CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/10
[2010] ZACC 18

In the matter between:

ROAD ACCIDENT FUND First Applicant

MINISTER FOR TRANSPORT Second Applicant

and

VUSUMZI MDEYIDE Respondent

Heard on : 11 May 2010

Decided on : 30 September 2010

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] The fundamental right of access to courts is essential for constitutional democracy under the rule of law.[1] In order to enforce one's rights under the Constitution, legislation and the common law everyone must be able to have a dispute that can be resolved by the

[1] According to section 1(c) of the Constitution, the Republic of South Africa is a sovereign democratic state founded on the values of, inter alia, supremacy of the Constitution and the rule of law.

application of law, decided by a court. The right of access to courts is thus protected in the Constitution.[2]

[2] In the interests of social certainty and the quality of adjudication, it is important though that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.

[3] At present prescription is provided for by the Prescription Act[3] in general and by other Acts of Parliament regulating specific areas. One of these is the Road Accident Fund Act[4] (RAF Act), a statute that provides for the establishment of the Road Accident Fund (RAF or Fund) and for compensation of victims of motor vehicle accidents.

[4] This matter requires the balancing of the right of access to courts and the need for the fair and manageable prescription of claims. It poses the question whether a provision

[2] Section 34 of the Constitution states:

> "Everyone has the 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."

[3] 68 of 1969.

[4] 56 of 1996.

of the RAF Act[5] violates the right of access to courts and is thus unconstitutional, because it determines that claims against the RAF prescribe if not instituted within three years from the date the cause of action arose, even if the claimant does not know of the existence of the RAF. This question has to be answered against the background of South Africa's socio-economic conditions, including a very significant degree of poverty and illiteracy, as well as the necessity of effective management of public finances earmarked for the compensation of people who need it for the restoration of some quality of life and human dignity.

Constitutional and legal framework

[5] It is convenient to first set out the applicable constitutional and legal framework and to look into the meaning of some of the core concepts of prescription that are central to this matter. Thereafter the facts of this case, its litigation history and the submissions presented to this Court will be summarised, before the questions posed are dealt with and a conclusion is reached.

[6] Section 34 of the Constitution enshrines the right of access to courts and states that "everyone has the 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."[6] The Constitution also recognises the values of human

[5] See section 23(1), quoted in [14] below.

[6] See above n 2.

dignity and the advancement of human rights and requires the state to respect, protect, promote and fulfil the rights recognised in it.[7]

[7] Rules of prescription – providing that claims become extinct after a period of time – are common in our legal system and apply to all civil claims. The Prescription Act and other Acts of Parliament, including the RAF Act, provide for specific periods in respect of claims brought in terms of those Acts. The origin of rules of prescription in our legal system dates back to Roman times.[8] Under the common law the prescription period was generally 30 years.[9] These rules were codified in the Prescription Act 18 of 1943, which was replaced by the current Prescription Act 68 of 1969 (Prescription Act).

[8] This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded.[10] The quality of adjudication is

[7] See sections 1(a) and 7(2) of the Constitution. The right to human dignity is furthermore protected in section 10.

[8] On the evolution of prescription in South African law, see Saner *Prescription in South African Law* (Butterworths, Durban 1996) 3-3 *et seq*. On prescription in general, see Loubser *Extinctive Prescription* (Juta, Kenwyn 1996) (*Extinctive Prescription)* as well as "Towards a Theory of Extinctive Prescription" (1988) 105 *SALJ* 34.

[9] See, for example, *Standard Bank of S.A. Ltd v Neethling, NO* 1958 (2) SA 25 (CPD) at 30A.

[10] See *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at para 11. See also *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5)

central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence.

[9] The precise manner in which prescription functions is determined through the application of a number of concepts. Some regulate the scope of a particular prescription clause. The manner in which prescription begins to run may furthermore be determined in a number of ways, usually with reference to the scope of the prescription clause.

[10] The Prescription Act deals with prescription in general. In terms of section 10 a debt is extinguished by prescription after the lapse of the period which applies in respect of the prescription of the debt.[11] A claim is thus after a certain period of time no longer actionable and justiciable. It is a deadline which, if not met, could deny a plaintiff access to a court in respect of the specific claim.

[11] Generally under the Prescription Act, prescription applies to a debt. For the purposes of this Act, the term *debt* has been given a broad meaning to refer to an obligation to do something, be it payment or delivery of goods or to abstain from doing

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BCLR 457 (CC) at para 29 and *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at paras 64-7.

[11] Section 10(1) of the Prescription Act states:

> ". . . a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

something.[12] Although it may on occasion be doubtful whether an obligation is indeed a debt in terms of the Act,[13] there is no doubt that a claim under the RAF Act constitutes a debt. However, the RAF Act regulates the prescription of claims under it and some of the differences between the two statutes have been placed at the core of this matter.

[12] The period of prescription is important. Section 11 of the Prescription Act provides for generic prescription periods. Generally, the prescription period is three years.[14] Section 23(1) of the RAF Act provides for the same period in regard to claims against the RAF.[15]

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[12] See *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA); 2007 (11) BCLR 1214 (SCA) at para 19 and *Desai NO v Desai and Others* 1996 (1) SA 141 (SCA) at 146H. Further see section 1 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 for a similarly broad definition of debt, with the additional requirement that the debt must be owed by an organ of state:

> "'debt' means any debt arising from any cause of action—
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> (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any—
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> (i) act performed under or in terms of any law; or
>
> (ii) omission to do anything which should have been done under or in terms of any law; and
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> (b) for which an organ of state is liable for payment of damages . . . ."

[13] This issue was raised for instance in *Njongi v MEC, Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC), where this Court raised but ultimately left open the question of whether a constitutional obligation could be considered a debt. In *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) at para 13, it was held that a claim for rectification of a contract was not a debt in terms of the Prescription Act.

[14] The relevant part of section 11 of the Prescription Act provides:

> "The periods of prescription of debts shall be the following:
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> . . . .
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> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[15] For the wording of section 23(1), see [14] below.

[13] When does prescription begin to run? This question is central to the present enquiry. Section 12(1) of the Prescription Act stipulates that it begins as soon as the debt is due. A *debt is due* when it is "immediately claimable or recoverable".[16] In practice this will often coincide with the date upon which the debt arose, although this is not necessarily always so. In terms of section 12(3) of the same Act, a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. A creditor is deemed to have the required knowledge if she or he could have acquired it by exercising reasonable care.[17] Furthermore, section 13 provides for circumstances in which the completion of prescription is delayed, for example, when the creditor is a minor, insane, or outside the Republic, or in certain other circumstances.[18]

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[16] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (SCA) at 532G.

[17] The relevant subsections of section 12 of the Prescription Act provide:

> "(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> . . . .
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> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[18] Section 13 of the Prescription Act states:

> "(1) If—
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> (a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or
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> (b) the debtor is outside the Republic; or
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> (c) the creditor and debtor are married to each other; or
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> (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
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> (e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or

[14] The RAF Act differs from the Prescription Act on the starting point of the prescription period. Section 23(1) provides for prescription of claims in terms of section 17[19] of the Act:

> "(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose."

[15] The scope of section 23 is thus defined in terms of claims under the RAF Act and not under the general rubric of *debt*. Section 23(1) of the RAF Act establishes a

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> (f) the debt is the object of a dispute subjected to arbitration; or
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> (g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 [Act 28 of 1966]; or
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> (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
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> (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[19] Section 17 of the RAF Act establishes the liability of the Fund and the relevant parts provide:

> "(1) The Fund or an agent shall—
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> (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;
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> . . . .
>
> 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."

prescription period limited to claims under section 17 against the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established.

[16] From the wording of sections 17 and 23(1) it appears that two situations are envisaged by the RAF Act, namely when the identity of the driver or owner of the motor vehicle has been identified and when this has not happened. This matter deals only with the first of these two.

[17] The RAF Act provides for exceptions. Prescription does not run against a minor, anyone detained as a patient in terms of mental health legislation or anyone under curatorship.[20]

[18] Section 12(3) of the Prescription Act builds a specific "knowledge requirement" into the scheme of section 12 though. As pointed out earlier, the subsection stipulates that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.[21]

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[20] Subsection 23(2) of the RAF Act states:

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

In this regard, see *Road Accident Fund v Smith NO* 1999 (1) SA 92 (SCA); [1998] 4 All SA 429 (A) at 102A-B.

[21] See above n 17 for the wording of this section.

[19] In terms of section 23(1) of the RAF Act, on the other hand, prescription runs from the date upon which the cause of action arose.[22] The term *cause of action* has been defined as "every fact which . . . would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."[23] In the case of claims under the RAF Act, the elements of a cause of action are established in terms of section 17[24] and include bodily injury or death, caused by or arising out of the negligent driving of a motor vehicle, or a wrongful act on behalf of the driver or owner of the motor vehicle.

[20] In contrast to section 12(3) of the Prescription Act, section 23(1) of the RAF Act does not provide that prescription starts to run only when the creditor acquires knowledge of the identity of the debtor and of the facts from which the claim arises. The question whether the creditor could have reasonably acquired this knowledge, raised by section 12(3), therefore does not arise under section 23(1). These differences between sections 12(3) and 23(1) have been the focus point of the submissions of the parties and the High Court judgment in this case and are dealt with below.[25] The RAF Act furthermore makes no provision for condonation of a late claim, either based on the ignorance of the claimant, or for any other reason.

