annexed to the Department of Health affidavits.[182] It is descriptive of its intent, of the classification of patient categories, and its basic principles with reference to the various medical treatment that can be applied for each particular case.

181 See vol 10, p3300

182 See vol 10 at p3365 to 3393

85.

Within the ambit of my powers referred to in the context of prayer 1 hereinabove, I cannot whole at all, if that is the contention find that either section 17(4B)(a) or regulation 5(1) is irrational and arbitrary. I have already decided in the context of prayer 10 that there was adequate consultation with the Minister of Health. Accordingly prayer 11 is not granted.

86.

Prayers 11, 16 and 17 have been deleted in the amended notice of motion.

87.

IS REGULATION 5(2) OF THE REGULATIONS AUTHORISED BY THE ACT AND IS IT INVALID ON THE GROUND THAT IT IMPERMISSIBLY DELEGATES TO THE ROAD ACCIDENT FUND THE POWER TO DETERMINE THE TARIFF FOR EMERGENCY MEDICAL TREATMENT APPLICABLE UNDER SECTION

17(4B)(b) OF THE ACT? (PRAYER 13):

Section 17(4B)(b) reads as follows: *"The tariff for emergency medical treatment provided by a health care provider contemplated in the National Heath Act, 2003 –*

(i) *shall be negotiated between the Fund and such health care providers; and*

(ii) *shall be reasonable taking into account factors such as the cost of such treatment and the ability of the Fund to pay."*

Regulation 5(2) reads as follows: *"The liability of the Fund or an agent contemplated in section 17(4B)(b) of the Act shall be determined in accordance with the tariff published by the Fund from time to time in the Gazette and such tariff shall apply only in the case of the immediate, appropriate and justifiable medical evaluation, treatment and care required in an emergency situation in order to preserve the person's life or bodily functions, or both."*

88.

First Applicant argued that in this context that the Fund acted on a “misconstrued authority” and that the delegation was unlawful. Regulation 5, in terms of which the Minister purported to empower the Fund to promulgate the tariff for emergency medical care is *ultra vires,* it was argued. In terms of section 26 of the Act only the Minister is authorised to make regulations under the Act. The Fund is only empowered to negotiate the tariff, and its prescription, after negotiation, is something only the Minister is authorised to do under the Act. The Minister’s purported sub-delegation is also inconsistent with section 238(a) of the Constitution. This section provides that an executive organ of State may delegate a power or function to the extent that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed. Because sub-delegation is not authorised by the RAF Act, the Minister acted unconstitutionally in purporting to delegate his powers. Hence, any conduct pursuant thereto by the RAF is unlawful for being contrary to the principle of legality. Further, the common law presumption *delegatus delegare non potest* negates this delegation and Respondents have not rebutted it, so the argument proceeded.

89.

The tariff published by the RAF pursuant to section 17(4B)(b) of the RAF Act is a tariff drawn from the 2008 National Health Reference Price List ("NHPRL"). By notice R.771 published in the Government Gazette on 21 July 2008 the RAF gave notice in terms of regulation 5(2) of the Emergency Medical Tariff which would apply. It is also contended in the First Applicant's founding affidavit that not only was the delegation impermissible, but also that the RAF unilaterally adopted this tariff instead of negotiating it with a representative group of health care providers who provide emergency medical services. (This is the subject matter of prayer 15).

90.

Second Respondent's argument in the context of the allegation is that there is no merit in that contention in that section 17(4B)(b)(i) of the RAF Act expressly provides that the tariff shall be negotiated "between the Fund and …health care providers." It does not envisage a role for the Minister and accordingly no

question of sub delegation arises. It was also contended that even if the Applicants submissions were correct, the high water mark of its case in this regard is that the RAF and health care providers should have agreed on the tariff, tell the Minister what they agreed, and the Minister would then have published the agreed tariff. If that is my finding, then the most that the Applicants would be entitled to is an order directing the Minister to re-publish the tariff already published by the RAF. It is my view that section 17(4B)(b) of the Act and the subsequent regulation 5(2) does not indicate any role for the Minister therein. By necessary implication the section envisages that the tariff for emergency medical treatment be negotiated between the Fund and such health care providers as mentioned and I do not agree that the Minister must promulgate the tariff under section 26 of the Act. Prayer 13 does not deal with the other complaints of the First Applicant as set out in the founding affidavit[183] and accordingly I do not intend dealing with those in the context of this prayer.

