REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 8853/2010

In the matters between:

CHRISTO ARNIEL DANIELS	First Applicant
NOZIPHO GLADYS SIKOTI	Second Applicant
NTOMBIKO PRISCILLA SUNDUZWAYO	Third Applicant

and

THE ROAD ACCIDENT FUND	First Respondent
THE MINISTER OF TRANSPORT	Second Respondent
THE CHIEF EXECUTIVE OFFICER OF THE ROAD ACCIDENT FUND	Third Respondent

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JUDGMENT DELIVERED ON 28 APRIL 2011

BINNS-WARD J:

[1] Each of the three applicants in this matter is a claimant for compensation in terms of s 17 of the Road Accident Fund Act 56 of 1996 ('the Act'). The relief sought by them, which will be described in detail later, goes to the manner in

which the Road Accident Fund ('the Fund') has dealt with their claims. The first, second and third respondents, respectively, are –

(i) the Fund, which is an organ of state established in terms of s 2 of the Act;

(ii) the Minister of Transport, who is the member of the Cabinet with overall responsibility for the administration of the Act and, in that capacity, also statutorily responsible, amongst other matters, for approving the Fund's budget and appointing its Board; and

(iii) the Chief Executive Officer of the Fund, being the person responsible, under the direction of the Board, for the conduct of the Fund's 'current business'. [1]

[2] The statutory object of the Fund is '*the payment of compensation in accordance with th*[e] *Act*[2] *for loss or damage wrongfully caused by the driving of motor vehicles*'.[3] For reasons that will become apparent, the papers in these proceedings give cause for concern at the manner in which the Fund falls short in material respects of properly fulfilling its statutory object.

The relevant provisions of the Act

[3] The provisions of the Act that are relevant to the determination of the applications are those that regulate the claims procedure.

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[1] The expression '*current business*' is used in s 12(2) of the Act, which sets out the CEO's powers and functions; I have construed it to denote the Fund's day to day functions.
[2] Emphasis supplied.
[3] Section 3 of the Act.

[4] In terms of s 4(1)(b) of the Act, the powers and functions of the Fund include '*the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, has been established*'.

[5] Section 17 of the Act provides (subject to a proviso in respect of '*non-pecuniary loss*',[4] with which I shall treat later, in connection with the third applicant's application) that the Fund is '*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 ..., 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*'.

[6] Section 17(5) of the Act permits suppliers of medical care to any 'third party' to claim payment directly from the Fund for goods or services supplied to such party. Suppliers' claims are limited to the amount that the third party could

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[4] '*Non pecuniary loss'* comprehends damages under the heads more commonly referred to in South Africa as 'general damages'. Damages in respect of 'pecuniary loss' are usually referred to as 'special damages' in South African delictual law. Compensation for loss of earning capacity, which properly falls to be characterised as a head of 'general damages' in South African legal parlance, is nevertheless claimable as pecuniary loss under the Act under the label 'future loss of income', subject to maximum limits determined in accordance with s 17(4)(c) read with s 17(4A) of the Act. The use of the foreign expression '*non pecuniary loss*' reflects the legislature's adoption, through the amendments to s 17 introduced in terms of the Road Accident Fund Amendment Act 19 of 2005, of material parts – sometimes *ipsissimis verbis* - of the statutory compensation regime in place in the Australian state of Victoria. The term is used in s 134AB of the Accident Compensation Act 1985 (Vic), and its antonym '*pecuniary loss*' is specially defined in s 93 of the Transport Accident Act 1986 (Vic).

have recovered from the Fund in terms of s 17(1) in respect of the third party's liability to the supplier for the goods or services concerned. It follows that the Fund is liable to pay a suppliers' claim only if the goods or services in question were supplied or rendered to a third party in connection with a death or injury which was due to the negligence or other wrongful act of a statutorily insured driver or owner of a motor vehicle, or the latter's employee. Put otherwise, it would be at odds with the provisions of the Act for the Fund to settle a supplier's claim and, in respect of the related third party claim, at the same time purport to assert that the statutorily insured driver or owner was not, but for the indemnity afforded in terms of the Act, liable for the third party's relevant damages.

[7] Section 24 of the Act provides that a claim for compensation in terms of the Act must be submitted by means of a duly completed form in the prescribed format. The section requires the claim form to be filled out so as to provide the Fund with '*a clear reply*' to each applicable question. '*Precise details*' must be furnished by a claimant in respect of each item in the prescribed form under the heading '*Compensation claimed*'. The prescribed form includes provision for the medical report required in terms of s 24(2)(a) of the Act.

[8] In terms of s 24(5), a claim form submitted by, or on behalf of a claimant in purported compliance with the requirements of the Act is deemed to have been validly completed in all respects if the Fund does not raise any objections within 60 days of the posting or delivery of the form to the Fund. Proceedings for the recovery of compensation from the Fund may not be instituted by a claimant before the expiry of a period of 120 days from the date on which the claim was

sent or delivered by hand to the Fund, and before all requirements contemplated in s 19(f) of the Act have been complied with.

[9] The liability of the Fund is excluded, however, if a third party claimant fails or refuses (i) to submit to the Fund together with his or her claim form, or within a reasonable period thereafter, and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or (ii) to furnish the Fund with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof (s 19(f) of the Act). The Fund's liability is also excluded if the person in respect of whose bodily injury compensation is claimed fails or refuses to make his or her medical and hospital records available for inspection by the Fund, or refuses to submit to medical examination at the request and cost of the Fund (s 19(e) of the Act).

[10] It is evident upon a consideration of the aforementioned provisions of the Act that the compensation scheme provided thereby contemplates that a claimant will, when submitting a claim, provide the Fund with sufficient relevant information to enable it (i) to investigate whether it is liable (in other words, whether the insured driver was causally at fault in regard to the injuries or death upon which the claim is founded) and, if so, (ii) also to determine the amount of compensation payable. The interval of 120 days that is required to pass between the filing of a claim and the accrual of a right to the claimant to institute action against the Fund to enforce payment of a claim for compensation is obviously intended to permit the Fund sufficient opportunity to carry out the required

investigations and, if indicated, to settle the claim, or attempt to settle it before the institution of litigation. In regard to the last-mentioned aspect, the provisions of s 17(3)(b) of the Act pertinently provide that if the matter should go to trial, '*the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund ... before the relevant summons was served*' in making a costs order.

[11] The scheme of the Act suggests that a claim for compensation under the Act should in most cases become litigious only if it is 'responsibly contestable'[5] by the Fund. If only the issue of the total quantum of compensation claimed by a third party is contentious, or if it is contended that the Fund is liable to compensate only a portion of the claimant's loss in terms of the Apportionment of Damages Act 34 of 1956, the Fund is empowered, in terms of s 17(6) of the Act, to make interim payments, in partial discharge of its overall liability, in respect of quantifiable loss suffered by the third party as a result of medical costs, loss of income and the like that have already been incurred. These interim payments are made in reduction of the Fund's admitted liability pending the eventual determination by a court of the issues remaining in dispute.

The constitutional implications of the Act

[12] The Act limits the common law rights of persons with claims arising out of bodily injuries or death sustained in or caused by motor vehicle accidents. Thus,

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[5] *Road Accident Fund v Klisiewicz* [2002] ZASCA 57 (29 May 2002) at para 42.

in terms of s 21 of the Act, save where the Fund is unable to pay compensation, no claim for compensation in respect of loss or damage from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie against the driver or owner of the vehicle, or against the driver's employer.[6] That incidence of the Act has been held by the Constitutional Court to manifest a limitation of the right to the security of the person entrenched in section 12(1)(c) of the Constitution.[7] That right has been recognised as being of great importance and '*often a prerequisite to the enjoyment of all other guaranteed rights*'.[8]

[13] The requirements of the Act in respect of the submission of claim forms and the provision of full information to the Fund, as well as the imposition of a mandatory moratorium before legal proceedings for the recovery of compensation may be instituted, constitute additional limitations. A yet further and - in the context of the first and second applicants' complaints - particularly pertinent limitation is the exclusion of any liability by the Fund to pay *mora* interest on awards made by the court in actions by claimants to enforce their rights to compensation unless payment is delayed for more than 14 days after the relevant court order.[9] Ordinarily, a debtor in respect of an unliquidated claim would be liable to pay interest at the prescribed rate from the earlier of the date

