



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/14

In the matter between:

VANESSA DA SILVA

Applicant

and

ROAD ACCIDENT FUND

First Respondent

MINISTER OF TRANSPORT

Second Respondent

**Neutral citation:** *Da Silva v Road Accident Fund and Another* [2014] ZACC 21

**Coram:** Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

**Decided on:** 19 June 2014

**Summary:** Road Accident Fund Act 56 of 1996 — constitutionality of section 19(b)(i) prior to 2008 amendment — section is unconstitutional

Section 9 of the Constitution — unfair discrimination — section 19(b)(ii) fails the *Harksen* test

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## ORDER

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Application for confirmation of the order of the Free State High Court, Bloemfontein declaring that section 19(b)(ii) of the Road Accident Fund Act 56 of 1996, as it read prior to 1 August 2008, is inconsistent with the Constitution and invalid:

1. The order made by the Free State High Court, Bloemfontein is confirmed.
2. The respondents are ordered to pay the applicant's costs, including the costs of two counsel.

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## JUDGMENT

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FRONEMAN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J concurring):

[1] The applicant (Ms da Silva) seeks confirmation of an order of constitutional invalidity granted by the Free State High Court, Bloemfontein (High Court).<sup>1</sup> The respondents, the Road Accident Fund (RAF) and the Minister, do not oppose the

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<sup>1</sup> In terms of section 167(5) of the Constitution.

relief.<sup>2</sup> This Court must nevertheless make its own determination of the constitutional validity of the provision at stake.<sup>3</sup>

[2] The provision declared invalid is section 19(b)(ii) of the Road Accident Fund Act<sup>4</sup> as it stood before 1 August 2008 (old Act). It reads in relevant part:

“The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—

...

(b) suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death—

...

(ii) is a person referred to in section 18(1)(b)<sup>5</sup> and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned, and was being conveyed in or on the motor vehicle concerned”.

[3] Ms da Silva was severely injured in a motor vehicle accident on 29 April 2006 in which she was a passenger. The motor vehicle was driven by her husband. It was common cause that the sole cause of the collision was the negligence of her husband,

<sup>2</sup> *Da Silva v Road Accident Fund and Another* [2013] ZAFSHC 188 (High Court judgment). In the High Court the RAF and the Minister filed affidavits agreeing that the provision is constitutionally invalid and that the relief sought constitutes just and equitable relief in terms of section 172(1)(b) of the Constitution. Written submissions were requested from the parties in this Court, where their earlier stance was confirmed.

<sup>3</sup> *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 8-9.

<sup>4</sup> 56 of 1996.

<sup>5</sup> Broadly, section 18(1)(b) refers to private persons, rather than commercial passengers, being conveyed, for example, as part of their employment. This provision does not therefore apply to claims in terms of section 18(1)(a) where the passenger was conveyed: for reward; in the course of the lawful business of the owner of the motor vehicle; as an employee acting in the course and scope of his or her employment; or as part of a lift club. Passenger claims in this category are capped at an amount of R25 000 in respect of—

“loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one person, excluding the payment of compensation in respect of any other loss or damage.”

who collided with a horse. The provision precluded her from claiming damages from the RAF under the old Act.

[4] Despite two later amending Acts, Ms da Silva remained without remedy. In 2005 the Road Accident Fund Amendment Act<sup>6</sup> (Amendment Act) was passed. The Amendment Act repealed section 19(b)(ii), but the section continued to apply to claims against the RAF where, as in the case of Ms da Silva, the cause of action arose before 1 August 2008.<sup>7</sup> In 2012 the Road Accident Fund (Transitional Provisions) Act<sup>8</sup> (Transitional Act) was passed. It followed this Court's decision in *Mvumvu*.<sup>9</sup> The Transitional Act sought to remedy the constitutional flaws in section 18 of the old Act, but does not deal with persons whose claims are excluded by section 19 of that Act.<sup>10</sup>

[5] Ms da Silva challenged the constitutionality of section 19(b)(ii) in the High Court, primarily on the grounds that it violated her right to equality. The High Court upheld her challenge.<sup>11</sup> In relevant part, the order reads as follows:

<sup>6</sup> 19 of 2005.

<sup>7</sup> Section 12 read with the Proclamation of the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005), GN R8927, *Government Gazette* 31249, promulgated on 21 July 2008.

<sup>8</sup> 15 of 2012.

<sup>9</sup> *Mvumvu and Others v Minister for Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).

<sup>10</sup> Persons in the position of Ms da Silva are excluded because the definition of "third party" in the Transitional Act refers only to "a person who has a right to claim compensation from the Fund in terms of section 17 of the old Act". Section 19(b)(ii) excluded Ms da Silva from claiming compensation from the RAF under the old Act.