Prayer 13 is therefore not granted.

183 See vol 1, p82

91.

IS THE EMERGENCY MEDICAL TARIFF INVALID, ON THE GROUND THAT IT WAS NOT NEGOTIATED BETWEEN THE FUND AND HEALTH CARE PROVIDERS AS REQUIRED BY SECTION 17(4B)(b) OF THE ACT? (PRAYER 15):

In the founding affidavit First Applicant alleges that the Fund unilaterally adopted the tariff published in the Gazette op 21 July 2008, instead of negotiating it with a representative group of health care providers who provide emergency medical services.[184] First Applicant then relies on a record of the Funds negotiations before the tariff was published and refers in that instance to a meeting of 3 April 2008. It is alleged that no tariff was in fact negotiated, and the health care providers who were present were not representative of the health care providers envisaged by the Act. Extracts from the record were then annexed, and this included the Fund's invitation to service providers, a list of persons who attended the meeting, a visual presentation and a transcript of the proceedings at the

184 See founding affidavit, vol 1, p82, par 158

meeting. These annexures were then analyzed in great detail and the submission is in the context of prayer 15 that instead of negotiating an emergency tariff which was acceptable to the emergency health care providers, the Fund unilaterally adopted the NHRPL tariff.[185]

92.

It is not in dispute herein that “negotiate” means that the relevant interchange between the involved parties should proceed until agreement or deadlock is reached.[186] What occurred on 3 April 2008 must in my view not be seen in isolation, and it is relevant what had previously occurred. Previous events in this particular context are set out in Second Respondent’s answering affidavit[187] The substance of Second Respondent’s contentions are the following in respect of the meeting of 3 April 2008:

1. Invitations were sent out;

185 See founding affidavit, vol 1, p83, parr 160 - 168

186 See Minister of Economic Affairs and Technology v Chamber of Mines SA 1991(2) SA 834 (T) at 836G to J

187 See First Respondent’s answering affidavit, vol 9 at p2994, par 165 to p3004, par 193

2. Invitations were published in the mass media;

3. There was no limitation as to who could attend;

4. There was a specific invitation for submissions to be made in relation to the emergency care tariff;

5. Mr Modise, the Chief Executive Officer of the Fund gave a presentation which captured the discussion of a meeting held on 21 October 2008 which was convened to commence negotiations on the emergency medical tariffs. This was also widely advertised and there was an extensive question and answer session;[188]

6. Dr A J Herbst, an expert on medical tariffs, gave a presentation;

7. Delegates were allowed to raise all questions they desired, which were responded to by the Fund's CEO and Dr Herbst;

188 As to details of the discussions on 21 October 2006, see vol 9, p2997, footnotes 29 and 30

8. No delegate indicated disagreement with the proposal that the tariff be equivalent to NHRPL 2008 with no premium, and there was ultimately an agreement on this tariff.

93.

On 23 July 2007 the Department of Health published regulation 681 pursuant to the National Health Act. Regulation related to obtaining information and determining and publishing the NHRPL. The outcome of this process (which happened quite independently from any Fund process) was that the NRHPL became a formal and legal instrument. This regulation and the guidelines published in terms thereof made the cost-based nature of the NHRPL clear.

94.

In respect of the background and the meeting on 3 April 2008 the Second Respondent submitted that at no stage did any health care provider at the meeting indicate that it disagreed with the proposal that the emergency medical

tariff be the NHRPL 2008 without the premium and it was pointed out to me that Applicants have been unable to put up a single affidavit from a health care provider who attended the meeting, and who now allegedly contends that it did not agree with the tariff or that it was forced to agree with such tariffs. It is therefore contended that the meeting of 3 April 2008 produced the agreement required and this agreement is also not surprising in the light of the (now) common cause possession that the NHRPL serves as a reasonable and fairly accurate proxy for the average amounts actually paid by private patients for health care.[189] In regard to the evidence put before me, I am unable to find that the tariff was not negotiated and accordingly prayer 15 is dismissed.

