

Rectifying the *Mvumvu* disparity

The Road Accident Fund (Transitional Provisions) Act 15 of 2012

By Decide Makhubele

The Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the transitional Act) came into operation with effect from 13 February 2013. The transitional Act was introduced to address the Constitutional Court judgment in *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC).

The Constitutional Court in the *Mvumvu* case confirmed the Western Cape High Court decision (*Mvumvu and Others v Minister of Transport and Another* [2011] 1 All SA 90 (WCC)), in which the court declared that ss 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996 (the RAF Act), as they stood prior to 1 August 2008, were inconsistent with the Constitution and thus invalid.

The *Mvumvu* case

Mvumvu was one of three applicants who sustained bodily injuries in motor vehicle collisions before 1 August 2008. The applicants approached the Constitutional Court seeking confirmation of the High Court's declaration of invalidity and leave to appeal against the ancillary order limiting the amount of compensation they may claim to what is recoverable under the Road Accident Fund Amendment Act 19 of 2005 (the amendment Act).

Mvumvu lodged a claim against the Road Accident Fund for compensation for the serious injuries she suffered as a result of the collision. The fund admitted liability, but maintained that Mvumvu was not entitled to any compensation over the R 25 000 it had already paid for her medical bills. Her claim was limited to R 25 000 in terms of s 18(1)(b) of the RAF Act because the driver of the taxi in which she was a passenger was solely to blame for the collision and the taxi was unlicensed. Mvumvu also lost her job as a result of the injuries sustained in the collision.

Section 18 of the RAF Act provides:

'(1) The liability of the fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No. 44 of 1957), or another Act of parliament governing the said force, but subject to subsection (2) –

(a) to the sum of R 25 000 in respect of any bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned –

(i) for reward; or

(ii) in the course of the lawful business of the owner of that motor vehicle; or

(iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or

(iv) for the purposes of a lift club where that motor vehicle is a motor car; or

(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R 25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage.

(2) Without derogating from any liability of the fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in respect of such injury or death –

(a) the liability of the fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the fund or such agent, or the amount of R 25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act’

The applicants contended that the above section violated their rights to equality, dignity and security of the person, effective remedy, as well as to health care and social security.

Court’s findings

The court found that the provisions of s 18 ‘indirectly’ discriminated against black people in a manner disproportionate to other races because most people using public transport, such as taxis and buses, are black. The court thus found that the discrimination was based on one of the listed grounds in s 9(3) of the Constitution, namely race.

The court’s reasoning was that other victims who were also passengers like the applicants enjoyed full compensation for their loss only because they fell outside the targeted categories. It was found that the section thus had a disparate impact – it targeted those workers and the class of people who use public transport such as taxis and buses.

The court found that by placing a cap of R 25 000 on certain claims, s 18 undermined the purpose of the RAF Act.

The RAF Act constitutes social security legislation, with its primary object described as ‘to give the greatest possible protection ... to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle’ (*Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A)).

There was no evidence to show that the limitation imposed by s 18 was ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. It was thus found that the impugned provisions were inconsistent with s 9(3) of the Constitution.

Court’s decision

The court declared ss 18(1)(a)(i), 18(1)(b) and 18(2) of the RAF Act, as they read before 1 August 2008, inconsistent with the Constitution and invalid. The court suspended the order of invalidity for 18 months from the date of the court order to enable parliament to cure the defect.

Remedy

If a court finds a challenged legislative provision to be inconsistent with the Constitution, s 172(1) of the Constitution obliges it to declare the provision invalid to the extent of the inconsistency. Thereafter, the court must make an order that is just and equitable, which may include limiting the retrospective effect of the invalidity order or its suspension.

The court in this matter noted that, unless the interests of justice and good government dictate otherwise, the applicants were entitled to the remedy sought because they were successful. The court suspended the retrospective effect of the declaration of invalidity to apply to the date of the court order only in the event that parliament failed to remedy the defect by the deadline. Further, the court held that the declaration of invalidity would not apply to claims in respect of which a final settlement had been reached or a final order granted.

The court weighed the competing interests of the parties whose rights were violated and the interests of good government. It was found that the interests of the respondents weighed above those of the applicants. The respondents provided evidence that showed that an order of invalidity with unlimited retrospective effect would increase the fund's financial liability by approximately

R 3 billion and would pose a serious threat to the sustainability of the fund, which had a deficit of over R 40 billion.

Transitional Act

Section 2(1) of the transitional Act gives third parties the option to choose whether their claims should be dealt with in terms of the RAF Act or in terms of the transitional Act, subject to the amendment Act. A third party must make this choice in the prescribed form within one year of the transitional Act taking effect, failing which his claim will automatically be subject to the transitional Act.

The advantage provided by the transitional Act is that it covers compensation for proven special and general damages above R 25 000, subject to the amendment Act. The Acts read together cover claims for loss of support, past loss of earnings, future loss of income and medical expenses.

In my opinion, a better option for a third party would be to choose the transitional Act route because the third party can claim compensation for general damages of more than R 25 000, provided a serious injury assessment report indicating a serious injury, as contemplated in reg 3 of the Road Accident Fund Regulations, 2008, is submitted within two years of the transitional Act taking effect.

Prescription

It is of paramount importance for attorneys and third parties to be aware of prescription when dealing with motor vehicle accident claims. The transitional Act provides a two-year prescription period from the date on which it came into operation for a third party to lodge a serious injury assessment report when claiming compensation above R 25 000 for general damages (s 2(1)(b)(i) of the transitional Act). However, if the third party is subject to an impediment contemplated in s 23(2) of the RAF Act (post-amendment) or s 13(1)(a) of the Prescription Act 68 of 1969, the period of one year referred to in s 2(1) of the transitional Act will commence running when the impediment ceases to exist. In terms of s 23(2), prescription of a claim for compensation does not run against a minor, any person detained as a patient in terms of any mental health legislation and a person under curatorship. This means that if a third party falls in the categories of persons mentioned in s 23(2), the relevant prescription period in s 2(1) of the transitional Act will commence running when the impediment ceases to operate; for instance, where a minor becomes a major.

Jurisdiction

The transitional Act brought changes to the RAF Act that will affect jurisdiction in terms of quantum in some litigated claims. Due to the changes introduced by the transitional Act, some claims litigated in the magistrate's court will be moved to the High Court.

In this regard, s 2(1)(e)(ii) of the transitional Act provides:

'(e) A third party who has, prior to this Act coming into operation –

...

(ii) instituted an action against the fund in the magistrate's court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period.'

Conclusion

The transitional Act brings relief to victims of the provisions of s 18 of the RAF Act whose claims for compensation against the fund were limited to R 25 000. Unfortunately for those third parties whose claims were settled or who obtained a final court order prior to the amendment cannot claim under the transitional Act. In principle, a court order and a settlement agreement that comply with the court rules are binding between the parties. A limited claim in which settlement was reached or a final court order was made before 13 February 2013 is therefore not covered by the transitional Act.

It must be borne in mind that parliament removed the limitation in s 18 of the RAF Act because it was unconstitutional and unfair. However, the amendment Act does not apply retrospectively in respect of the limited claims in question. This means third parties whose collisions occurred before 1 August 2008 remain governed under the RAF Act irrespective of the amendment Act taking effect from 1 August 2008.

Parliament decided that those whose claims arose before the amendment must continue to suffer the inequality. In my view, it is questionable as to why parliament did not include the retrospective effect in the amendment. By speculating, one may conclude that parliament was aware of the inequality but it had to make a decision that would sustain the fund.

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