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[6] An action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle is not excluded.
[7] See *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150, at para 75.
[8] See *Law Society of South Africa and Others v Minister of Transport and Another* supra, at para 79.
[9] Section 17(3)(a) of the Act.

of demand for payment, or that of service of the process commencing enforcement proceedings.[10]

[14] There can be no doubting therefore that the limitations of common law and constitutional rights arising out of the aforementioned provisions of the Act create an obligation on the Fund to diligently investigate claims submitted to it and to determine, if practically possible within 120 days of receipt of the claim, whether it is liable to compensate the claimant, and, if so, in what amount. The Fund is obliged to conduct itself in this respect with due recognition that its very reason for existence is *'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'*.[11] In this connection it was observed in the majority judgment of the Constitutional Court in *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) (at para 78) that the Fund is '*a hugely important public body which renders an indispensible service to vulnerable members of society*'.[12] The majority judgment in *Mdeyide* reflected an acknowledgment of the crucial importance of a '*properly administered*' Fund to the upholding of '*the*

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[10] Section 2A of the Prescribed Rate of Interest Act 55 of 1975.
[11] See *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F, cited in *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 23; *Law Society of South Africa and Others v Minister of Transport and Another* supra, at para 40, and *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) at para 20. In *Engelbrecht* loc cit, Kondile AJ, writing for the Constitutional Court, stated that the legislature's primary concern in enacting the Act remained the same as it had been in respect of all the preceding statutes, beginning with the Motor Vehicle Insurance Act 29 of 1942. The relevant legislative history since 1942 is related in *Law Society of South Africa and Others v Minister of Transport and Another* supra, at para 17-21.
[12] See also para 125 of the minority judgment.

constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms'.[13]

[15] In my view the constitutionality of at least some of the rights-limiting provisions in the Act mentioned earlier is predicated on the implicit undertaking by the state that the operation of the Act will entail the efficient discharge by the Fund of its functions in respect of the processing and determination of claims. Certainly, the justification for the limitations goes limping when the relevant organ of state fails properly, in faithful compliance with the Act, to render the performance that constitutes the very basis for characterising the limitation as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Recognition of that effect inexorably impels the conclusion that a materially inadequate performance by the Fund of the relevant statutory functions would amount to conduct that would unjustifiably infringe the affected limited rights. At the same time, any such failure by the Fund to fulfil its statutory object would evidence a breach by the state of its obligations in respect of other rights, like equality, human dignity, security of the person, health and social security, which the Act is meant to represent a means of advancing and protecting.

[16] In *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150, the Constitutional Court described the Act as an instrument that might '*properly be seen as part of the arsenal of the state in fulfilling its constitutional duty to protect the security of the*

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[13] See *Mdeyide* at para 80.

person of the public and in particular of victims of road accidents'.[14] Accepting that to be so, the state fails in its identified constitutional duty to the extent that it does not deploy that part of its arsenal efficiently and effectively in furtherance of its dedicated object.

The history of non-fulfilment by the Fund of its statutory object

[17] That during the last decade the Fund has too often failed to perform in a manner consistent with the realisation of its object of rendering an indispensible service to vulnerable members of society, with resultant prejudice to third party claimants, is evident from the adverse remarks made in a significant number of superior court judgments given during that period. The Fund's management cannot be unaware of this criticism; in some matters the courts concerned directed that copies of the judgment be sent to the Chief Executive Officer or the Chairperson of the Board. The sorry history suggests that the Fund has turned a deaf ear to repeated judicial enjoinders to comply properly with its statutory obligations, alternatively, that it is materially lacking in effective resources, and that insufficient has been done by government to address the underlying cause or reason for such incapacity.

[18] Thus, in *Road Accident Fund v Klisiewicz* [2002] ZASCA 57 (29 May 2002), Howie JA, in the course of upholding a cross-appeal by a claimant against the trial court's refusal to make a special costs order against the Fund arising out of the unnecessarily prolonged duration of the damages action that had resulted

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[14] At para 66.

as a consequence of the Fund's evident unpreparedness on account of its failure to properly investigate the claim, stated (at para 42):

> A special costs order is therefore not only appropriate but necessary. The [Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed.

[19] In *Madzunye and Another v Road Accident Fund* 2007 (1) SA 165 (SCA), the Fund was again made the subject of a punitive costs order because of its ill-considered opposition to an appeal in circumstances which evinced a striking failure by it to adhere to its statutory object. At para 17-18 of *Madzunye*, Maya JA, having quoted Howie JA's remarks in *Klisiewicz* loc cit supra, stated:

> '....the respondent, which relies on the public purse for its existence and does not, therefore, have unlimited financial resources, conducted itself in a manner which cannot be reconciled with the requirements set out in the *Klisiewicz* case. This is particularly so having regard to the fact that the intention of the Act, in terms of which the respondent functions, is to give the greatest possible protection to victims of negligent driving of motor vehicles.

[20] In *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at para 3, Froneman J noted an increasing tendency of its officials to disregard the duty imposed on the Fund in respect of the handling of claims of road accident victims. In that matter the learned judge deplored the Fund's failure to investigate the plaintiff's claim and its consequent unmerited defence of the action at trial. An order was made that the responsible employees of the Fund should be liable personally, jointly and severally with the Fund, for the costs of a

meritless application for a postponement of the trial. The Fund was, in addition, ordered, punitively, to pay the plaintiff's costs in the action on the scale as between attorney and client.

[21] The Fund's '*deplorable conduct*' in failing to conform to its statutory responsibility towards a claimant was also the subject of deprecatory remarks in *Road Accident Fund v Delport* [2006] 1 All SA 468 (SCA) at para 26-29. Referring to an apology tendered in that regard to the Appeal Court, Zulman JA remarked '*The hope is expressed that there will not be a recurrence of such conduct on the part of the appellant in similar cases in the future.*' A forlorn postscript to the learned judge of appeal's expression of hope is provided in the example described by Moleko J in *Razack v Road Accident Fund* [2007] ZAKZHC 26 (19 October 2007) [15] at para 254-261 of the Fund's failure to pay an agreed amount of compensation to a claimant and its attempt consequent thereupon to seek, in an unpersuasive manner, to distinguish its conduct from that for which it had apologised in *Delport*.

[22] Other recent judgments which reflect adversely on the manner in which the Fund has conducted itself in respect of its statutory duty towards third party claimants include *Road Accident Fund v Ramalebana* [2010] ZAGPJHC 52 (25 June 2010);[16] *Jwili v Road Accident Fund* 2010 (5) SA 32 (GNP);[17] *Kekana v RAF* [2010] JOL 25206 (GSJ); *Chetty v Road Accident Fund* 2009 (5) SA 193

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[15] Accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAKZHC/2007/26.pdf .
[16] Accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAGPJHC/2010/52.pdf . See especially para 26-28 of the judgment.
[17] See especially para 10-16.

(N); *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E); *Nonkwali v Road Accident Fund* [2009] ZAECMHC 5 (21 May 2009);[18] *Shikwambana obo Ngobeni v Road Accident Fund* [2007] ZAGPHC 105 (19 June 2007) at para 17; *Soko v Road Accident Fund* [2008] ZAGPHC 257 (19 August 2008);[19] *Naicker v RAF* [2008] JOL 22709 (Ck) and *Road Accident Fund v Radebe* [2010] ZAFSHC 154 (2 December 2010).[20] Mention should also be made of the unreported judgment of Satchwell J in *Seymour-Smith v Road Accident Fund* WLD case no. 12441/03 (26 January 2006) in which the Fund was justly criticised in trenchant terms for being wholly unprepared for trial, having denied liability to compensate the plaintiff notwithstanding that it had no material in its possession to justify that position. Summons instituting action had been issued some two years and eight months before the matter came to trial.

[23] A depressing feature of all of the aforementioned judgments is that they instance examples of cases in which the Fund must have incurred substantial legal expenses in taking to trial, or on appeal, claims which it had no basis to

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[18] Accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAECMHC/2009/5.pdf .