95.

IS REGULATION 6(1) OF THE REGULATIONS NOT AUTHORISED BY THE ACT AND INVALID ON THE GROUND THAT IT IMPERMISSIBLY PURPORTS TO RESTRICT THE AMBIT OF SECTION 24(1)(b) OF THE ACT AND IMPERMISSIBLY LIMITS WHERE A CLAIM FOR COMPENSATION MAY BE

189 See Second Respondent's answering affidavit, vol 9, pp3007 to 3010, parr 201 to 202

SENT BY REGISTERED POST OR DELIVERED BY HAND (i.e. LODGED) IN COMPLIANCE WITH SECTION 24(1)(b)? (PRAYER 18):

Section 24(1)(b) reads as follows:

"(1) A claim for compensation and accompanying medical report under section 17(1) shall –

(a) …;

(b) be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing."

Regulation 6(1) in turn reads as follows:

"(1) Any reference in section 24(1)(b) of the Act to the Fund's principal, branch or regional office, or to an agent's registered office or local branch office, shall for the purposes of compliance with that section, referred to such principal, branch or regional office of the Fund, or registered office or local branch office of an agent, as the case may be –

(a) which is situated nearest to the location where the occurrence from which the claim arose took place; or

(b) which is situated nearest to the location where the third party resides."

96.

Applicants contend that by denying the ability of victims to file their claims at any of the RAF's "principal, branch or regional office", regulation 6(1) unlawfully infringes on their rights. Victims may have been severally injured and undergone lengthy treatment far away from home or from where the accident occurred. Such

offices may be remote. Accordingly, the provision is patently unreasonable, arbitrary and also discriminatory in effect inasmuch as it bears down hardest on the poorest overwhelming the rural people. In its answering affidavit[190] the Second Respondent states that the intention behind Regulation 6(1) was to avoid the suggestion, the claimant could only lodge his or her claim at the principal, branch or regional office closest to where the accident occurred. The regulation was accordingly intended to expand the claimant's option by ensuring that the claimant could lodge at the office closest to where the accident occurred or the office closest to where or she lives. The Fund has opened branch offices at various offices in the country, for instance, and this was an RAF initiative to facilitate the submissions of claims in instances where accident victims wished to lodge their claims directly with the RAF.

I agree that a regulation may not limit the ambit of a statute. Regulation 6(1) was clearly introduced for the benefit of the third party but cannot detract from section 24(b) and therefore must be read to mean that judgment of claim can take place at the Fund's principal, branch or regional office or at the agent's registered office

190 See vol 9, p3033, parr 267 to 270

or local branch office as well as those offices referred to in regulation 6(1). Misinterpretation would give effect to the Act on the one hand and would clearly expand on it to the benefit of the third party if the third party so chooses. Obviously regulation 6(1) cannot exclude the peremptory provisions of sections 24(1)(b). It can, and must, in my view, be interpreted on the basis that the words “in addition” between the word “section” and “refer” in the introductory part to regulation 6(1). Failing such, the regulation would in my view be invalid in that it impermissibly restricted the ambit of section 24(1)(b) of the Act.

97.

IS REGULATION 6(1) OF THE REGULATIONS INVALID IN THAT IT PRESCRIBES A METHOD OF ASSESSMENT AND A PROCEDURE FOR LODGING CLAIMS WHICH UNREASONABLY IMPEDES ROAD ACCIDENT VICTIMS’ ABILITY TO ENFORCE THEIR STATUTORY RIGHT TO COMPENSATION? (PRAYER 19):

This regulation does not refer to any “method of assessment”. The procedure for

lodging claims is also not unreasonable (that was intended to be a separate attack on regulation 6(1) in that it sensibly intends to expand the claimant's options that section 21(1)(b) offer. Very little, if any at all argument, be it written or oral, was addressed to me in the context of this particular prayer and in my view there is in any event no merit in it. Prayer 19 is accordingly not granted.