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[22] See [14] above for the wording of section 23(1).

[23] See, for example, *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23, confirmed in *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) at para 19.

[24] See above n 19 for the wording of section 17 of the RAF Act.

[25] *Vusumzi Mdeyide v The Road Accident Fund* Case No. EL 91/2004, 3 October 2006, unreported.

Factual background

[21] The tragic facts of this case were canvassed in detail in an earlier judgment by this Court.[26] The facts are revisited here only to the extent necessary for this judgment.

[22] The respondent, Mr Mdeyide, has not had an easy life. Left virtually blind after a childhood accident, he had almost no formal education and is illiterate. He cannot leave his home without help. He has never held gainful employment and receives a disability grant. Having lived in informal settlements around East London in the Eastern Cape, he often drifts from one to the other. His mother and sister help him in his daily activities. At the time of the accident on which his claim is based he was married, but his wife later left him.

[23] On 8 March 1999 Mr Mdeyide, accompanied by his wife, was walking on the road close to his home when he was struck by a motor vehicle. He was rendered unconscious and transported to Frere Hospital by ambulance, where he was treated and discharged seven days later. He does not have an independent recollection of the events, save for being struck by a motor vehicle.

[26] *Road Accident Fund v Mdeyide (Minister of Transport, Intervening)* [2007] ZACC 7; 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC) at paras 5-23.

[24] On 17 September 1999, upon his wife's urging, Mr Mdeyide visited the offices of Niehaus, McMahon and Oosthuizen in East London and consulted with an attorney who was to lodge a claim with the RAF on his behalf. It would appear that this was the first time he learnt of his right to claim from the RAF.

[25] Unfortunately, however, events hereafter did not run smoothly. According to Mr Niehaus, the attorney, he struggled to contact his client. Only on 23 January 2002 did he manage to secure Mr Mdeyide's attendance at his office. He drafted an affidavit based on a statement taken at that meeting. Mr Mdeyide did not return to the office to sign the affidavit. On 11 March 2002 the attorney sent the unsigned affidavit to the RAF. This was three years and three days after the accident.

[26] After some initial confusion as to the validity of the claim, as reflected in the correspondence between the attorney and the RAF, it became clear that – in the Fund's view – the claim had prescribed and was therefore inadmissible.

The High Court and this Court

[27] Having had his claim rejected by the RAF, Mr Mdeyide instituted proceedings in the East London Circuit Local Division of the Eastern Cape High Court. The Fund raised a special plea of extinctive prescription in terms of section 23(1) of the RAF Act.

[28] In the High Court, Notshe AJ dealt with a number of issues that are not before this Court, like whether the RAF had in fact waived its right to plead prescription and whether it had tacitly accepted the claim as valid in law. He rejected the arguments to this effect.

[29] The High Court noted the difference between section 12(3) of the Prescription Act and section 23(1) of the RAF Act. It considered an argument presented on behalf of Mr Mdeyide that section 12(3) of the Prescription Act applies to claims under the RAF Act by virtue of section 16 of the Prescription Act.[27] It held that the two provisions were inconsistent with each other and concluded that the provisions of the Prescription Act did not apply to claims under the RAF Act.

[30] The High Court then, on its own accord, raised the constitutional validity of section 23(1) of the RAF Act. It invited the parties to make submissions on the point.

[31] In considering the constitutionality or otherwise of section 23(1), the High Court asked whether the right in section 34 of the Constitution had been infringed or limited.[28]

[27] Section 16(1) defines the ambit of the provisions of the Prescription Act:

> "Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act."

[28] The High Court used both the terms "infringed" and "limited".

Thereafter it asked whether the limitation was justified in terms of section 36 of the Constitution.[29]

[32] In the view of the High Court, there could be no doubt that section 23(1) of the RAF Act limited the right of access to courts. The court found that the limitation was not justifiable under section 36. Whilst accepting that prescription periods served a laudable purpose and that the three year period was not offensive, the rigidity of the provision rendered it unjustifiable. The High Court found that it was not the period that limits section 34 of the Constitution, but rather the—

> "insufficient and inadequate room that is left open in the beginning for the exercise of that right. It does not take into account the fact that there might be a justifiable reason for a delay. It does not take into account the ignorance and illiteracy of some, if not majority, of the people that the legislation is intended to protect."[30]

[33] The High Court found that section 23(1) of the RAF Act did not take into account the purpose of prescription – to penalise unreasonable inaction, and not inability to act – and consequently failed to take into account the social and economic conditions

[29] Section 36(1) states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose."

[30] See above n 25 at para 52.

prevailing in South Africa. Thus, it was the fact that prescription did not begin to run when the claimant acquired knowledge of the RAF, as well as the lack of a condonation procedure, that caused the provision to fail to pass constitutional muster.

[34] Accordingly, the High Court struck section 23(1) down as unconstitutional for its "failure to include the requirement that prescription should begin to run when the claimant has knowledge of the identity of the debtor and of the facts from which the debt arises", in other words for differing from the contents of section 12(3) of the Prescription Act. It should also have had a provision allowing for the condonation of a delay, the High Court reasoned.

[35] The order was referred to this Court for confirmation. The RAF appealed against it as well. The Minister for Transport (Minister) sought and obtained leave to intervene to support the position of the Fund. This Court found that the mental capacity of the plaintiff had been given insufficient attention,[31] as those who were deemed to be mentally ill or in need of a curator *ad litem* or curator *bonis* were excluded from the ambit of section 23(1) of the RAF Act by virtue of section 23(2) of the Act.[32] Thus, this Court referred the matter back to the High Court for a finding on this issue.

[31] See *Road Accident Fund v Mdeyide* above n 26 at paras 35-46.

[32] For the wording of section 23(1) and (2) see [14] and n 20 above.

[36] After an additional inquiry, the High Court found that the plaintiff was of sound mind. Consequently, the court re-instated its original order. The matter has again been referred to this Court for confirmation. The RAF and the Minister again appeal against the judgment.

The parties' submissions

[37] A brief summary of the parties' arguments may provide an overview of the issues raised. A more detailed consideration of particular points appears below.

[38] In their attack on the finding that section 23(1) of the RAF Act is unconstitutional, the RAF and the Minister make two main submissions. The first is directed at the High Court's view that the right protected in section 34 of the Constitution was limited. The RAF and the Minister submit that the High Court applied an incorrect test as to whether a prescription period limits the right of access to courts. They submit that section 23(1) of the RAF Act grants claimants a real and fair opportunity to lodge a claim and therefore does not infringe or limit the right, in view of this Court's jurisprudence.[33] The section also applies to a relatively narrow ambit of claimants who are aware of the circumstances surrounding their accident and who are given three years to lodge their claim. Claimants like the respondent are practically no worse off under section 23(1), than they would have been in terms of the Prescription Act, so they argue.

[33] They rely especially on *Mohlomi v Minister of Defence* n 10 above.

[39] Alternatively, they submit that if the right is found to be limited, this limitation is reasonable and justifiable under section 36 of the Constitution. In this regard they rely on the extensive adverse administrative and financial impact on the Fund and its beneficiaries, if the term of prescription were to be relaxed.

[40] On behalf of Mr Mdeyide two main submissions were made. First, it is argued that it is not necessary to reach the constitutional issue. By virtue of section 16 of the Prescription Act, section 12(3) of the Act applies also to cases falling under the RAF Act and delays the commencement of prescription, until the creditor acquires knowledge of the identity of the debtor. Consequently, prescription would only have begun to run when Mr Mdeyide found out about the RAF during his first consultation with his attorney. Thus, his claim would not have prescribed when he filed it. Alternatively, it is submitted that the High Court was correct in its reasoning and conclusion that section 23(1) of the RAF Act is unconstitutional.

[41] Counsel for both sides presented submissions as to the appropriate remedy and order, should section 23(1) be found to be unconstitutional.

The issues

[42] The issues before this Court, emanating from the judgment of the High Court and submissions by the parties, are the following:

(1) Does section 12(3) of the Prescription Act apply to claims under the RAF Act, by virtue of section 16 of the Prescription Act? In other words, should or

could the knowledge requirement of the Prescription Act be read into the RAF Act? This depends on whether sections 12(3) and 23(1) are consistent or inconsistent and requires an analysis of the differences between them.

(2) If section 12(3) of the Prescription Act does not apply to the RAF Act, does section 23(1) of the RAF Act limit[34] the right of access to courts?

(3) If so, is the limitation reasonable and justifiable?

(4) What would the appropriate remedy be, if any?

What is the difference between the two Acts, are they consistent and does section 12(3) of the Prescription Act apply to claims under the RAF Act?