[19] Accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAGPHC/2008/257.pdf . In this matter Makgoba J described the Fund's opposition to the claimant's claim as follows (at para 18): '*I hasten to say that the respondent* [i.e. the Fund] *conducted the trial in the court a quo in a frivolous and/or vexatious manner. What appeared to have been a simple case wherein an amount of R4 900,00 was claimed became a long drawn out case preceded by uncalled for postponements at the instance of the respondent. The respondent knew all along that the only version of how the accident occurred was that of the appellant. The driver of the insured vehicle was unknown, therefore the respondent did not have any version to put before court. The only witness in the case was labelled a liar by respondent's attorney whereas no evidence was produced to gainsay the only version available. Unfounded statements were put to the witness to the effect that he does not know or remember how the accident occurred. The respondent was unable to substantiate such unfounded statements but simply closed its case in the face of a clear prima facie case. This is the matter which could and should have been settled instead of engaging in such vigorous litigation which resulted in the appellant being out of pocket for a meager claim amount of R4 900,00.*'

[20] Accessible on the SAFLII website at http://www.saflii.org/za/cases/ZAFSHC/2010/154.pdf .

responsibly contest. In the context of the evidence before us that legal expenses constitute a very significant component of the Fund's overall expenditure,[21] this is an aspect of the Fund's conduct which is demanding of conscientious attention by the responsible authorities, including the second and third respondents.

The nature of the applicants' claims in the current cases

[24] The difference between any of the aforementioned cases and the applications of the first and second applicants in the current matter is that the Fund's dereliction of duty and responsibility in those matters did not give rise to an application for constitutional relief in the manner sought in the cases before us. It is the alleged failure by the Fund to efficiently or in good faith investigate, process and make a timely concession of liability in respect of the respective claims submitted by the first and second applicants that has given rise to their applications to this court. The Fund's refusal to fund a medical assessment required by the third applicant in respect of her claim for compensation in respect of '*non pecuniary loss*' is the subject of her application.

The preliminary objections as to joinder

[25] The facts and the statutory provisions pertinent to the complaints of each of the applicants are peculiar to each of their separate cases. That has given rise to an objection by the respondents concerning the manner in which the

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[21] See also *Law Society of South Africa and Others v Minister of Transport and Another* supra, at para 43.

current proceedings were instituted. Before turning to address the merits of the applications, it is convenient at the outset to deal with that procedural objection.

[26] We are seized with three separate applications brought together under a single notice of motion. The three applicants have joined together in instituting these proceedings in a manner that would, in an appropriate case, be permissible in terms of rule 10(1) of the Uniform Rules of Court.[22] As mentioned, however, the determination of the respective applications does not depend substantially on the same questions of fact or law, which is the criterion for joinder in terms of rule 10(1). The respondents' objection is founded on the applicants' misplaced resort to the procedure afforded by rule 10(1). Accepting the technical merit in the respondents' objection, it was nevertheless one that they should have addressed, if so advised, at the outset; either in terms of rule 30, or rule 30A of the Uniform Rules. The respondents' counsel were unable to suggest any cogent reason why the applications should not be heard at this stage, when the papers (which are relatively voluminous) are complete in all three cases, and when there is no identifiable material prejudice to the respondents if the court were determine them together at a single hearing, as if they had been consolidated for that purpose in terms of rule 11. In my judgment, therefore, the objection is not one that should be sustained at this stage of the proceedings.

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[22] Rule 10 provides insofar as relevant: '*Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action,...*'.

[27] There was also an objection of misjoinder in respect of the citation of the third respondent. This objection was also well taken. There was no proper basis to join the Fund's chief executive officer as a party to the proceedings. No substantive relief was sought against him. This objection should also have been taken in terms of rule 30. No prejudice has been demonstrated in respect of the misjoinder of the third respondent. It is therefore unnecessary to say more about it.

The history of the current litigation

[28] The current applications were launched at the end of April 2010. On 11 August 2010, an order was made by agreement between the parties enrolling the matter for hearing on 11 February 2011 on a timetable which required the Fund to deliver its answering papers by 17 September 2010; the applicants to deliver their replying papers, if any, by 29 October 2010; and for the parties' heads of argument to be delivered by 24 November 2010 and 15 December 2010, respectively. As it happened, the Fund's answering papers were filed only on 10 November 2010. Despite the fact that according to the tenor of the order made on 11 August 2010, the Minister of Transport, as second respondent, was party to the agreement in terms of which it had been made, the Minister has taken no role in the proceedings. (In this regard it should be mentioned that in terms of the applicants' notice of motion costs were sought against the Minister only in the event that the Minister should oppose the application.)

The relief sought by the applicants

[29] The occurrence of certain factual developments between the date of the institution of proceedings and the hearing (in particular, the concession by the Fund of liability in respect of the third party claims of the first and second applicants and the subsequent making to them both of interim payments) resulted in some changes to the content of the relief originally sought by the applicants. At the commencement of his argument, Mr *Heunis* SC, who appeared for the applicants assisted by Mr *Osborne* and Ms *Ferreira*, indicated that the substantive relief now sought by the applicants[23] is in the following terms:

> 2. That it [be] declared that:
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> 2.1 The First Respondent (the "RAF"), has failed in its duty, *qua* organ of state, to litigate ethically, fairly and responsibly, inasmuch as:
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> 2.1.1 In respect of the First Applicant, the RAF has arbitrarily failed to investigate, process, or concede the merits of the claim, and has in that regard conducted itself in an unethical, obstructive and irresponsible manner, inconsistent with the Road Accident Fund Act (56 of 1996), and with his rights to dignity, equality, health, and fair administrative action.
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> 2.1.2 In respect of the Second Applicant, the RAF has conducted itself in an unethical, obstructive and irresponsible manner, inconsistent with the Act, and with her rights to dignity, equality, health, and fair administrative action, in particular by virtue of its bad faith denial and failure to investigate and process her claim.
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> 2.1.3 In respect of the Third Applicant, the RAF has conducted itself in an unethical, obstructive and recalcitrant manner, inconsistent with the Act, and with her rights to dignity, equality, health, and fair administrative

[23] A reading of the replying affidavit deposed to by the applicants' attorney on his clients' behalf might have suggested that in respect of the first and second applicants' cases, the only issue remaining for determination after the admission of liability by the Fund and the subsequent making of interim payments was that of costs. However, that was not the manner in which those applicants' cases were advanced in the heads of argument, or at the hearing of the applications.

action, both in its delay in considering her application to have the RAF commit to paying for a serious injury medical assessment, and in its decisions of 19 April and 5 October 2010 not to fund such assessment.

2.1.4 The RAF, with respect to all three Applicants, has acted *ultra vires,* in frustrating the administrative machinery intended by the legislature to furnish a speedy internal claims resolution mechanism, designed to operate prior, and in preference to, litigation.

2.1.5 The rights to dignity, equality, health and fair administrative action established in the Constitution prohibit the RAF from adopting and implementing policies that unreasonably frustrate the expeditious processing of claims lodged by victims of accidents covered by the Act, and which unfairly discriminate between suppliers of medical care, as defined in terms of s. 17(5) of the Act, on the one hand. and claimants under the Act, on the other hand.

3. [That a] mandamus be issued directing the RAF to:

3.1 conduct itself in a responsible and responsive manner in the processing and investigating of Applicants' claims, in keeping with its statutory and constitutional obligations *qua* organ of state.

3.2 lodge a report with this Court, within three months of the issuance of the order, setting out in detail the steps it has taken to implement the terms of this order with respect to each Applicants' claim; such report is to be made available to Applicants 15 days prior to being lodged with the Court, to allow Applicants the opportunity to simultaneously lodge any comments on the report they may see fit.

4. [That an order be made r]eviewing and setting aside the decisions to refuse the Third Applicant's application for RAF funding of a serious injury assessment.

5. [That an order be made a]warding administrative damages to each of the Applicants in the amount of R50 000.

[30] There is some similarity between the situations of the first and second applicants, who are both plaintiffs in separate actions for compensation currently pending against the Fund. Their situation is quite different from that of the third applicant, whose claim is currently still being processed administratively and is not yet the subject of delictual litigation. It is thus convenient to deal with the

applications of the first and second applicants together before turning to treat separately with the quite different considerations affecting the determination of the relief sought by the third applicant.

The factual basis of the first applicant's case

[31] In summary, the background to the first applicant's application is as follows: An artisan at the time, he was badly injured on 11 November 2007 when he was run down from behind by a truck, while walking home from work. He had been walking on the gravel verge of a road near his home in Louwville. The incident was initially treated as 'a hit and run', but the identity of the vehicle and the fact that it been stolen earlier on the day of the accident by one Henry Jacobs - who would therefore probably have been the driver - were subsequently ascertained.