98.

IS REGULATION 6(2) INVALID IN THAT IT AFFORDS THE FUND THE RIGHT TO INTERROGATE A THIRD PARTY AND/OR DEPRIVE VICTIMS OF ROAD ACCIDENTS THE RIGHT TO BE EQUAL BEFORE THE LAW AND TO A FAIR TRIAL TO WHICH THEY ARE ENTITLED IN TERMS OF SECTIONS 9 AND 34 OF THE CONSTITUTION? (PRAYER 20):

Regulation 6(2) reads as follows:

"(2)(a) The Fund or an agent shall at any time after having received a claim for compensation referred to in section 17(1) of the Act, be entitled to require

the third party concerned to submit to questioning by the Fund or an agent at a place indicated by the Fund or an agent or to make a further sworn statement regarding the circumstances of the occurrence concerned or any aspect of it.

(b) In the event of the Fund or an agent requiring the third party to submit to questioning or to make a sworn statement, or both, in terms of paragraph (a), no claim shall be enforceable by legal proceedings commenced by summons served on the Fund or an agent before the third party has submitted himself or herself to questioning or has made the sworn statement, or both."

99.

It was submitted that this requirement is not contained in, or authorised by the Act. It leaves victims vulnerable to abuse and violates their rights to equal protection of, an excess to justice and a fair trial in terms of sections 9 and 34 of the Constitution. The regulation also exceeds the Minister's powers to make

regulations. Regulation 6(2) contains much broader terminology than sections 19(f)(i) and (ii) of the Act. It is contended, that these powers are neither necessary nor expedient in order to achieve or promote the objects of the Act. The practical effect of the interrogation is that one of the parties to an actual or potential dispute – the RAF – may interrogate its opponent, without the opponent being legally represented. This creates the potential for abuse. The procedure is fundamentally unfair and so unreasonable that it falls foul of the empowering provisions of the Act when construed congruent with the Constitution. These powers also unreasonably subvert victims' right to a fair public hearing under section 34 of the Constitution.

100.

In answer[191] First Respondent contended that the mechanism of regulation 6(2) is not in principle any different from that in the Act and the regulations, which require a third party to provide a range of relevant information as condition for making and enforcing a claim. Section 19(e) and (f) already includes wide ranging

191 See vol 5, p1692, par 496 and further

requirements that the third party has to comply with before the Fund is obliged to compensate that person. This includes a medical examination, the furnishing of copies of all medical reports, the inspection of all relevant records, the making of an affidavit, the submission of all statements and documents. First Respondent in this context says that Regulation 6(2) "merely goes a step further by recognizing that the information ordinarily required and supplied may sometimes not be enough to enable the Fund to judge and decide whether and if so, to what extend, it should accept liability for the third party's claim. The regulation is not constitutionally objectionable, it does not engage the rights to dignity and privacy and nor is there any right to "equal access to the Courts". In the context of whether this regulation features the right to equality in section 9(1) of the Constitution or the right to a fair public hearing in terms of section 34 of the Constitution the First Respondent contended as follows:[192]

1. The need for the mechanism created by regulation 6(2) in the case of hit-and-run claims is obvious. The Fund normally has no knowledge of nor any witness to the accident and is entirely dependent on the third party for information about it. It needs a mechanism to enable it to find out more about the accident so as to decide whether to pay the claim or to oppose it;

192 See First Respondent's answering affidavit, vol 5, p1693, parr 500 to 501

2. The Fund is often in the same position, even if when the driver or owner of the offending vehicle has been identified;

3. In any given context the Fund is an unusual litigant in that it never has personal knowledge of the circumstances giving rise to the claims against it, and often has no other evidence, or in any event no other satisfactory evidence of those circumstances. It is more over a public Fund and is obliged to manage its resources in the public interest, and not in its own interest. It is accordingly reasonable, so it was submitted, that in these circumstances and in the public interest the mechanism is given to the Fund by way of regulation 6(2) to assist it in its determination to decide whether to pay or oppose the claims against it;

4. It referred to the analogy in the case of trustees of insolvent estates and the liquidators of companies in winding-up, who will also have the powers of interrogation to determine *inter alia* whether to pursue or resist claims

subject to litigation. Those powers are also given to them because they are also required to meet or resist claims arising from circumstances of which they have no personal knowledge, and often no other evidence;

5. The very purpose of the power to question is to enable the Fund to litigate on equal terms with the third party. Any abuse of that power can be controlled by the Courts.[193]

101.