[43] As indicated above, it was argued on behalf of Mr Mdeyide that the provisions of the Prescription Act apply to claims under the RAF Act. If so, a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, as required by section 12(3) of the Prescription Act. Prescription will thus not commence until the creditor is aware not only of the accident, but also of the existence of the RAF as a public body created by statute responsible for compensation in

[34] The term "limitation" is used in this judgment. In its previous jurisprudence this Court has employed a form of the verb "to limit" when referring to the manner in which section 34 (or its equivalent in the interim Constitution) is affected. See for example *Mohlomi* above n 10 at paras 12-3; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae*)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at paras 15-6; *Engelbrecht* above n 10 at para 39; *Brümmer* above n 10 at paras 48 and 56. This is also the language of section 36 of the Constitution above n 29, which regulates the justifiability of limitations to the Bill of Rights. However, in *Mohlomi* terms like "infringement", "invasion" and "encroachment" were also used. See also the use of noun-based constructions indicating that section 34 is affected, such as for a regulation to amount to "an unconstitutional fetter upon the access to courts for which section 34 . . . makes provision" by the Supreme Court of Appeal, cited in *Engelbrecht* at para 32. Academic commentators, for example Friedman and Brickhill "Access to Courts" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta, Cape Town 2008) at 59-37 to 59-48 and Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta, Cape Town 2005) (*Bill of Rights Handbook*) at 715-7 further employ terms like "infringement" and "violation", in addition to "limitation".

the event of road accident injuries. Mr Mdeyide's claim would therefore have been filed in time.

[44] Whether the provisions of the Prescription Act apply is determined by section 16 of the Act. It states that the provisions apply save in so far as they are inconsistent with the provisions of any Act of Parliament, which in this case would be the RAF Act.[35]

[45] A consistency evaluation is thus necessary.[36] The test has been formulated as "in every case in which a plaintiff relies upon a [certain provision], the cardinal question is whether that provision is inconsistent with [another provision]".[37] Inconsistency may arise as the result of a different time period being stipulated, but also on other points, for example, with regard to mental capacity.[38] However, where provisions have been found to deal with a similar subject matter, yet without being identical, it has on occasion been held that there was no inconsistency.[39]

[46] Before considering whether the provisions are inconsistent, it should be noted that section 23(1) of the RAF Act purports to apply "[n]otwithstanding anything to the contrary in any law".[40] This seems to indicate that the RAF Act was drafted with the

[35] See above n 27.

[36] See *Road Accident Fund v Smith NO* above n 20 at 98C.

[37] Id at 98F.

[38] *Terblanche v South African Eagle Insurance Co Ltd* 1983 (2) SA 501 (N).

[39] *Kotze NO v Santam Insurance Ltd* 1994 (1) SA 237 (C) at 246F-247J.

[40] See [14] above for the wording of section 23(1).

knowledge that other provisions on prescription might exist on the statute book and in common law and that the purpose of the Act is to regulate a specific and separate area, namely claims for compensation against the RAF, regardless of any other legal rule. This may well be sufficient to oust the provisions of the Prescription Act. But there are further reasons why the provisions of the Prescription Act cannot apply to claims under the RAF Act.

[47] Section 12(3) of the Prescription Act and section 23(1) of the RAF Act differ with regard to the central topic in the two provisions, namely the point when prescription starts to run. Section 23(1) simply relies on the date on which the cause of action arose, provided that the requirements of section 17 are met. It does not require knowledge of the identity of the debtor and of the facts from which the debt arises, as section 12(3) does.

[48] As to the requirement of knowledge of *the facts from which the debt arises*, the difference between the two provisions is probably not very relevant for the present enquiry. Most conscious and mentally able victims of an accident[41] would certainly know about the accident in which they were injured.

[41] Section 23(2) provides protection for minors, persons detained on the grounds of their mental health and persons under curatorship. See above n 20.

[49] As to knowledge of the *identity of the debtor*, the RAF as the debtor against whom claims are lodged, differs from the debtors whose identity is referred to in the Prescription Act. The reason why knowledge of the identity of the debtor is required in the event of prescription of claims in general is obvious. One may often know that money is being owed to you, for example in terms of a delictual claim for damage to property, but one may not know who caused the damage and thus who to claim from, until this knowledge is gained from some investigation or the emergence of evidence otherwise. In contrast, the RAF does not have an "identity" in the same sense that debtors in general have. It is not one of several or numerous possible wrongdoers. It was never an actor in the facts making up the cause of action. As indicated earlier, knowledge of the identity of the driver or owner of the vehicle is in any event required by section 17. The RAF is a statutory body specifically created for the purpose of compensating the victims of road accidents. Knowledge of the identity of the debtor thus means knowledge of the law, that is that a victim of a motor vehicle accident has a claim against a public fund, namely the RAF.

[50] There is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. The legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the

very reason that the Prescription Act was not regarded as appropriate for this area. Looking for consistency in this context, is a quest bound to fail.

[51] To argue that the Prescription Act and the RAF Act are not inconsistent, because the RAF Act says nothing about the issue of knowledge, and that knowledge of the identity of the debtor could thus be read into the RAF Act, would amount to circular reasoning. The argument would ignore the essential difference between the two Acts. Practically the meaning of the two different provisions would be the same. Section 23(1) of the RAF Act would be rendered meaningless. This is not logically tenable.

[52] Furthermore, while section 12(3) stipulates prescription to begin to run as soon as the debt is due, in other words in terms of a claimable debt, section 23(1) states that prescription is to start running as soon as the cause of action has arisen, which generally refers to the date of the accident.[42] The very fact that sections 12(3) and 23(1) define the point at which prescription begins to run in different terms gives rise to an inconsistency.

[53] The Prescription Act and RAF Act are thus inconsistent. Section 12(3) of the Prescription Act cannot apply to claims under the RAF Act. The finding of the High Court in this regard was correct.

[42] In a fatal accident the cause of action arises upon the death of the victim.

[54] It is consequently necessary to address the constitutional validity of section 23(1) of the RAF Act. This has to be done on its wording as it stands.

Does section 23(1) of the RAF Act limit the right of access to courts?

[55] This Court has addressed the constitutionality of prescription periods and similar time bars on a number of occasions. In this case, though the attack is directed at the time bar, the complaint is not the three-year period, but the lack of flexibility in its initiation.

[56] Because the Constitution recognises specific rights in Chapter 2 and provides for the limitation of rights by way of a general limitation clause, a two-stage enquiry is necessary. The process of interpreting a right is different from that of considering the limitation of the right. Two questions have to be asked. The first is whether the right is limited and, if it is, the second is whether the limitation is constitutionally permissible.[43] If the answer to the first question is that the right is not limited, the second question does not arise.

[57] This approach has been followed by this Court, also in respect of the right of access to courts. In *Mohlomi v Minister of Defence*[44] this Court considered the constitutional validity of a time bar clause in the Defence Act.[45] The provision imposed

[43] See for example *Bill of Rights Handbook* above n 34 at 164-8 and the cases referred to therein. See above n 29 for the wording of section 36(1). As to the use of "limitation" and other terminology, see above n 34.

[44] See above n 10.

[45] Section 113(1) of the Defence Act 44 of 1957.

an obligation on claimants pursuing an action against the state, to institute the action within six months and to give notice of one month to the defendant before instituting the claim. Mr Mohlomi claimed compensation for injuries allegedly sustained when a soldier shot him intentionally. The defence of the Minister was that the dual requirements of the six-month period and the notice had not been met.

[58] Writing for a unanimous Court, Didcott J recognised the laudable purpose that prescription periods serve[46] but held that "[i]t does not follow, however, that all limitations . . . are constitutionally sound".[47] Each prescription period must be scrutinised in order to determine whether its "particular range and terms are compatible with the right which section 22 bestows on everyone".[48] He recognised that while there may be instances in which the right is denied altogether if a claim prescribes, this is a possibility in every case in which prescription periods exist. What matters, he said, is "the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right" and "the availability of an initial opportunity to exercise the right".[49] He found that claimants were not afforded "an adequate and fair opportunity to seek judicial redress for wrongs allegedly

[46] *Mohlomi* above n 10 at para 11. Most of the reasoning in connection with the purpose and value of prescription appears in [8] above.

[47] Id at para 12.

[48] Id. Section 22 was the equivalent in the interim Constitution of section 34 of the Constitution.

[49] Above n 46.

done to them" and that the limitation of the right of access to courts had not been shown to be reasonable and justifiable.[50]

[59] A two-step analysis was undertaken in *Mohlomi.* The meaning and scope of the right of access to courts were discussed and the right was found to be limited. Thereafter the question whether the limitation was reasonable and justifiable in terms of the limitation clause was dealt with.[51] However, some of the considerations taken into account during the first phase of the enquiry, could have been relevant in the second as well. The finding that the claimant was not afforded an adequate and fair opportunity to seek judicial redress, could have been made at the end of the second stage of the enquiry, as it was at the end of the first.[52]

[60] In other cases this Court broadly followed the approach laid down in *Mohlomi.* In *Moise*,[53] *Potgieter*[54] and *Engelbrecht*[55] this Court struck down periods of 90 days, three

[50] Id at paras 14 and 21.

[51] Id at paras 11-20.

[52] In *Mohlomi* at para 14 it appears that the conclusion that a "fair and adequate opportunity" was not afforded was reached at the end of the first enquiry. In *Brümmer* above n 10 at para 51 this test is mentioned as a part of the limitation analysis, in other words the second enquiry. It is also clear from the judgments of this Court that although a two-step approach is appropriate, the questions raised and the standards applied may sometimes overlap and be applicable to both. It is not always practical to rigidly separate the two stages of the enquiry. In *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) this Court departed from a strictly separated two-stage approach. It assumed that rights regarding religion were limited by a prohibition on corporal punishment, proceeded directly to the limitation analysis and found the limitation to be justified.