[32] The first applicant's claim for compensation was submitted to the Fund on 20 June 2008. It was accompanied, amongst other documents, by (i) the hospital records in respect of the applicant's treatment at the Vredenberg and Groote Schuur hospitals, (ii) a consent to the inspection of the applicant's medical records, (iii) an affidavit by the applicant describing, as far as he was able to, the collision, (iv) a certificate by the applicant's employer at the time of the collision setting out his period in employment and the level of income he had enjoyed, and also stating that as a consequence of his injuries he is no longer able to work, (v) a copy of a letter from the police indicating the decision by the public prosecutor not to prosecute anyone arising out of the incident because of

a lack of information, (vi) a copy of a letter in response thereto by the applicant's attorney pointing out to the police that the required information might be found in the docket related to the theft of the vehicle, (vii) a photograph of the scene of the collision and (viii) a rough sketch plan of the scene. After an exchange of correspondence with the Cape Town office of the Fund, during the course of which the claim form was amended to furnish details of the vehicle which had struck the applicant and particulars of the alleged driver at the time, the applicant's attorney was advised by letter dated 28 August 2008 that the file had been transferred to the 'High Value Department' at the Fund's head office in Pretoria.

[33] It was apparent from the information provided in the claim form that the estimate of the applicant's claim for the cost of future medical expenses would be advised later. In a letter dated 8 September 2008, the Cape Town office of the Fund requested information concerning witness statements, the police accident collision report, the SAPS sketch plan, the applicant's full employment history and the precise amounts claimed in paragraph 8 of the claim form, including advice as to how these amounts were calculated. The applicant's attorney responded to this request by letter dated 22 September 2008. The applicant was not in a position to furnish much of the additional information requested by the Fund. His attorney stated that his claim had not been finally quantified. It was stated that his claim for compensation for loss of earning capacity had not yet been calculated, and could only be determined after reports from medical specialists, an occupational therapist and an industrial psychologist had been

obtained. The attorney indicated that the applicant would be examined by a neurosurgeon and by an orthopaedic surgeon on 21 October 2008 and that he might also need to be seen by a neurologist and a neuropsychologist. It was nevertheless plainly apparent from the information that had already been furnished to the Fund that the first applicant had been gravely injured and seriously incapacitated as a consequence. The Fund had also been furnished by that stage with more than adequate information to undertake whatever investigation it might consider necessary or appropriate in order to determine whether it was liable to compensate the first applicant.

[34] The applicant's attorney's letter of 22 September 2008 concluded with the following rhetorical question: '*We ask ourselves why you in any event request the abovementioned information if you in any event do not make offers* [of settlement] *until 20 days before a trial date*.' The attorney then stated '*We are now obliged to issue a summons as soon as possible in order to obtain a trial date.*'[24] (As will become apparent, the attorney's remark was inspired by the perception that the Fund was disinclined to settle such matters, or to make any admission of liability until shortly before the trial date in proceedings instituted to enforce a claim.)

[35] No further communication between the parties seems to have occurred before summons in an action against the Fund for payment of compensation was issued by the applicant on 14 January 2009. The summons quantified the various heads of compensation claimed by the applicant. The allegations in that

[24] My translation from the Afrikaans in which the original was written.

respect were supported with reference to annexed reports prepared by an orthopaedic surgeon and a neurosurgeon, respectively, which described the applicant's injuries and the *sequelae* thereto in some detail. The Fund defended the action and responded to the summons by pleading, amongst other matters, that it had no knowledge of the alleged collision. In a letter to the applicant's attorneys written nearly three months after the Fund's plea was delivered, the Fund's attorneys of record in the action enquired as to how the applicant had established the particulars of the owner and driver of the vehicle that had struck the applicant.

[36] When the Fund made discovery in the action in October 2009, there was no indication that could be discerned in the discovered documentation that the Fund had taken any steps, other than those reflected in the correspondence already mentioned, to investigate the claim. There was also no indication in the discovered documentation that the Fund had, by the time it made discovery, effected payment directly to the Vredenburg and Groote Schuur hospitals at which the applicant had been treated for his injuries.

[37] The applicant's attorneys discovered the direct settlement by the Fund of the 'suppliers' claims' when they made an enquiry to the accounts department at Groote Schuur Hospital in February 2010 to ascertain what amount was outstanding by the applicant to the hospital in respect of his treatment there for the injuries that he had sustained in the collision. The attorney was informed that an amount of R59 222,75 had been paid to the hospital by the Fund and that the balance owed had been written off.

[38] The first applicant averred that the Fund's plea denying liability was dishonest. In this respect he pointed to the inherent inconsistency between the denial of any knowledge by the Fund of the collision - as well as the alternative allegations made on its behalf that the applicant was contributorily negligent in identified respects - and its specific denial that the aforementioned Jacobs was causally negligent in any respect. The applicant contended that it was '*irresponsible and improper*' of the Fund to have instructed its attorneys to have pleaded in that fashion; more especially, the unqualified denial of liability was irreconcilable with the Fund's conduct in having settled the hospital accounts. The first applicant similarly objected to the manner in which the Fund had pleaded to his claim in respect of incurred medical expenses, including the hospital costs mentioned earlier, which had been directly settled by the Fund. The applicant contended that the Fund's plea of an absence of relevant knowledge in respect of this part of his claim was untenable in the context of his having submitted the hospital records together with his claim form and, even more tellingly, in the context of the Fund's settlement payments to relevant direct suppliers.

[39] The first applicant alleged that the Fund's denial of liability in the circumstances described above was a manifestation of a stratagem by it to avoid having to make interim payments in reduction of its ultimately to be determined liability to compensate him. He described how the interim payments were critically necessary to afford him the means to maintain a reasonable degree of human dignity in his mutilated and disabled condition. The interim payments

would enable him to have repaired the prosthetic limb with which he had been provided, but which has subsequently been damaged and rendered useless. An interim payment would also enable alterations to be made to the house in which he lived to allow him to use the bathroom independently of assistance. He explained that the long wait for the matter to come to trial with no interim redress being forthcoming had not only adversely affected his right to dignity, but also unnecessarily drawn out his suffering in a state of extreme incapacity. This had depressed him so badly that he had often considered suicide and had refrained from doing so only because of the devastating effect he believed this would have on his parents. He complained that the Fund had made '*no effort ...to investigate* [his] *case, and that every effort is being made to delay the matter by litigating irresponsibly*'.

The factual basis of the second applicant's case

[40] The second applicant's claim for compensation was submitted to the Fund on 6 May 2009. She had been injured in a collision which occurred on 5 September 2008 between a taxi, in which she had been carried as a passenger, and another vehicle. She was treated in hospital for her injuries. The after-effects of her injuries have left her unable to continue to work as a domestic worker and also unable, without assistance, to carry out many ordinary daily activities such as cooking, cleaning and dressing herself.

[41] The second applicant's statutory claim form submitted to the Fund was accompanied by (i) copies of the hospital records, (ii) an affidavit by the applicant

describing the collision, (iii) an accident report form which included the names and addresses of various persons who were apparently witnesses to the collision, (iv) copies of photographs of the collision scene and (v) a certificate by the applicant's employer at the time of the collision confirming her terms of employment. (The content of the employer's certificate did not establish that the applicant had lost her employment in consequence of her injuries.)

[42] The applicant's attorneys discovered that the Fund had in March 2009 – that is before the applicant had even submitted her claim form - settled an amount in excess of R168 000 owed by the applicant in respect of her treatment at Groote Schuur Hospital. A claim by the health service provider, Netcare, in the sum of R3182,10 had also been settled by the Fund. Attempts by the applicant's attorney to obtain an extracurial agreement by the Fund to admit liability to compensate the applicant were unsuccessful. Summons in the action instituted by the second applicant against the Fund was issued at the beginning of October 2009. The Fund had by 24 November 2009 failed to deliver a plea in the action within the period prescribed in the rules of court, and a notice of bar was served on it. In its plea, delivered on 27 November 2009, the Fund pleaded a denial of the collision and also denied the allegations in the particulars of claim that the applicant had been injured and that she had been earning the amount set out in the employer's certificate that had accompanied her claim form.

[43] As in the case of the first applicant, the schedule to the Fund's discovery affidavit contained nothing to suggest that the Fund had investigated the second applicant's claim, or that it had settled direct suppliers' claims arising out of

services rendered as a result of her injuries. The applicant's employer confirmed that she had no recollection of any enquiries having been directed to her concerning the applicant's employment by any person representing the Fund.