Should a third party's rights be infringed, whether in the context of prayer 20 or any other prayer that deals with procedure, the Courts will have the power to deal with any such injustice or irregularity at the appropriate time. The regulation also does also not prohibit the third party from being represented if questioned, and its overall purpose seems to be not to defeat any claim, but to enable the Fund to litigate on equal terms with the third party should such litigation become necessary. Regulation 6(2) does also not deal with and does not preclude a

193 See Bernstein & Others v Bester & Others 1996(2) SA 751CC at par 36, 106 and 121

summons from being issued or served, but merely renders the third party's claim unenforceable in a Court of law until he or she has complied with the request of the Fund. It cannot at this stage be assumed that the Fund will exercise any of its given powers in bad faith or unreasonably. The powers of the Fund are constrained by law and subject to judicial control.

I therefore decline to grant prayer 20.

102.

IS REGULATION 6(2) OF THE REGULATIONS INCONSISTENT WITH THE CONSTITUTION AND INVALID ON THE GROUNDS THAT IT IS ARBITRARY AND IRRATIONAL AND UNREASONABLY IMPEDES ROAD ACCIDENT VICTIMS' ABILITY TO ENFORCE THEIR STATUTORY RIGHT TO COMPENSATION? (PRAYER 21):

What I have said about irrationality in the context of prayer 1 and reasonableness in the context of prayer 20, applies here as well. No other discernable argument in the context of prayer 21 was placed before me, but besides that I am of the

considered view that the regulation is neither arbitrary nor irrational, or otherwise impedes the third party's ability to enforce his or her right to compensation.
It is accordingly not granted.

103.

IS FORM RAF1 DESCRIBED IN REGULATION 7 INVALID IN THAT IT:

1. Is not authorised by the Act; or

2. Is arbitrary and irrational, or

3. Is incapable of implementation; or

4. Unreasonably impedes a victim's ability to enforce his or her statutory right to compensation; or

5. Does not achieve or promote the object of the Act? (Prayer 22).

104.

According to Regulation 7(1), a claim for compensation and accompanying medical report referred to in section 24(1)(a) of the Act, shall be in the Form RAF1 attached as Annexure “A” to the regulations, or such amendment or substitution thereof as the Fund may from time to time give notice of in the Gazette. Section 24(1)(a) of the Act requires that a claim for compensation and accompanying medical report under section 17(1) shall be set out in the prescribed form, which shall be completed in all its particulars.

105.

RAF1 – the third party claim form is a 12 page form annexed to the regulations. It requires, amongst others, the personal details of the claimant, the accident details, workman compensation details, witness details, employer details, employment details, details of claims for loss of support and compensation claimed. A separate paragraph draws the person’s attention to details which are substantially required for compliance with section 24 of the Act. A 3 - page

medical report is part thereof in compliance with section 24(2)(a) of the Act. There is a provision for details of the third party's bank account that in the light of the previous judgment of this Court this does not have to be completed and the claim cannot be rejected on the basis of non-completion or any other non-compliance in that context.[194]

106.

Second Respondent contended, in the context of the irrationality argument that I have already dealt with, that this is a very difficult threshold to overcome. The Applicants obviously have a number of complaints and views that differ from those of the Minister as to what the content of the RAF1 (and RAF4 for that matter) should be. However, this does not justify conclusion that the forms (or any part of them) are irrational or indeed otherwise unlawful. Form RAF1 also correctly reflects section 24(2)(a) of the Act, which has not been challenged in these proceedings. There is also nothing to prevent the claimant submitting a letter or report from a medical practitioner, if this is required, together with the

194 See Law Society of South Africa v Road Accident Fund 2009(1) SA 206C

RAF form, dealing with additional information desired in the context of the recordal of the actual injuries sustained.