[53] *Moise* above n 34.

[54] *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere* [2001] ZACC 4; 2001 (11) BCLR 1175 (CC).

[55] See above n 10.

months and 14 days, respectively, as unconstitutional. In each case the time period – with reference to the six months in *Mohlomi* – was held to be too short. The right was found to have been limited and the limitation to be unreasonable and unjustifiable.

[61] It is quite possible that the legislature may limit the right of access to courts in a way that is reasonable and justifiable and thus passes muster under section 36. In *Beinash*[56] this Court considered the constitutionality of a provision of the Vexatious Proceedings Act,[57] imposing certain restrictions on the ability of persons identified as having abused their right to bring legal actions. The applicant challenged the provision as a violation of the right of access to courts. The Court found that the right was indeed limited by the section. However, the limitation was reasonable and justifiable in terms of section 36, because it served an important purpose namely protection of the judicial process.[58]

[62] In my view the right of access to courts is indeed limited by section 23(1) of the RAF Act. A time limit is imposed with regard to claims for compensation against the RAF. As stated in *Brümmer*,[59] time bars limit the right to seek justifiable redress. The starting point for the time period is fixed and in some respects inflexible and no

[56] *Beinash and Another v Ernst & Young and Others* [1998] ZACC 19; 1999 (2) SA 116; 1999 (2) BCLR 125 (CC).

[57] Section 2(1)(b) of Act 3 of 1956.

[58] Above n 56 at paras 16-9.

[59] Above n 10 at para 51, also quoted in [68] below.

knowledge of the existence of the RAF is required. This impacts on the exercise of a claimant's right to approach a court.

Is the limitation reasonable and justifiable?

[63] Consequently, we have to consider whether this limitation of the right of access to courts meets the requirements of section 36 of the Constitution. Section 36(1) provides that the rights in the Bill of Rights may be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It requires taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve that purpose.[60]

[64] Section 23(1) of the RAF Act is law of general application. The question is therefore whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, in view of all relevant factors, including those mentioned in section 36(1).

[65] Not much needs to be said about the nature of the right of access to courts. It is clearly an important right. As stated earlier, it is essential in a constitutional democracy

[60] For the wording of section 36(1), see above n 29.

under the rule of law. It implies a degree of awareness, or knowledge, on the part of the bearer of the right. But, like other rights, it can be limited.

[66] The central issue is one of proportionality. All the factors are to be considered and weighed together; not one of them is conclusive on its own. In this process, the devastatingly final effect of prescription on a claim, the inflexibility of the starting point of the prescription period in section 23(1), the absence of a knowledge requirement and provision for condonation and the difficult situation in which some claimants might be placed, must be considered, especially against the backdrop of poverty and illiteracy in our society. These must be weighed against the generosity of the time period of three years, the need for the proper administration of public funds and the potential harmful effects of a more flexible or open dispensation.

[67] The state – in this case the RAF and the Minister – has to demonstrate that the limitation is reasonable and justifiable. This duty is not the same as the evidentiary onus of proof.[61]

[68] In *Brümmer*[62] Ngcobo J summarised the principles emerging from this Court's prior jurisprudence on time bars as follows:

[61] See for example *Moise* above n 34 at para 19. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 34 this Court described the obligation as "an onus of a special type."

[62] *Brümmer* above n 10 at para 51.

> "The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The 'enquiry turns wholly on estimations of degree'. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive."[63] (Footnotes omitted.)

[69] There are thus no hard and fast rules, each case must be judged on its own circumstances and it is a matter of degree. Adequate time must be given to institute a claim and the practical possibility and genuine opportunity to do so is important. *Mohlomi* started to define this approach. In the cases between *Mohlomi* and *Brümmer*, the periods were so short that this Court barely needed to consider the specific circumstances surrounding the individual cases to conclude that no litigation to enforce rights was reasonably possible within those time limits. In *Brümmer* this Court went further and also considered the general steps one needs to take to lodge an application.[64]

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[63] Id at para 51.

[64] In *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC), in evaluating whether the time period was adequate, this Court considered the applicability of the principles established in cases relating to statutory prescription periods to contracts between private individuals. Ngcobo J applied the principles enunciated in *Mohlomi* in enquiring whether the prescription provision of a contract satisfied the requirements of public policy. It found the provision stipulating a 90-day period to be constitutionally acceptable. This case must of course be viewed in its proper context of the short-term insurance market, the additional considerations that play a role regarding private contracts (including the fact that the applicant had freely and voluntarily entered into the contract) and the background of persons entering into those types of contract. The dissenting judgments by Moseneke DCJ and Sachs J are also noteworthy for the different emphasis they lay on the various considerations in the matter.

[70] Socio-economic conditions in South Africa are of course highly relevant in considering the reasonableness and justifiability of a limitation of the present kind. In a society where the workings of the legal system remain largely unfamiliar to many citizens, due care must be taken that rights are adequately protected as far as possible. In *Mohlomi* reference was made to—

> ". . . the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons."[65]

[71] It is true, despite the progress that has been made in many areas since the time when *Mohlomi* was decided, that poverty and illiteracy are still widely prevalent in our country. But these considerations are not the sole ones deserving attention in this case. The purpose of the analysis is to determine whether the limitation of the right of access to courts is reasonable and justifiable in view of all relevant considerations and within the context of the facts of the case before us.

[72] Mr Mdeyide's submissions rely heavily on the considerations regarding poverty and illiteracy. His counsel contends that the infringement of the right of access to courts

[65] Above n 10 at para 14.

cannot be justified in these circumstances. Furthermore, there would be no prejudice to the RAF if his claim were to be entertained. In fact, the claimant promptly informed the Fund that the claim was being launched outside of the three-year period and the Fund seemed to have been amenable to it, as the correspondence between the parties illustrates, according to counsel for Mr Mdeyide.

[73] The RAF and the Minister seek to justify the infringement by pointing out the serious adverse financial and operational effects that changes to the strict prescription period would have. In essence they submit that the operations of the RAF depend heavily on the fixed prescription period.

[74] More specifically, they rely on three direct effects of deviating from a strict time bar. First, the fixed commencement date allows the RAF to process claims efficiently and expeditiously. Mr Abrahams, the Acting Chief Operations Manager of the RAF, states under oath that the Fund receives on average about 18 800 claims per month and that a backlog of approximately 250 000 unfinalised cases existed in December 2009. If a condonation procedure or a knowledge requirement were to be brought into section 23(1), it would have a far-reaching impact on how new cases would have to be dealt with. According to an affidavit by Mr Karberg, the Senior Manager of Legal Services at the Fund, RAF officials would have to investigate whether a case for condonation has indeed been made out in each case. Not only is this a highly individualised and laborious task, but the Fund is also at a particular disadvantage as it does not have a way of anticipating

such claims. This would require them to change fundamentally the way in which they deal with claims. It is also likely to increase the RAF's backlog of cases.

[75] The RAF and the Minister furthermore submit that changing the time bar would have a significant impact on the way in which the Fund evaluates claims, that is to say whether they settle a claim or litigate to oppose it. In order to evaluate claims, the RAF requires sets of documents from the police and hospitals, details relating to non-hospital medical treatment, witnesses' and drivers' contact details and other related information. In addition, inspections *in loco* are required. As time passes, the possibility of these documents becoming unavailable, being discarded, or going missing, increases. The same goes with even greater force for statements which witnesses must make from memory. All of this would pose a serious threat to the ability of the RAF to evaluate claims properly and, consequently, raise the possibility of the Fund being forced to litigate against claims because it was not satisfied a claim is valid as a consequence of it not being able to evaluate a claim properly. In essence, the Fund contends that it is particularly dependent on the quality of claims that it receives, magnifying the need for prescription periods that is present in every case before a court.

[76] The Fund argues that the proposed changes to section 23(1) would make it impossible for the RAF to accurately predict its future expenditure. It bases its predictions on past patterns. Were the system to be changed fundamentally, these patterns would no longer hold true and the RAF would be unable to budget accurately for

a number of years into the future. Thus, at the very least, a declaration of invalidity of section 23(1) of the RAF Act would cause great uncertainty to the finances of the RAF, in addition to any additional expenditure.

[77] In my view the exact nature and full extent of the practical consequences of a more open prescription period for the RAF – and by extension the public – are necessarily subject to some speculation at this stage. However, it seems reasonably safe to say that they are potentially costly at best and calamitous at worst. The Fund is financially burdened as it is, and significant further expenditure will inevitably lead to an increased budget deficit. To what extent the operations of the RAF would be affected may not be absolutely certain; however, given the backlog of cases it could be accepted that the RAF will suffer in its efficiency. To some extent this further burden would be borne by the public, as road accident claims would be processed slower and everybody would be worse off. The worst case scenario is that the Fund might collapse and road accidents would go uncompensated, leaving thousands of claimants without the possibility of receiving compensation for their injuries and losses.