[44] The second applicant concluded her founding affidavit with the following averments:

> 55. It is inexplicable that in a matter as straight-forward as mine, in which I was a taxi passenger, the RAF had not by January [2010] conceded the merits. The assurance of [the Fund's attorney of record in the action]...that he is "awaiting instructions" and will submit a formal Rule 34 tender [i.e. in regard to an interim payment] as soon as we are in a position to do so" offers no comfort whatsoever.
>
> 56 It has become clear that the [Fund] does not take seriously its responsibility to administer public funds with efficiency and integrity, and for the benefit of victims of motor vehicle accidents.
>
> 57 I am advised and verily believe that the prospect of achieving an early settlement of my claim is bleak. It is apparent that the [Fund] is content to leave me to suffer until I am on the steps of the Court, when, so I am advised and verily believe, it may offer me a "package settlement" well below the value of my claim.

The supporting evidence of the applicants' attorney

[45] The relief sought by the applicants in the matters before us in the current proceedings was supported by an affidavit by their attorney of record, Mr Marius Kruger. He averred that his firm, which is also the first and second applicants' attorney of record in their pending damages actions against the Fund, had been doing '*Road Accident Fund work*' for some fifteen years. He stated that his firm had more than 2000 claims against the Fund '*in process*' at any given time, of which about 600 would typically be enrolled for trial.

[46] Mr Kruger drew attention to some of the judgments mentioned earlier in which the Fund's conduct has been the subject of trenchant judicial criticism and proceeded:

> But this is cold comfort for persons in the positions of the First and Second Applicants who need interim payments on an urgent basis. One would have hoped that, faced with a barrage of criticism from the bench, the [Fund] would have changed its ways, rendering further chastisement unnecessary. However, it seems that [the Fund] is quite prepared to continue to absorb punitive costs awards – financed with public funds – and continue with the practices that have attracted such judicial approbation (sic) [?deprecation]. It is this continued recalcitrance that compels Applicants to file this suit. To ask that Applicants herein await trial to raise their grievances (a trial which may be three years hence), not only condemns them to lives of wretched deprivation, it also gives licence to the [Fund] to continue its practice of foot-dragging, evasion and cynical avoidance.
>
> It is fair to say that the *modus operandi* of the [Fund] is to conduct itself in such a manner as to divert (sic) what the legislator envisaged as an expeditious and cheap administrative process for resolving deserving road accident claims into drawn-out litigation, and to manipulate this process to prevent claimants from receiving prompt and appropriate compensation.

[47] The applicants' attorney described a meeting that he and a number of other practitioners involved in MVA work had attended with the local management of the Fund in Cape Town in January 2010. At this meeting, according to Mr Kruger, the attorneys had been informed that the Fund was experiencing difficulty obtaining payment timeously from the National Treasury of the funding to which it was entitled based on the recovery of fuel levies. This, the legal practitioners had been informed, inevitably delayed the settlement of claims. Mr Kruger averred that the attorneys were also told that only one official of the Fund had the authority to agree in litigious matters to a concession of the issue of liability so as to leave only the quantum of a claim in issue. That this

was the manner in which the Fund dealt with the separation of liability and quantum of damages issues in litigious cases, at least historically, is borne out by the content of an affidavit made by its chief executive officer in February 2009 in proceedings before the late Natal Provincial Division of the High Court, which was introduced in evidence before us.

[48] Mr Kruger referred to the settlement of direct supplier claims in respect of the treatment of the first and second applicants for the injuries sustained by them in collisions and questioned the legal basis for the making of such payments in the context of an apparent absence of any investigation by the Fund into the issue of liability and its pleaded denial of liability in the actions.

The Fund's answer to the first and second applicants' applications

[49] The Fund's answering affidavit was deposed to by its acting chief executive officer, Mr André Gernandt. He sought to explain that an investigation had been required into the merits of the first applicant's claim before there could be any question of the Fund admitting liability to compensate him. There was, however, no meaningful description of what that investigation entailed, or when it was undertaken. There was no explanation whatsoever as to why it was only on 17 September 2010 that the Fund formally conceded liability in the first applicant's claim, or as to why instructions to concede liability to the second applicant were given to the Fund's attorneys only on 31 May 2010. On the established facts there was no justification for the delay. We are thus left with the strong impression that there is probably substance in the contention by the

applicants' legal representatives that the concession was made as a consequence of the pressure exerted by the institution of the current proceedings, which, whatever their merits or lack thereof, were no doubt recognised by the Fund's management to constitute a cause for embarrassment.

[50] It is no explanation for the delays in admitting liability to compensate the first and second applicants for any damages that they are able to prove for the Fund to say that its pleaded denials of liability in the actions brought against it were predicated on the Fund's duty to responsibly and properly investigate and establish the factual grounds for its liability before making any admission. As described earlier in this judgment, the Fund is afforded a period of about four months after receipt of a claim to undertake its investigations. In the cases of the first and second applicants, the indications are that the Fund dissembled, rather than fulfilling its duty of investigation. If it had properly discharged its responsibilities, it should have been in a position to admit liability even before the litigation against it was instituted.

[51] The acting chief executive officer of the Fund offered no adequate explanation of the payment of the direct supplier claims. He merely stated that they had been made in error '*due to an administrative oversight*'. There was no explanation as to how an oversight of this magnitude (over R230 000) could have occurred; and also no explanation as to how it could have remained apparently undetected and unaddressed in the accounting systems of the Fund for so long. (The delay between the payment of the first applicant's hospital expenses and the Fund's formal admission of liability on the claim was about 21 months;

between February 2009 and September 2010.) The only explanation that was offered was that direct supplier claims '*are processed in a different department*' from that which processes third party claims and that the sheer volume of supplier claims does not allow the investigation of supplier claims to be subject to the same rigour as third party claims. That is no explanation at all.

[52] While one can understand that a rigorous investigation of each and every one of large volumes of low value supplier claims might be impracticable, there is no understanding why payment in respect of any supplier claim should be made before liability to the third party to whom the supplier claim relates has been admitted. The disparity between the number of supplier claims (124 584) lodged during the financial year prior to the deposition by Mr Gernandt to the answering affidavit and the number of third party claims (85 397) submitted during the same period would suggest that, on average, there are less than two supplier claims received per third party claim. In a further affidavit, made only a few days before the applications were heard, Mr Gernandt explained that his initial answering affidavit had misstated the Fund's policy in respect of the payment of supplier claims and conceded that even large supplier claims were routinely paid while liability towards the third parties to whose treatment they related was being denied. It was evident from documentation secured by the applicants from the Fund by way of compelled further discovery that the hospital expense claims had in fact been vouched by supporting documentation provided by the suppliers' agent, which, on their face, supported the conclusion that the Fund was liable to the affected third parties on the investigated and determined facts of the

respective motor vehicle collisions to which those parties' claims were connected.

[53] The payment of direct suppliers while payment of the related personal claims of third parties is delayed or refused amounts to unequal treatment before the law and infringes the third parties' right to equality.

[54] The thinness of the explanations offered by the acting chief executive officer does little to inspire confidence in the cogency of the 'turn-around programme' reportedly determined upon by the RAF Board appointed in 2005, after the previous Board was dismissed by the Minister. More than five years after 2005, the deputy chief executive officer of the Fund indicates that it will take '*a few more financial years*' before the Fund will be able to operate at acceptable levels of efficiency. The facts and the explanations, such as they are, impel one of two conclusions: either that the management of the Fund is financially and administratively dysfunctional, or that the Fund is being less than frank about the reasons for the delay in admitting liability in respect of the claims by the first and second applicants. The averments by Mr Gernandt concerning the Fund's financial situation indeed suggest that both the aforementioned conclusions probably apply to some extent.

[55] The denial by Mr Gernandt in the circumstances just described that there has been any wrongdoing by the Fund is disturbing. It shows an extraordinary lack of appreciation of the extent to which the Fund's performance in respect of these claims fell short of its statutory responsibilities and of the unlawful

consequences of that under-performance. It follows from the remarks in *Mdeyide* cited earlier[25] that the demonstrated shortcomings in the Fund's performance inevitably reflects a failure by the Fund to fulfil its statutory role of upholding '*the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms*', with a directly adverse effect on the human rights of the applicants.