107.

In my view there is no basis for finding that RAF1 has not been authorised by the Act or that it is arbitrary or irrational or that it is indeed incapable of implementation. It also does not unreasonably impede the third party's ability to enforce his or her statutory right to compensation. I also cannot hold that it does not achieve or promote the object of the Act and accordingly there is no basis for granting prayer 22.

108.

IS FORM RAF4 INVALID FOR THE SAME REASONS RAISED IN RESPECT OF FORM RAF1? (PRAYER 23):

Form RAF4 is the "serious injury assessment report" which is also referred to in Regulation 3(3)(b)(i) of the regulations consist of 7 pages, also annexed to the

Regulations. It contains an explanatory paragraph as to what is required, details of the patient, details of the medical practitioner, a list of non-serious injuries, AMA impairment rating, in the case of a serious injury, the narrative test details and annexures relating to an upper and lower extremity impairment evaluation, and a spine and pelvis impairment evaluation.

109.

In the Applicants written heads of argument it was initially contended that this form is “equally obstructive, if not vindictive”. A gentle questioning by myself resulted in withdrawal of the allegation that the form was vindictive or that it was an example of bad faith for some or other reason. It was however submitted that some of the detail could not be provided by a medical practitioner, some information was irrelevant to the AMA impairment rating, some information was “unnecessary and all in all the form reflected quite an utter irrationality” and it also constituted “an unwarranted attempt to extract multiple potentially conflicting versions on behalf of a claimant. This constituted an unlawful and unfair weapon in the RAF’s already formidable armory against victims.

110.

In respect of both forms the further submission was then made that their inherent flaws and anomalies render their prescription arbitrary, irrational, unfair, incapable of implementation and *ultra vires.*

111.

In this context Second Respondent submitted Applicants complaints were unfounded and flawed. The reason for requesting a medical practitioner to set out the nature of the accident was to deter and detect fraud. The RAF experiences claims from claimants who were either injured in accidents which have nothing to do with a motor vehicle, or claims for injuries which are not consistent with the type of motor vehicle accident in which they were allegedly involved. Including this issue on the RAF4 form, was therefor a lawful and rational decision.[195] Also, issues such as the "social and personal history" and "educational and occupational history" are not irrelevant to the AMA assessment. Including these on the RAF form was therefore also lawful and rational. The fact that a "better" or

195 See Second Respondent's answering affidavit, vol 9, p3039, par 285.2

"different" form could have been produced by the Applicants, by a medical practitioner or by myself for that matter, is of no consequence. Any such defects do not make the form arbitrary or irrational, or incapable of implementation. It is clearly authorised by the Act and it does not unreasonably impede a victim's ability to enforce his right. There is also no reason why it cannot be amended at some later stage by providing additional information and I certainly cannot find that it does not achieve or promote the object of the Act. Accordingly I declined to grant prayer 23.

112.

In the result the application as a whole falls to be dismissed save insofar as in the context of prayer 18, regulation 6(1) must be read as meaning in addition to what is required by section 24(1)(b) of the Act.

113.

COSTS:

Although every possible imaginable complaint against the Second Respondent,

quite apart from the Act and the regulations, were placed before me without any or concise relief being sought in each context, Applicants application was *bona fide* and raised many legitimate concerns which needed to be addressed by a Court. It can rightly be described as constitutional litigation, and the general rule is that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights. This is of course not an inflexible rule and there may be circumstances where it should be departed from, such as where the litigation is frivolous or vexatious. This is not such a case. Accordingly no order as to costs is made.

H FABRICIUS ACTING JUDGE
North Gauteng High Court
Pretoria
Date of hearing: 1 – 3 March 2010
Date of judgment: 31 March 2010

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No appearance for the Fifth to Tenth Applicants