[78] In spite of the lack of absolute certainty regarding the effects of scrapping the strict cut-off point of section 23(1), or the introduction of a general condonation clause on the viability of the RAF, the risk must not be underestimated. The evidence and arguments put forward by the Fund are uncontradicted and compellingly persuasive and cannot be ignored or taken lightly. The fact that the Fund does not show exactly how many people

are affected by the prescription period as currently formulated, cannot be decisive. The risk that claimants may explain their lateness by relying on their ignorance of the law is real. It would not be easy for the RAF to prove their reliance to be incorrect, or to show that they could reasonably have acquired the knowledge, as provided for in section 12(3) of the Prescription Act. And it would certainly be costly.

[79] The limitation of the right in this case is clearly connected to a legitimate purpose of high public importance, namely the continued existence and maximum efficiency of a fund for the compensation of people injured in road accidents. Relaxing the system of prescription for claims under the RAF Act might at the very least lead to a significant increase in the Fund's expenditure. It is, however, not only about increased administrative and other costs, but also about the functioning and financial sustainability of a hugely important public body which renders an indispensible service to vulnerable members of society.

[80] It is of course not easy to square the limitation of a fundamental right with what on its face may appear to be administrative work and financial costs. But our Constitution – like most or all modern Constitutions – recognises that rights can be limited in an open democratic society and requires us to consider the limitation by taking a range of factors related to practical realities into account. In this case we have to balance the limitation of a fundamental right with the potentially calamitous consequences for the RAF, a body

designed to help those who suffered as a result of road accidents, which may well otherwise follow.

[81] It is a reality that interests – and rights – compete. Section 36 allows for the limitation of rights necessitated by the competition and provides a formula to weigh competing interests and rights. The legislature has a duty to respect and protect the constitutional right of access to courts, but also the right to human dignity of the victims of road accidents, by providing for them to be compensated by a properly administered public fund. To regard as crucially important the need for a fund like the RAF to remain viable in order for it to serve its purpose, is in line with the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[66]

[82] In considering the proportionality of the limitation and its purpose, we have to return for a moment to the length of the prescription period. The generosity of the time period of three years within which to institute a claim weighs heavily in the balancing

[66] See section 1(a) of the Constitution. To weigh competing rights and governmental duties is not the same as the purely utilitarian sacrificing of rights in the interest of the greater (administrative or financial) good. It is a constitutionally mandated exercise, which is well in accordance with the ideal of transformative constitutionalism. On the last-mentioned, see the cases cited in n 27 of the judgment by Froneman J, as well as Van der Westhuizen "A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy" (2008) 8 *African Human Rights Law Journal* 251 at 256-7, with reference to the works of Klare, Liebenberg, Langa and others.

process. The time bars previously struck down by this Court as unconstitutional were much shorter, ranging between 14 days and six months.[67]

[83] People who are injured in road accidents are likely to learn of the RAF during the three years following the event. Although poor and illiterate people are in very many respects less empowered than those with significant means and education, knowledge of the existence of a claim is not only related to the degree of formal education one has undergone, or to one's wealth. It is the kind of information not normally acquired from books, but rather through word of mouth and day-to-day interaction, not unlike questions of how to use public transport, or where to get medical help, or how to claim state benefits.

[84] Only the very first step in the process of claiming compensation needs to be taken within the three-year period. The process of claiming under the RAF Act is relatively simple compared to more complex legislation. No written notice, linked to the time bar of six months, is required, as was the case in *Mohlomi*.[68]

[85] Next, the perceived inflexibility of section 23(1) requires closer scrutiny. Section 12(3) of the Prescription Act cannot necessarily be elevated to a benchmark, as far as the knowledge requirement is concerned, as was done by the High Court. As indicated

[67] See *Mohlomi* and *Engelbrecht* above n 10; *Moise* above n 34; *Potgieter* above n 54.

[68] See section 24(1) of the RAF Act for the procedure. As to *Mohlomi*, see above n 10. The report of the Satchwell Commission, or Road Accident Fund Commission, referred to in the judgment of Froneman J was not placed before this Court and no argument on it was presented.

earlier, the Prescription Act and the RAF Act are different pieces of legislation, with very different purposes. Knowledge of the identity of the debtor, required by section 12(3) of the Prescription Act, plays no role in the scheme of section 23(1) of the RAF Act.[69]

[86] In *Mohlomi*[70] the Prescription Act was used as a "handy yardstick" against which to measure the limitation imposed by section 113(1) of the Defence Act. Didcott J mentioned that the period of prescription under the Prescription Act was three years, in contrast to the six months in terms of the Defence Act. He also referred to the knowledge requirement. The Prescription Act was far more comparable to the Defence Act than to the RAF Act, though. Didcott J furthermore referred to the then section 57 of the South African Police Service Act,[71] a very comparable provision, allowing for 12 months after the claimant became aware of the act or omission giving rise to the claim.

[87] In *Brümmer*[72] Ngcobo J said that sufficient or adequate time must be allowed between "the cause of action coming to the knowledge of the claimant" and the launching of litigation. This does not mean that knowledge as referred to in the Prescription Act is always required though. As stated in *Brümmer*,[73] there are no hard and fast rules, each enquiry turns on estimates of degree and each provision must be scrutinised to see whether it is compatible with the right of access to courts.

[69] See [18]-[20] and [47]-[50] above, as to the differences between the Prescription Act and the RAF Act.

[70] See above n 10 at para 13.

[71] 68 of 1995.

[72] Above n 10 at para 51.

[73] Id at paras 51-2.

[88] The absence of provision for condonation has been raised as a part of the concern about the inflexibility of section 23(1). In *Brümmer*[74] this Court made clear that the power to condone non-compliance with a time bar is a relevant consideration, but not necessarily decisive. Furthermore, the Prescription Act also does not provide for condonation.[75] In this matter the RAF has put forward persuasive arguments as to the negative effects condonation would have on its functioning.

[89] The length of the period of prescription must necessarily be considered together with and balanced against the rigidity of its starting point, the absence of the requirement of knowledge and the absence of provision for condonation. The shorter the period, the more one would look for flexibility and scope for exceptions. A very generous prescription period – like the three-year period in this case – in itself provides considerable flexibility and space for people experiencing difficulties. If, for example, the RAF Act provided for a period of two instead of three years, but required knowledge of the RAF for it to commence, Mr Mdeyide would have been worse off. He would have had two-and-a-half years to submit his claim instead of three years.

[90] The prescription period does not disregard the plight of the poor and the illiterate. The facts of this case provide a telling example. Because of his disability and socio-

[74] Id at para 51.

[75] See Act 68 of 1969 as a whole. The common law does not provide for condonation as such. See *Extinctive Prescription* above n 8.

economic status Mr Mdeyide certainly falls into the category of very disempowered and marginalised people. Yet, he found out about the RAF within approximately six months after his accident. His ignorance was not the main problem. After first approaching an attorney, two-and-a-half years passed during which his claim could have been submitted. Eventually the claim was three days late. A knowledge requirement would of course have benefited him in that the prescription period would have started later and his claim would have been filed in time. But this would have been coincidental. His lack of knowledge for six months was not the primary cause of the lateness of his claim. It is not insignificant that – when confronted with the special plea of prescription – Mr Mdeyide's legal representatives did not raise the unconstitutionality of section 23(1) on the basis that he was not aware that he could sue the Fund and that the provision does not require knowledge for prescription to start running. The High Court did so.

[91] The poverty, illiteracy and lack of access to transport, modern communication facilities and proper legal advice, which continue to plague and marginalise many in South Africa, have diverse causes, run deep and are widespread. The Constitution and the courts applying it have a role to play in advancing human dignity and other human rights, but one must guard against over-simplification.

[92] Froneman J rightly draws attention to and emphasises the criterion of less restrictive means. Could the legislature have enacted a less drastic dispensation? According to the RAF and the Minister, it could not have done so. Even if they are

incorrect, this is not the only consideration. The exercise is one of proportionality in which all the factors are weighed against one another. The mere possibility of less restrictive means is therefore not decisive.[76]

[93] Bearing this in mind, the potential harm to the viability and functioning of the RAF, should a knowledge requirement or provision for condonation be imported into the scheme of section 23(1), outweighs the possible negative impact of the provision in its present form on people who might not come to know about the Fund for three years after the accident in which they sustained injuries. The RAF Act was legislated for a specific area and purpose. It limits the right of access to courts, but the importance of the purpose, the nature and extent of the limitation and the relation between the limitation and its purpose render the limitation proportional to its purpose and thus reasonable and justifiable.

Conclusion

[94] Accordingly, the limitation of the right of access to courts by section 23(1) of the RAF Act is reasonable and justifiable under section 36 of the Constitution. Taking all relevant considerations into account, claimants are – in the words used in *Mohlomi*[77] and

[76] As to section 1 of the Canadian Charter of Rights and Freedoms, containing some similar wording as section 36 on the limitation of rights, see Hogg *Constitutional Law of Canada* 5 ed Supplemented (Thomson/Carswell, Toronto 2007) 38-17 at 38.8(b). See also *Illinois Elections BD v Socialist Workers' Party* 440 US 173, 188-9 (1979). This was quoted by O'Regan J and Cameron AJ in their dissent in *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 94 and not disavowed by the majority.

[77] Above n 10 at para 14. Also quoted in [70] above.

in *Brümmer*[78] – afforded an adequate and fair opportunity to seek judicial redress. Section 23(1) is not unconstitutional.