[56] The acting chief executive officer of the Fund initially denied that it was, or had ever been the policy of the Fund not to make settlement offers until 20 days before trial in a claim subject to a court action. That averment was quite extraordinary in the context of a written instruction to that effect issued to all regional mangers of the Fund on 28 August 2008 (less than a month before the first applicant's attorney's letter referred to in para [34], above). The Fund had, a few weeks earlier, also issued an internal instruction that its staff members were not to make tenders of settlement in litigious matters before a trial date had been set. These policies were withdrawn only after litigation had been instituted against the Fund to have the instructions declared unlawful. Mr Gernandt explained the error in his initial answering affidavit by stating that he had been unaware of the facts, having taken up his current position only in January 2010. It remains regrettable, to say the least, that the acting chief executive officer of the Fund could have made these unfounded denials under oath without properly verifying that he had good reason to do so. Whether the fault was his personally, or due to bad briefing by his support staff, we cannot say.

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[25] See para [14].

[57] Mr Gernandt averred that '*the delay in finalising claims is regretted, but inevitable*'. He explained that the Fund '*is constrained by budgetary limitations. It cannot process and pay claims as quickly as it would like to, because it lacks the financial wherewithal, for which it is dependent on the National Treasury*'. In this regard, as I understood his evidence, he averred that the Fund's funding model was inadequate to meet the rising number of claims being made under the Act. He indicated that the Fund was conscious of the problems and that various (largely unidentified) programmes were being put in place to address them. One of the ways in which the financial demands upon the Fund has been addressed is by amending the Act so as to limit the Fund's liability to pay compensation in respect of certain heads of loss suffered by road accident victims.

[58] The evidence, judged in historical context, suggests that the delays in conceding liability in principle are a means by the Fund to manage cashflow issues. The Fund admits as much. This is unacceptable. A state of affairs in which an organ of state is unable to discharge its statutory objects because of inadequate funding is inimical to the rule of law and deserves urgent and appropriate attention from the executive and the legislative arms of government. The recent amendments to the Act are, no doubt, a manifestation of such attention, but it seems that more might be required. Financial constraints on the Fund's ability to pay claims as immediately as it should afford no excuse, however, for the failure to administer the claims received efficiently, or for drawing out litigation and driving up legal costs by what is sometimes euphemistically described as 'tactical pleading'.

[59] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 88, O'Regan J held as follows: '*An organ of State will not be held to have reasonably performed a duty simply on the bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human and financial, in the context of the overall resources of the organ of State will need to be provided.*' In *S v Jaipal* 2005 (4) SA 581 (CC) at para 55 the Constitutional Court observed: '*In view of South Africa's history and present attempts at transformation and the eradication of poverty, inequality and other social evils, resources would obviously not always be adequate. However, as far as upholding fundamental rights and the other imperatives of the Constitution is concerned, we must guard against popularising a lame acceptance that things do not work as they ought to, and that one should simply get used to it.*' Administrative failures are no excuse for state's shortcomings in fulfilling its responsibilities and afford no reason to absolve organs of state from responsibility for any failure to execute their functions in faithful compliance with governing legislation. The state's function is to execute its duties in terms of applicable legislation; see *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 81 (per Madala J, in the majority judgment).

[60] The funding of the Fund is provided for in terms of s 5 of the Act:

> **5 Financing of Fund**
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> (1) The Fund shall procure the funds it requires to perform its functions-

(a) by way of a Road Accident Fund levy as contemplated in the Customs and Excise Act, 1964; and

(b) by raising loans.

(2) The Road Accident Fund levy paid into the National Revenue Fund in terms of the provisions of section 47(1) of the Customs and Excise Act, 1964, less any amount of such levy refunded under that Act, is a direct charge against the National Revenue Fund for the credit of the Fund.

[61] Section 5 of the Act read differently prior to its amendment, with effect from 1 April 2006, in terms of s 126 of the Revenue Laws Amendment Act 31 of 2005. Section 5(2) had previously provided '*There shall be paid into the Fund monthly the amount of money by virtue of the provisions of section 1 (2) (a) (ii) of the Central Energy Fund Act, 1977 (Act 38 of 1977), calculated for the latest month for which such amount can be calculated, and such payments shall be accompanied by statements reflecting the sale of fuel within the Republic.*' That provision fell to be read with the previously existent s 5(3), which was deleted by s 126 of Act 31 of 2005. The deleted provisions in s 5(3) of the Act had provided '*The Chief Executive Officer shall from time to time withdraw money from the Fund for repayment to the Commissioner for the South African Revenue Service of amounts of fuel levy in respect of diesel refunded by the Commissioner and recoverable from the Fund in accordance with the provisions of section 75 (1A) and (1B), respectively, of the Customs and Excise Act, 1964 (Act 91 of 1964).*'

[62] It is readily conceivable that the 2005 amendments to s 5 of the Act may have impacted on the Fund's cashflow. On the superficial evidence to hand in respect of funding issues we are, however, unable to determine whether or not this has in fact been the case. We are also not able to find, one way or the other,

whether the legislative amendments contributed in any manner to the need for government to make extraordinary funding contributions to the Fund in March 2006 and again in 2009. The testimony of Mr Gernandt suggests, however, that the difficulty with funding arises simply out of a disparity between the amount of monies generated by the fuel levy and that required to settle current third party claims; and that the problem had manifested as early as 2004.

[63] For fundamental constitutional reasons going to the rule of law, it is imperative that there should not be an unrealistic divide between the requirements of any statutory regime established by the state and the state's ability to implement and enforce it. The outcome of the litigation in *Law Society of South Africa and Others v Minister of Transport and Another* supra, was, in a sense, an acknowledgment of this axiom. Therefore, to the extent that a funding deficiency, as distinct from administrative inefficiency, is responsible for the failure of the Fund to properly fulfil its statutory object, it behoves the executive arm of government to address the problem effectively and without unreasonable delay, including, if necessary, by introducing legislative amendments to the statutorily ordained funding model.

[64] The general impression that we are left with, however, is that the Fund's failure administratively to carry out its statutory mandate efficiently and conscientiously contributes in material measure to its financial woes. If the matters currently before us are anything to go by, it is apparent that the more efficient and timely investigation of claims would significantly reduce legal costs. This impression is strengthened upon a consideration of the history that emerges

upon a consideration of the series of judgments of other courts throughout the land reviewed earlier in this judgment.[26] The proper assessment of claims and the timely submission to claimants of competently assessed and reasonably calculated offers would place third party claimants against the Fund under appropriate pressure to settle, rather than litigate at risk of being found liable for unnecessarily incurred costs. The narrow compass of the evidence in the cases currently before us does not allow us to do anything more than to record our general impressions in this regard. These impressions are reinforced by our general experiences as judges in this court in respect of compensation claims against the Fund. We are not able on the limited evidence to make firm and reasoned determinations as to the inadequacy in general of the Fund's performance of its statutory mandate. The inefficiencies in the manner in which the Fund has dealt with the claims of all three of the applicants have been admitted. The inefficiencies in question bear primarily on the investigation and processing of the claims rather than on the issue of payment of compensation due; although it would appear that the failure to properly investigate and then timeously concede liability to compensate the first and second applicants has kept them out of being able to exact interim payments from the Fund. The result has been that the blight on the quality of their lives caused by their misfortune in being injured in road accidents has been exacerbated, and their rights to human dignity, security of the person, social security and administrative justice unjustifiably infringed thereby.

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[26] At para [18] - [22].

[65] Mr Gernandt pointed out that subsequent to the Fund's admission of liability in September 2010, an interim payment had been made to the first applicant. He also pointed out that the action in respect of the first applicant's claim was due to be tried on 24 May 2011. The Fund asked for the first and second applicants' applications to be dismissed with costs. Elsewhere in his affidavit, Mr Gernandt had suggested that the current litigation had been instituted as part of a broader agenda by the applicants' attorney, Mr Kruger, and that the latter should be ordered to pay the costs *de bonis propriis*. Wisely, no such contention was advanced in oral argument by the respondents' counsel.