<sup>11</sup> High Court judgment above n 2 at paras 38-52.

- “66.1 It is declared that section 19(b)(ii) of the Road Accident Fund Act 56 of 1996, as it read prior to 1 August 2008, is inconsistent with the Constitution and invalid.
- 66.2 The order in paragraph 66.1 above does not apply to claims in respect of which a final settlement has been reached or which have prescribed or in which a final judgment has been granted, before the date of confirmation of this order by the Constitutional Court.
- 66.3 Claims to which the order in paragraph 66.1 applies shall be governed by the Road Accident Fund (Transitional Provisions) Act 15 of 2012, provided that in respect of such claims the period of one year contemplated in section 2 of the Act shall not commence running before the date of confirmation of this order by the Constitutional Court.
- 66.4 Upon confirmation of the invalidity of section 19(b)(ii) of the Road Accident Fund Act 56 of 1996, as it read prior to 1 August 2008, by the Constitutional Court, the Road Accident Fund is directed within 14 days to:
- 66.4.1 Pay an amount of R4 014 079.90 to the applicant; and
- 66.4.2 Issue the applicant with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.”

I agree with the High Court’s findings.

[6] Notwithstanding that a driver is to blame for an accident, the effect of section 19(b)(ii) of the old Act is that claims for compensation against the RAF are excluded where the claimant, a passenger, was a member of the driver’s household or owed that driver a duty of support. Conversely, if the passenger was not a member of the driver’s household or a person owing a duty of support to the driver, compensation would be payable.

[7] The provision differentiates between categories of people, namely those who stand in a close familial relationship with the driver and those who do not. Spouses

and children are the most likely to be excluded from the Act's protection. It is difficult to discern a rational connection between the differentiation and a legitimate government purpose, as required at the first stage of the discrimination enquiry.<sup>12</sup> The RAF and Minister referred, in their written submissions, to the explanation apparently offered in Parliament in 1980,<sup>13</sup> namely that it was inserted to prevent fraudulent claims resulting from collusion between members of households, but disavowed any reliance on it for present purposes.

[8] Even if a rational connection is assumed, the differentiation amounts to indirect discrimination on the basis of marital status and age.<sup>14</sup> Spouses and children are those who would be most affected by the application of the provision. As the discrimination is on grounds listed in section 9(3) of the Constitution, it is thus presumptively unfair.<sup>15</sup> Neither the RAF nor the Minister ever sought to rebut this. And there is nothing further to justify any rebuttal.

<sup>12</sup> *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54.

<sup>13</sup> See Hodes *Suzman, Gordon and Hodes on the Law of Compulsory Motor Vehicle Insurance in South Africa* 3 ed (Juta & Co Ltd, Cape Town 1982) at 193. See also Klopper *The Law of Third Party Compensation in terms of the Road Accident Fund Act 56 of 1996* 2 ed (LexisNexis, Durban 2008) at 133.

<sup>14</sup> Section 9(3) of the Constitution provides:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

<sup>15</sup> Section 9(5) of the Constitution provides:

“Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

And see *Mvumvu* above n 9 at para 32, where the provisions of parts of section 18 of the old Act were held to operate mainly against black people and thus to constitute presumptively unfair discrimination based on race.

[9] For the purpose of confirmation it is not necessary to go into the other alleged grounds of invalidity, namely infringements of the rights to dignity, health care services and social security, relied upon by the High Court. They are all in some way or another connected to the primary ground of unfair discrimination.

[10] That leaves the question of remedy. Again, the Minister and the RAF do not object to the order sought and made in the High Court. ~~The order is not an unlimited order of retrospectivity. It restricts claims to those that are pending and that have not yet prescribed. These claims will be subject to the provisions of the Transitional Act. The period of a year for an election to be made under section 2 of the Transitional Act<sup>16</sup> shall not commence until the date of this order. The order balances the rights of road accident victims with the financial consequences for the RAF.~~

#### *Order*

[11] The following order is made:

1. ~~The order made by the Free State High Court, Bloemfontein is confirmed.~~
2. The respondents are ordered to pay the applicant's costs, including the costs of two counsel.

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<sup>16</sup> Section 2 of the Transitional Act reads:

“Unless the third party expressly and unconditionally indicates to the fund in the prescribed form, within one year of this Act taking effect, to have his or her claim remain subject to the old Act, the claim of such third party is subject to the [Amendment] Act”.

For the Applicant:

Advocate A Annandale SC and  
Advocate Z Pretorius instructed by A C  
de Sousa Attorneys.

For the First Respondent:

Advocate S Budlender instructed by  
Hogan Lovells (South Africa).

For the Second Respondent:

Advocate S Budlender instructed by the  
State Attorney.