[95] The order of the High Court cannot be confirmed. The appeal must succeed. No further consideration of a remedy based on the unconstitutionality of the provision is necessary.

[96] It inevitably follows from this finding and the nature of the proceedings before the High Court that Mr Mdeyide's claim has reached the end of the road. Prescription was raised by way of a special plea. The court found section 23(1) unconstitutional and dismissed the special plea. The matter is before us as confirmation proceedings and also on appeal. The High Court is *functus officio*. If section 23(1) is not unconstitutional, the special plea should have been upheld, which would mean that the claim had to be dismissed.

[97] Mr Mdeyide's situation is extremely regrettable, but not because section 23(1) is unconstitutional for not permitting him to bring his claim later. There are other possibilities. One was mentioned in this Court's previous judgment in this matter:[79]

> "Mr Niehaus has not explained why he did not submit the plaintiff's claim within the three-year period - it was submitted three years and three days after the date of the

[78] Above n 10 at para 51.

[79] Above n 26 at para 11.

> collision. After all, Mr Niehaus had no more information at the time he sent the letter to the RAF than he had immediately before the termination of the three-year prescription period. There is nothing to suggest that Mr Niehaus could not have submitted the claim timeously."

Costs

[98] There is no reason to deviate from the ordinary rules on costs in this Court.[80] Mr Mdeyide approached the High Court in terms of his constitutional right of access to courts, in order to enforce his right to compensation under the RAF Act. The constitutional validity of a statute limiting his right of access was under scrutiny. He is ultimately unsuccessful. It is appropriate that each party be responsible for their own costs in this Court, as well as in the High Court.

Order

[99] The following order is made:

1. The appeal is upheld.
2. The declaration of constitutional invalidity of the Eastern Cape High Court, East London Circuit Local Division, regarding the constitutional validity of section 23(1) of the Road Accident Fund Act 56 of 1996 under case number EL 91/2004 is not confirmed.
3. The order of the High Court is set aside and replaced by the following

[80] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

order:

(a) The defendant's special plea is upheld.

(b) The plaintiff's claim is dismissed.

(c) There is no order as to costs.

4. There is no order as to costs in this Court.

Ngcobo CJ, Moseneke DCJ, Cameron J, Khampepe J, Mogoeng J, Nkabinde J, and Skweyiya J concur in the judgment of Van der Westhuizen J.

FRONEMAN J:

Introduction

[100] The right of access to court to resolve justiciable disputes is fundamental to a society governed by the rule of law.[1] Knowledge of the facts that give rise to a justiciable claim is a necessary precondition for the exercise of the right of access. Without that knowledge the right of access means nothing; it remains abstract and illusory.

[1] *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at para 61 and *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 16.

[101] Time bars and prescription periods[2] limit the right to seek judicial redress. The main object of these limitations is no doubt to create legal certainty and finality between the parties after a lapse of time, but they should not serve as a blunt instrument to achieve finality regardless of the circumstances of the parties to an obligation.[3] Even though these limitations serve an important purpose in preventing inordinate delays which may be detrimental to the interests of justice, they must still be scrutinised to determine whether they pass constitutional muster under section 36 of the Constitution.

[102] There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. It depends upon whether the limitation affords litigants an adequate and fair opportunity to exercise the right to judicial redress. The limitation must allow sufficient time between the date when the facts giving rise to the claim come to the knowledge of the claimant and the time within which litigation may be launched.[4]

[103] The Prescription Act,[5] as the benchmark legislation for the operation of prescription, requires knowledge, actual or reasonably deemed, as a necessary

[2] For the difference see *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) at 492C-493A.

[3] Loubser "Towards a Theory of Extinctive Prescription" (1988) 105 *SALJ* 34 at 52-3.

[4] *Brümmer* above n 1 at para 51 and *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at paras 12 and 14. See also *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC); *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) and *Moise v Greater Germiston Transitional Local Council*: *Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae*)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC).

[5] 68 of 1969.

precondition to enable someone to exercise their right of access to court.[6] This is also evident in various other laws[7] and past decisions of this Court.[8] The object of this requirement is aimed at preventing prescription running against a person who, by reason of the lack of knowledge and the inability to acquire it by the exercise of reasonable care, is unable to institute action. Where knowledge is not expressly recognised in this way, access to courts may also be preserved by providing courts with powers to grant condonation in deserving cases.[9]

[104] The provisions of section 23(1) of the Road Accident Fund Act[10] (RAF Act) go against this. It has no knowledge requirement and it does not provide courts with the power to grant condonation. Except for the lengthier time periods, its provisions suffer

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[6] Section 12 in relevant part provides:

> "(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> . . . .
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[7] Section 3(3)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002; section 27(3)(a)(ii) of the Financial Advisory and Intermediary Services Act 37 of 2002; section 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and section 34(2) of the National Nuclear Regulator Act 47 of 1999.

[8] *Brümmer* above n 1 at para 52 and *Mohlomi* above n 4 at para 19.

[9] Section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act; section 9(2) of the PAJA; section 191(2) of the Labour Relations Act 66 of 1995; section 96(1)(c)(ii) of the Customs and Excise Act 91 of 1964 and section 344(3) of the Merchant Shipping Act 57 of 1951.

[10] 56 of 1996. Section 23(1) provides that:

> "Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose."

from the same defects that failed to pass constitutional muster in *Mohlomi*.[11] I therefore respectfully disagree with the majority judgment that there is sufficient justification under section 36 of the Constitution for it to survive. I believe that our different assessment of the merits of its justification has its roots, first, in divergent views on the extent to which section 23(1) limits the right of access under section 34 of the Constitution and, second, on the proper social context in which this matter must be decided. I deal with the limitation imposed by section 23(1) and the social context, before turning to justification under section 36 of the Constitution.

Limitation of the right

[105] As stated above, I consider that knowledge (actual or reasonably deemed) of the facts giving rise to a justiciable claim is a necessary part of the right of access to court under section 34 of the Constitution. To recognise this seems to me to be logical, fair and practicable. I can discern no fundamental constitutional value that would exclude knowledge as a necessary definitional part of the right of access to court under section 34 of the Constitution.[12]

[106] The majority judgment alludes to the possibility that in *Mohlomi*,[13] the same kind of considerations were discussed in both stages of the two-stage limitation and

[11] *Mohlomi* above n 4 at para 19.

[12] Woolman and Botha "Limitations" in Woolman et al (eds) *Constitutional Law of South Africa* vol 2 at 34-17.

[13] Above n 4.

justification analysis.[14] It is equally plausible to read *Mohlomi* as including knowledge as a requirement in the definitional first stage of the inquiry. Secondary to that, but also a necessary part of the right of access, is that it must always be open to courts to scrutinise and control the purported exclusion of any constituent part of the right of access. This reading of *Mohlomi* is consistent with this Court's insistence that it is an indispensable part of the right of access, as underpinning the foundational constitutional value of the rule of law, for courts to keep control of all aspects of the judicial process.[15]

[107] Section 23(1) thus limits the right of access in three ways:

(a) By denying that an essential part of the right of access, namely knowledge of one's claim, forms part of that right;

(b) By precluding the secondary justiciable issue, whether one had sufficient time to claim after acquiring knowledge, from being adjudicated in court; and

(c) By providing that one's right to compensation becomes prescribed after three years.

[14] Above [59]. On the two-stage analysis see *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 100; *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 71; *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 9 and *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 21.

[15] See *Chief Lesapo* above n 1 at para 22. Compare *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 55.

[108] The time period of three years in section 23(1) obscures and obfuscates the real issues in the case. On its face section 23(1) does not provide for the time "between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched", summarised as a requirement for constitutional validity by Ngcobo J in *Brümmer*.[16] The facts of this case illustrate the potential danger of this failure. It is common cause that the applicant, Mr Mdeyide, only gained knowledge of the necessary facts to institute his claim six months after the accident in which he was injured. From this it is temptingly easy to conclude that he nevertheless still had two-and-a-half years in which to lodge his claim; that this was sufficient time to do so and that consequently, his constitutional challenge to section 23(1) must fail. But to do that would be wrong, for two different but interrelated reasons.

[109] The first reason is that the constitutional validity of section 23(1) is an objective question, not dependent on the particular facts of Mr Mdeyide's case.[17] The question is *not* whether two-and-a-half years passes constitutional scrutiny, but simply whether section 23(1) provides for the relevant time "between the cause of action coming to the knowledge of the claimant and the time during which the litigation may be launched."

[16] Above n 1 at para 51.

[17] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 28; *Member of the Executive Council for Development Planning and Local Government; Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 64 and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 26. See also *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

And the simple answer to that is that it does not. Even if the section has the potential to deprive one person of a right of action without sufficient justification that is enough. The question is not whether people have actually been deprived but whether objectively speaking the provisions of section 23(1) have that potential.

[110] The second reason is that the question whether two-and-a-half years is nevertheless a sufficient time after gaining the necessary knowledge to lodge a claim, is one which the terms of section 23(1) preclude courts from answering. Under the provisions of section 23(1) the courts have no power to entertain that question.

[111] Upon close analysis the threat posed by section 23(1) to the fundamental right of access to courts thus runs deep. It seeks to negate an essential part of the right by precluding knowledge as a requirement and it seeks to prevent the courts from maintaining judicial control over the justification of the limitation in individual cases, a necessary corollary of that right. It does all that in addition to what it has in common with all other time bar and prescription provisions; imposing a time limit beyond which a litigant is precluded from access to court.