The legal characterisation of the relief sought by the first and second applicants

[66] Mr *Mitchell* SC, who, together with Ms *Mayosi*, appeared for the respondents, contended that the relief sought by the first and second applicants was founded in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The basis on which that characterisation was argued was that their claim for administrative damages could only have been founded on the provisions of s 8 of PAJA, which allows, in exceptional circumstances, for the award of compensation to an applicant which has applied for judicial review of administrative action in terms of s 6(1) of PAJA. Counsel submitted that the manner in which the Fund conducts the litigation in which it is currently engaged as the defendant in the respective damages actions instituted by the first and second applicants is not '*administrative action*' within the meaning of PAJA and falls to be regulated, where appropriate, by interlocutory availment of the court's

rules of procedure and practice. He contended that the first and second applicants are therefore misconceived in seeking the relief set out above.

[67] The applicants' counsel contended on the other hand that the conduct by the Fund of its defence in the action is '*administrative action*' as defined in PAJA. As I understood their argument, it was to the effect that this followed because conduct within the ambit of litigation by an organ of state in the exercise of its public powers was not expressly excluded from the definition of '*administrative action*' in s 1 of PAJA.

[68] In my judgment, it is, to say the least, doubtful whether the pleading of a case before a court by an organ of state constitutes administrative action within the meaning of PAJA. Even if it did, I consider that it would be exceptional for a court to exercise its discretion in favour of granting judicial review *in medias res* in respect of a matter of pleading. In the view I take of the matter, however, it is unnecessary to decide the point. Although I can understand why the Fund's counsel understood the damages claim to have been premised on s 8(1)(c)(ii)(bb)[27] of PAJA because of the employment of the term '*administrative damages*' in the relevant paragraph of the notice of motion, I think it is clear, when the relief sought under that part of the notice of motion is examined in the context of the founding papers as a whole, that what the applicants were in fact seeking was an award of constitutional damages for the infringement of a range

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[27] Section 8(1)(c)(ii)(bb) of PAJA provides: '*The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-setting aside the administrative action and in exceptional cases- ...directing the administrator or any other party to the proceedings to pay compensation.*'

of their constitutional rights over and above their right to administrative justice.[28] Indeed it was on that basis that the applicants' counsel argued their case.

[69] The award of constitutional damages is not restricted to cases in which the claim is founded in terms of s 6 of PAJA. In *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) ([2006] 2 All SA 455), for example, the Supreme Court of Appeal upheld an award of constitutional damages in a case which arose before PAJA came onto the statute book. It is also clear from the consideration given to the issue in the judgment of Nugent JA in that matter that although it may be accepted that the issue of constitutional damages will arise more often than not in the context of redressing the consequences of a failure of administrative justice, consideration to an award of such damages is not limited to that context. As mentioned, the fundamental rights which the first and second applicants contend have been infringed by the Fund's conduct in respect of their claims in any event go beyond only their right to administrative justice. The subtext of their complaint was that a dysfunctional Fund represented a breach by the state of its duty in terms of s 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights' and resulted in the infringement of a number of their basic rights.

[70] Whether the first and second applicants' claim is founded in PAJA, or not, is not a critical question. Assuming in favour of the respondents that the claim finds no basis in PAJA, it does not follow, if the Fund's manner of processing

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[28] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851, in a footnote to para 77, Didcott J preferred the expression '*damages for the infringement of a constitutional right*' to the term '*constitutional damages*'.

their claims infringed their constitutional rights, that the applicants would not be entitled to apply to court for a declaration of rights and ancillary relief, including constitutional damages. Irrespective of whether the claim resorts under PAJA, or falls outside that Act, declaratory relief, and also an attendant interdict or an award of administrative or constitutional damages is discretionary in nature.

[71] Assuming a basis for such relief is notionally established, the determining question in the exercise of the court's discretion to grant or withhold it is what would be appropriate in the circumstances. When the claim is advanced on the basis that the applicant's rights under the Bill of Rights have been infringed or threatened, the court may in terms of s 38 of the Constitution grant appropriate relief, including a declaration of rights. I think it is clear that the proper place to find a foundation for the relief sought by the first and second applicants is s 38 of the Constitution. In determining the nature of appropriate relief an important consideration must be the effectiveness of the remedy to be granted; cf *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 at para 69.

The appropriateness of granting declaratory relief to the first and second applicants

[72] The declaratory relief sought by the first and second applicants goes, according to the tenor of the notice of motion, to the conduct of the Fund as a litigant. In my view it would be unwholesome for this court, in separate proceedings, to make a declaratory order in respect of the conduct of one of the

parties in respect of a pending action. In general, the conduct of a party to an action or indeed any other form of pending proceedings is a matter that should be dealt with by the court within the ambit of the pending proceedings; not in parallel proceedings. I therefore consider that it would be inappropriate to grant a declaratory order in the form in which it has been sought by the first and second applicants. It is nevertheless clear on the papers, as discussed earlier in this judgment, that the essence of the first and second applicants' complaints is the failure by the Fund to investigate and determine their third party claims in accordance with the Act and the consequent infringement of their basic rights which has been caused by that failure. There is no doubting that the applicants have succeeded in establishing that that complaint is well-founded. I consider that the indicated remedy in the circumstances would be afforded by the making of an appropriately worded declaratory order. Such an order, framed in terms somewhat different from that sought by the applicants, could be granted under the applicants' prayer for further or alternative relief.

[73] An appropriately worded declaratory order would be an effective remedy to address the infringement of the applicants' rights that resulted from the manner in which their third party claims were dealt with before the institution of litigation. A declaratory order in that regard would usefully serve two purposes; firstly, it would formally acknowledge the infringement of the applicants' rights, thereby, in a measure at least, affording a vindication of their assertion of the rights; and secondly, it would serve to bring home to the respondents that the dysfunctional manner in which the Act is currently being administered in respect

of the processing and determination of third party claims under the Act unlawfully infringes the basic constitutional rights of third party claimants and falls to be addressed urgently by the state under its obligations in terms of s 7(2) of the Constitution, irrespective of whether the cause of it is a matter of financial provision, or plain mismanagement, or a combination of both. In regard to the second purpose, it would emphasise, as it seems might be necessary, the distinction in approach between the court's duty to insist on the administration of the statutory compensation scheme that is currently in place strictly in compliance with the subsisting law and the indulgence allowed the government in respect of matters of policy to fulfil its constitutional objectives by means of 'incremental measures' in the sense mentioned in *Law Society of South Africa and Others v Minister of Transport and Another* supra, at para 52. Seen in the context of the history described by the Constitutional Court on the basis of the evidence before it in that case, the Act falls to be recognised as 'an interim measure' already in place in a process of ongoing and incremental reform. As an interim measure currently in place with the effect of law, it imposes on the Fund, as an organ of state, an obligation of faithful compliance, and a duty on the wider apparatus of the state, notably the executive and the legislature, to do whatever might be necessary to enable the Fund to fulfil its statutory duties in a legally compliant manner. That there may be a governmental objective by incremental measures to put a fairer or more effective scheme in place later does not give the state leave to put off fulfilment of its current duty.

[74] Before moving on from the subject of declaratory relief, I consider it necessary to record that the Fund's acknowledgment of liability in respect of the first and second applicants' third party claims played an important part in the decision that it would be appropriate to grant declaratory relief to the applicants. As will have been noted, that acknowledgment was forthcoming only after the institution of these proceedings and accordingly the question of the Fund's liability was still in issue on the founding papers.[29] It is in general undesirable for the court in a second set of proceedings between the same parties to be called upon to decide an issue that is centrally relevant in already pending proceedings between them.[30] Had it not been for the Fund's belated acknowledgment of liability, it would not have been possible to determine that any of the first and second applicants' fundamental rights other than their right to administrative justice had been infringed. The only order we might have been persuaded to make would have been one directing the Fund to make a decision in respect of its liability on the applicants' claim after a conscientious investigation of the facts. The fact that litigation to enforce the claims had already been instituted would have weighed heavily against our being disposed to make even such an order. It was only the exceptional nature of this case and the importance of its implications for the proper administration of the road accident compensation

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[29] In *Fose* supra, the issue of whether a claim for constitutional damages was competent in law came before the Constitutional Court in an appeal against the order upholding an exception taken to particulars of claim including such a claim as an additional head of damages in an action against the responsible minister arising out of a series of assaults allegedly carried out by the police.

[30] Compare, for example, the observations about so-called '*preliminary litigation*' in *Van der Merwe v National Director of Public Prosecutions and Others* [2011] 1 All SA 600 (SCA); 2011 (1) SACR 94.

regime that were ultimately persuasive in favour of the appropriateness of the grant of some form of declaratory relief.