[112] On its own, these limitations require strong justification. Add the social context in which the analysis needs to be done and the need for a particularly compelling purpose for the limitations becomes even more urgent.

Social context

[113] As is apparent from the analysis of the limitation justification put up in the papers by the Road Accident Fund (RAF) and the Minister for Transport (Minister) in the majority judgment, that justification did not attempt to provide any information on the likely number of people who would not have the necessary knowledge of the facts to lodge claims against the RAF under the provisions of the Act. In my view the failure to do so undermines their justification argument, but for the moment I want to restrict the discussion to the question whether there is any reasonable basis for concluding that the acquisition of the necessary knowledge to lodge a claim would most likely present a problem for poor, illiterate and uneducated people, rather than for the more advantaged in society. The answer seems quite obvious to me.

[114] Fourteen years ago Didcott J described South Africa as a land:

> "[W]here poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of s 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them."[18]

[18] *Mohlomi* above n 4 at para 14.

[115] It is true that it is the commitment of our Constitution and public authorities to alleviate and if possible eradicate that state of affairs, and that much has been done in that regard since then. I believe, however, that it is unrealistic to think that for a substantial portion of our population things have changed that much.

[116] This is confirmed by the findings of the Satchwell Commission (Commission) in the Report of the Road Accident Fund Commission which investigated the workings of the RAF in 2002.[19] According to the Commission's findings, research indicated that general awareness of the road accident compensation scheme was restricted to slightly less than 50% and that awareness of the RAF increased with household income levels and living standards.[20] Similar kinds of statistics emerged even in respect of persons who had been involved in accidents.[21] The Commission found that "one of the main barriers to

[19] Road Accident Fund Commission, established in terms of the Road Accident Fund Commission Act 71 of 1998, appointed 1 June 1999, Report Published 2002. These findings do not appear to me to be contentious.

[20] Above n 19 vol 1 at 150 para 7.53.

[21] Id at 150-1 paras 7.53-7.58 titled *Ignorance of the Scheme*:

> "The research project conducted by Research Surveys (Pty) Limited reveals that general awareness of the scheme of road accident compensation is currently restricted to less than half (47%) of the South Africa public. The white and Asian population groups are the most aware and it is noted that these figures correlate directly with car ownership statistics. Awareness of the Fund tends to escalate with an increase in household income levels and Living Standards Measure (LSM). There was greater awareness in metropolitan and small urban areas than in rural areas.
>
> Road users' own claimed understanding of the scheme of road accident compensation was rated as "very limited" although those who had previously claimed compensation rated their own understanding closer to "quite good".
>
> Of those respondents who claimed awareness of the Fund 78% knew that the Fund was responsible for accident compensation but only 2% knew the type of damages payable and only 5% knew that the scheme was funded by the fuel levy.
>
> When provided with a set of statements road users who claimed awareness of the RAF acknowledged that compensation would be offered to injured passengers and pedestrians (85% and 70%); that drivers who were injured in an accident but not at fault would be compensated (54%) and that the Fund would not compensate a driver where no other motor vehicle was

claiming compensation from the RAF is the limited awareness of the Fund and a lack of knowledge about the current scheme of accident compensation."[22]

[117] What is also clear from the findings of the Commission is that there are other reasons, beside lack of knowledge, that have hindered people from being able to claim from the RAF. These include the fact that it is often difficult for people, emerging from apartheid bureaucracy, to produce documentation proving birth, marriage and dependency. People participating in the informal economy are often unable to provide proof of employment and earnings. Even the incompetence of legal representatives in failing to bring timeous claims has hindered the process.[23] The former two reasons also illustrate, even more acutely, the social context within which this limitation operates.

[118] Further confirmation comes from Mr Mdeyide himself. As pointed out in the majority judgment, he has not had an easy life. The summary of his difficulties in that judgment in my view amply illustrates that his socio-economically deprived

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involved (81%). There was significant awareness that the Fund will not compensate a driver at fault (81%) and that compensation is not provided to effect repairs to a motor vehicle (89%).

However, the researchers comment:

> 'Those who have previously claimed do not seem to have a much greater or more correct understanding of the Fund. Their perceptions mirror those of the general population who are aware of the Fund …'

It appears that one of the main barriers to claiming compensation from the RAF is the limited awareness of the Fund and a lack of knowledge about the current scheme of accident compensation. Approximately two-thirds (66%) of road users who are eligible to have claimed for compensation in that they had been injured in a road accident have never claimed from the Fund. Approximately one-third of that group was unsure of how to claim."

[22] Id at 151 para 7.58.

[23] Id at 155 para 7.78.

circumstances caused or contributed to his failure to acquire the necessary knowledge to lodge his claim against the RAF. It is not difficult to imagine that there are still many others like him, some perhaps better off, others possibly even much worse off.

[119] I am afraid that I need to reiterate that in my view it is not only wrong in law to justify the workings of section 23(1) by reference to the fact that he still had two-and-a-half years to claim after gaining the necessary knowledge, but that it is also procedurally unfair.

[120] Mr Mdeyide only had to show that his own right of access has also been infringed because of the provisions of section 23(1). He has done that. Because of the initial six months during which he did not have knowledge, his claim has prescribed. As a result of his social disability he has had less time to lodge his claim than a socially advantaged person. If there was a condonation provision in section 23(1) he would have had the opportunity to try and convince the court that the two-and-a-half year period was still not enough. But the provisions of section 23(1) have prevented him from being able to do that by making his inability to comply with section 23(1) a non-justiciable issue between him and the RAF. This is one of his constitutional complaints. It is also unfounded to assume that because he acquired knowledge in six months most people in his position would too.

[121] In my view, the correct social context within which to evaluate the justification of the limitations to the right of access under section 34 of the Constitution brought about by the provisions of section 23(1) is that those limitations will primarily affect poor, illiterate and uneducated people. That probability holds important consequences for the justification evaluation, as do the deep and multi-layered limitations imposed by the provisions of section 23(1) of the Act on the exercise of the right of access.

Justification

[122] The limitations imposed on the right of access by the provisions of section 23(1) of the Act must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[24] In *Brümmer* the evaluation process was summarised as follows:

> "In assessing whether the limitation imposed by [the section] is reasonable and justifiable under section 36(1), regard must be had to, among other factors, the nature of the right limited; the purpose of the limitation, including its importance; the nature and extent of the limitation; the efficacy of the limitation, that is, the relationship between the limitation and its purpose; and whether the purpose of the limitation could reasonably be achieved through other means that are less restrictive of the right in question. Each of

[24] Section 36(1) of the Constitution states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

> these factors must be weighed up but ultimately the exercise is one of proportionality which involves the assessment of competing interests. Where justification rests on factual or policy considerations, the party contending for justification must put such material before the court."[25] (Footnotes omitted.)

[123] In their papers before this Court, the RAF and the Minister justified the inflexibility of the limitations on three efficiency considerations, namely that: (a) a fixed commencement date facilitates the efficient and expeditious processing of claims, (b) a fixed cut-off date does the same by ensuring that information on claims is still reasonably available in order to assess the validity of claims and (c) the fixed time frame underlies the RAF's budgeting process for the future. The introduction of flexibility by way of a knowledge requirement would in all likelihood increase the already existing backlogs experienced by the RAF and also seriously affect its financial viability.

[124] The RAF and the Minister argue that the RAF is not an ordinary debtor. Unlike other debtors, it is dependent on the quality of information it receives from others which makes this consideration even more acute. These significant burdens must be weighed against the relatively insignificant limitations of the right of access to courts occasioned by section 23(1) of the RAF Act, as evidenced by the generous three year time period and its narrow application to persons who are not incapacitated by mental disabilities, age and

[25] *Brümmer* above n 1 at para 59. See also *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 33 and 65; *Mohlomi* above n 4 at para 15; *Moise* above n 4 at paras 18-9 and *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at paras 20-1.

the like, for whom special provision is made in section 23(2).[26] No figures of the likely numbers of people excluded by the inflexibility of section 23(1) were advanced, nor were any projections of the likely costs to deal with more flexible provisions.

[125] Our Constitution has often been described as "transformative".[27] One of the most important purposes of this transformation is to ensure that, by the realisation of fundamental socio-economic rights,[28] people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy.[29] The RAF Act fits comfortably into this aspiration. The RAF Act and its predecessors, dating back to

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[26] Section 23(2) of the RAF Act provides that:

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

[27] *Hassam v Jacobs NO and Others* [2009] ZACC 19; 2009 (11) BCLR 1148 (CC) at para 28; *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 17; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 73-4; *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 142 and *Makwanyane* above n 14 at para 262. See also Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, Cape Town 2010) 34-42.

[28] Sections 25-28 of the Constitution.

[29] The Constitution states in section 1(a):

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

Section 7(1) states:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

See also *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 23.

1942,[30] have consistently been regarded as "social legislation", the primary concern of which was "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."[31]

[126] Hence, one would expect this kind of "social" legislation to endeavour to include all segments of society and pay particular heed to the socially and economically disadvantaged in doing so. To the extent that it does not, this would have to be considered as a relevant factor in evaluating whether their exclusion is reasonable in an open democratic society based on human dignity, equality and freedom.

[127] In assessing the reasonableness of measures taken for the progressive realisation of the right to have access to housing under section 26(1) of the Constitution in *Grootboom*,[32] Yacoob J remarked that:

> "A programme that excludes a significant segment of society cannot be said to be reasonable."[33]

and, further:

[30] Starting with the Motor Vehicle Insurance Act 29 of 1942 and then followed by the Compulsory Motor Vehicle Insurance Act 56 of 1972; Motor Vehicle Accident Act 84 of 1986 and the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.

[31] *Engelbrecht* above n 4 at para 23 citing *Aetna Insurance Co. v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F.

[32] *Grootboom* above n 29.

[33] Id at para 43.

> "To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test."[34]

[128] Similar considerations have been taken into account in other decisions of this Court.[35] They are relevant to the present matter in evaluating what an open democratic society based on dignity, equality and freedom regards as justifiable and reasonable when fundamental rights are limited.[36]

[129] The RAF and the Minister provided no figures to indicate what segment of the population would most likely be affected by dispensing with the knowledge requirement and what the extent of their exclusion would be. That is a puzzling omission. The purpose of the exclusion of the knowledge requirement is said to be the enhancement of efficiency, both administratively and financially, in the assessment, investigation and

[34] Id at para 44.

[35] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 67 and *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere* [2001] ZACC 4; 2001 (11) BCLR 1175 (CC) at para 7.

[36] Prominent thinkers in other democratic societies regard it as just that the advancement of a society should not come at the cost of the most vulnerable. See Rawls *Political Liberalism* Expanded Edition (Columbia, New York 2005) 282-4 and Rawls *A Theory of Justice* Revised Edition (Oxford University Press, New York 1999) 3-4. But justification analysis under section 36 is not a theoretical or philosophical exercise seeking ideal justice. It allows so-called 'non-commensurable' comparisons: compare Sen *The Idea of Justice* (Harvard University Press, Cambridge 2009) 239-40 and 254-7.

payment of claims. Section 23(1) of the RAF Act was introduced in 1996. Before its introduction road accident compensation legislation had, for approximately half a century, contained condonation provisions for late claims. This position changed under the Multilateral Motor Accidents Vehicle Accident Fund Act[37] where, as a result of Proclamation 102 of 1991,[38] the provisions that allowed for an application to court for condonation, if the claim was filed outside the stipulated three year period, were deleted. The RAF Act followed the amended formulation in section 23(1).

[130] There is no evidence before us that those provisions materially contributed to the inefficiency of previous legislation and led to the exclusion of the knowledge requirement. What one can deduce from the dire warnings of financial and administrative collapse put before this Court, is that if it is the purpose of the change to enhance administrative and financial efficiency in dealing with claims, it has had little effect in the twenty years since its introduction, there are still backlogs and there are financial difficulties. Their cause has not been explained. Had the causes been explained it might have been possible to assess the reasonableness of the limitations in section 23(1) as one of a number of measures that could have been taken to alleviate the backlogs. As things stand, there is no rational explanation before us why the change was necessary. In my judgment, the justification already fails at this juncture. But there are further reasons to reject it.

[37] 93 of 1989.

[38] GN 13597, 1 November 1991.

[131] As indicated earlier, however, it should be abundantly clear that the dispensing of the knowledge requirement would primarily have an effect on the socio-economically disadvantaged segment of the population. There is no recognition or reference to this in the facts and policies advanced in justification of the limitation. I find this failure disappointing and disquieting in public authorities responsible for social legislation such as the RAF Act. Justification for the exclusion of a knowledge requirement would perhaps be rational and reasonable if the benefits of the Act accrued only to literate, educated people who could be expected to be aware of the facts which entitle them to claim from the RAF. But the bulk of people who stand to benefit from the RAF Act's provisions are not in that privileged position. The RAF and the Minister must have been aware of that situation.

[132] If the change in the legislation (dispensing with the knowledge requirement and not allowing condonation) was initiated because of an assessment that it would materially relieve administrative and financial burdens, it implies that a significant and socio-economically disadvantaged segment of the population were late in lodging their claims under the previous dispensation. An exclusion based on that premise "cannot be said to be reasonable" in the words of Yacoob J,[39] stated in a different but nevertheless analogous context. If, on the other hand, there was nothing material to fear from late claims as far as administrative and financial burdens were concerned, there is and was no

[39] *Grootboom* above n 29 at para 43.

rational reason for the legislative change. In my judgment this is the fundamental conundrum created by the RAF and Minister's attempted justification. I see no escape from it.

[133] In argument counsel for the RAF and the Minister took the route that dispensing with the knowledge requirement was justified because realistically the three year period meant that anyone would be able to gain the necessary knowledge within that generous period. That argument, as explained earlier, begs the real question: what is the acceptable time period within which someone who gains the necessary knowledge must lodge the claim? Mr Mdeyide had six months less time to do so than someone would have had who knew the law well when the accident happened. I do not find it inconceivable that others, worse off in terms of education, literacy and access to advice, in more remote areas, would take longer than he did to acquire the necessary knowledge, or even that in exceptional cases knowledge may only be acquired after the claim has prescribed. Different facts might show that the acquisition of the necessary knowledge to enable the lodging of a claim means that different time periods will be available to lodge the claim: two-and-a-half years for Mr Mdeyide; or two years, or one-and-a-half years, or one year, or six months, for others; perhaps even no time at all for the exceptional cases.

[134] I think that it is difficult to justify on non-discriminatory grounds why Mr Mdeyide should have six months less time to lodge his claim after he gains knowledge that he is capable of doing so, than a person who has better access to education and means to gain

that knowledge. This difficulty will simply increase as less time might be available in other cases. The provisions of section 23(1) of the RAF Act not only allow the Fund to escape from having to face up to these difficult questions, they prevent affected persons like Mr Mdeyide from approaching the courts to decide these eminently justiciable issues.

[135] The RAF and the Minister paint a grim picture of how difficult it would be, administratively and financially, if each case that comes before the RAF has to be investigated in order to check when the claimant gained knowledge. A fixed start and end to the period within which the claim is lodged is said to be necessary to obviate these difficulties and would also help to preclude false claims of lack of knowledge. The justification advanced is not sufficiently cogent to warrant a limitation of the right of access to courts in a fundamental way. Even if I were persuaded that the difficulties adverted to are of sufficient substance (which I am not), there is little in the papers setting out why the retention of the fixed period within which to lodge the claim from the date when the cause of action arose (the date of the accident) together with an exceptional condonation procedure for an applicant who alleges lack of knowledge, is impracticable.

[136] That approach may reduce the administrative difficulties and costs associated with a delay at the start of proceedings. Condonation requirements may legitimately be formulated and structured to ensure that only factors relating to individual lack of knowledge may justify condonation (and not any dilatory conduct on the part of legal

representatives) to prevent the possibility of fraud. I do not think the right of access to courts can legitimately be denied on the ground that the judicial process is unable to detect fraud and false claims. I do not think the practice in our courts remotely justifies that kind of assertion.

[137] In short, I consider that there are other less restrictive means available to alleviate the perceived administrative and financial burdens that the RAF and the Minister rely on to justify the limitations imposed upon the right of access to court. This consideration, on its own, is not conclusive, but it is nevertheless one of the factors to be considered in the justification analysis.[40]

Summary and conclusion

[138] The right of access to court under section 34 of the Constitution is of fundamental importance to ensure that concrete expression is given to the foundational value of the rule of law. Section 23(1) of the RAF Act limits this fundamental right as follows:

(a) By negating an essential part necessary for the exercise of the right of access, namely knowledge of the facts grounding a justiciable claim;

(b) To the extent that it does not fully negate knowledge as part of the right of access, by preventing access to courts on the issue whether sufficient time is granted to lodge a claim after such knowledge has been acquired; and

[40] Section 36(e) of the Constitution expressly requires consideration of whether less restrictive means are available. It is the duty of this Court to give serious and proper attention to that enquiry.

(c) By precluding enforcement of the claim after three years from the date upon which the cause of action arose.

[139] The stated purpose of the limitations is to relieve the administrative and financial burdens of the RAF, thereby curbing spending of social resources. However, on the justification offered in the papers and argument, there is no rational relation between the limitations and their stated purpose. If the limitations were necessitated by the cost of a substantial number of late claims under condonation provisions of previous legislation, it would mean that the limitations sought to exclude a significant segment of society from the benefits of social legislation and that the most likely segment of the population so excluded would be socio-economically disadvantaged people. That would not be reasonable and justified in an open democracy based on human dignity, equality and freedom. If the limitations were or are not necessitated by the potential cost of a large number of late claims there is no need for them.

[140] To the extent that the limitations do serve their purpose by ensuring that only a potentially small number of people may not be able to acquire the necessary knowledge during the three year prescription period, they are overbroad in effect by excluding judicial control over exceptional cases completely. Less restrictive means are able to achieve the purpose.

[141] The difficulty with the provision is the absence of a knowledge requirement, combined with the absence of a condonation provision. It is this that renders the provision too inflexible to be justified.

[142] In the result I would hold that the provisions of section 23(1) are unconstitutional.

Jafta J and Yacoob J concur in the judgment of Froneman J.

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