Interdictory relief

[75] Having regard to the stage that the first and second applicants' claims against the Fund have progressed in the pending actions, and assuming (against my inclination to hold to the opposite effect) that there might otherwise have been a sound basis in principle to grant such relief, there would, in my judgment, be nothing to be served at this juncture by making the mandatory and structural interdictory orders sought in the notice of motion.

Constitutional damages

[76] Turning to what has been characterised as the applicants' claim for constitutional damages. The concept that an award of constitutional damages may be an appropriate remedy has been established.[31] The question to be answered is whether it would be an appropriate remedy in the circumstances of the current cases. While there might be scope in principle in an appropriate case for such an award, the factors that enjoin a circumspect approach to the award of constitutional damages have been widely acknowledged; see *Fose* supra, at para 65, including the footnoted references.

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[31] See e.g. *Kate* supra and *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

[77] In relation to the infringement of the applicants' right to administrative justice, I think it must follow from the provisions of s 8 of PAJA, enacted as they were in terms of s 33(3) of the Constitution, that damages should be granted for that type of infringement only in 'exceptional circumstances'. The implication in the constitutional legislation, as I read it, is that infringements of the right to administrative justice should in the usual course be addressed by 'public law' remedies such as judicial review, with attendant declaratory or interdictory relief as might suit the interests of justice in the particular case; cf. *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 at para 29-30.

[78] There are no indications in the Act that the legislature intended the Fund to be liable in damages for any negligent breach of its obligations under the statute. On the contrary, the only indications point the other way; cf. s 15(3) of the Act. There is no denying therefore that the effect of the award of constitutional damages in the circumstances would be punitive rather than compensatory in character. Indeed, the computation of the damages sought by the applicants was not undertaken with regard to any patrimonial loss or *iniuria* allegedly sustained by them as a consequence of the alleged infringements of their constitutional rights.

[79] In my view, the interests of justice and the vindication of the applicants' infringed constitutional rights are adequately served by the declaratory relief that we have found should be granted. If relief sounding in money were to be awarded for the infringement of the applicants' rights, it would serve as an

indication that equivalent relief should be available to an indeterminate of other third party claimants whose claims are being delayed by the Fund's failure to fulfil its statutory object in faithful compliance with the requirements of the Act. (That there is probably a significant number of such other claimants can be inferred from the Fund's effective admission that it delays the processing of claims as a cashflow management measure.) The financial consequences of such a course would in the greater scheme be indeterminable on the information available to us. It is undesirable, at least at this stage of what might be regarded as the judicial dialogue - through the series of judgments mentioned earlier - with the other arms of government in respect of the functioning of the Fund, to impose, with unpredictable effect, a further financial burden on an apparently under-resourced social security utility. The disposition of the courts in this regard might have to be reconsidered if the situation of endemic shortcoming by the Fund in the fulfilment of its statutory object in a legally compliant manner continues despite what is intended to be the clear message to be conveyed by the declaratory orders that are to be granted in favour of the first and second applicants. For now, however, I do not consider that an award of constitutional damages would be an appropriate remedy.

[80] I would in any event, in general, regard it as undesirable, in the context of third party claims that are the subject of litigation to exact payment of the statutorily provided compensation, that any claim for constitutional damages that might be instituted as a consequence of the Fund's non-fulfilment of its statutory object should be pursued separately from the delictual action. The proper

determination of such a claim, and, if it were to be found that the award of such damages would be appropriate, its amount, would be assisted by its being tried and judged together with the statutory claim.

The third applicant's case

[81] It is now time to address the application of the third applicant. She was injured in a motor vehicle accident on 9 April 2009. At the time, she was working at a bus terminal in Philippi, Cape Town, as a passenger-tout for long distance buses and taxis to the Eastern Cape. She was struck down by a motor vehicle while crossing a road. She is alleged to have sustained severe injuries to her lower leg. It is not altogether clear whether these involved a fractured tibia and fibula, or a fractured ankle. It is alleged that as a consequence of her injuries the third applicant now has to walk with the assistance with a crutch and that she is unable to move quickly or for any great distance. As a result, she avers that she is unable resume her work as a tout, an occupation which requires her to run about physically in search of potential passengers.

[82] The third applicant avers that her unemployment as a consequence of the effect of the injuries sustained in the collision has had a profound impact. Her only income is a disability grant of R1,010.00 per month, which is insufficient to provide adequately for her needs and those of her dependent son. The effect of her injury-induced disability is exacerbated given her living conditions. She shares a one bedroom house with her son. The house has no running water or sanitation; these facilities are housed in a temporary structure outside the house.

In addition, her restricted mobility means that she is no longer able to shop for food and other necessities at bigger shopping centres as she once did. She is constrained to make her purchases at smaller shops in close vicinity to the place where she lives. The prices at these local shops are more expensive than at the shopping centres. The third applicant also alleges that her relative immobility exposes her, to a greater extent than in her pre-morbid state, to attack by the antisocial elements that prowl the streets in the area in which she lives. The third applicant contends that the impact of the consequences of her injuries on her quality of life renders it appropriate to characterise the injuries as 'serious' within the meaning of the proviso to s 17(1) of the Act. On the basis of the aforegoing, the third applicant contends that her injuries have resulted in a serious long-term impairment or loss of a body function. She proposes to claim compensation in general damages for 'non-pecuniary loss'.

[83] The proviso to s 17(1) of the Act mentioned earlier[32] limits the liability of the Fund to compensate victims of road accidents for non-pecuniary loss. It provides: '*...that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A)...*'. Subsection 17(1A) provides:

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

[32] At para [5].

b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974).'

[84] Section 26 of the Act provides that the Minister of Transport may make regulations to prescribe any matter contemplated by the Act. Subsection 26(1A) deals in particular with the assessment of 'serious injuries'. It provides:

'Without derogating from the generality of subsection (1), the Minister may make regulations regarding-

a) the method of assessment to determine whether, for purposes of section 17, a serious injury has been incurred;

b) injuries which are, for the purposes of section 17, not regarded as serious injuries;

c) the resolution of disputes arising from any matter provided for in this Act.'

Section 26(2) provides that any regulations made in terms of s 26(1A) must be made after consultation with the Minister of Health.

[85] We were informed that no regulations of the sort contemplated by s 26(1A)(b) of the Act have as yet been made. Relevant regulations prescribing the method of assessment of serious injuries were, however, made in terms of Regulation Notice R 770 dated 21 July 2008 (the Road Accident Fund Regulations, 2008).[33] Regulation 3 therein provides, insofar as currently relevant:

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

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

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[33] Published in Government Gazette 31249 dated 21 July 2008.

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

(i) ...

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

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

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

(bb) constitutes permanent serious disfigurement; resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or resulted in loss of a foetus.

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

(v) Despite anything to the contrary in the AMA Guides, in assessing the degree of impairment, no number stipulated in the AMA Guides is to be rounded up or down, regardless of whether the number represents an initial, an intermediate, a combined or a final value, unless the rounding is expressly required or permitted by the guidelines issued by the Minister.

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

(2) *(a)* Unless otherwise provided in these Regulations, the costs of an assessment shall be borne by the Fund or an agent only if the third party's injury is found to be serious and the Fund or the agent attracts overall liability in terms of the Act.

(b) The Fund or an agent may at its cost, at the request of a third party, make available to the third party the services of, or, alternatively, refer the third party to-

(i) a medical practitioner for purposes of an assessment in accordance with these Regulations; and

(ii) a health care provider, for purposes of collecting and collating information to facilitate such an assessment if the Fund decides that there is a reasonable prospect that a medical practitioner may assess the injury to be serious and the third party lacks sufficient funds to obtain an assessment.

(3) (a) A third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

[86] The 'AMA Guides' are the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition.[34] A '*serious injury assessment report*' is '*a duly completed form RAF4*'. (Form RAF4 is annexure D to the Road Accident Fund Regulations, 2008.) It is apparent from the regulations that the determination of whether or not an injury falls to be characterised as a serious injury for the purposes of compensation is dependant in the first place upon a finding that the injury has resulted in a prescribed minimum, or greater, percentage of impairment of the whole body. The finding falls to be made applying the standardised criteria set out in the AMA Guides. An injury which does not qualify as serious on that approach may nonetheless still be characterised as serious if it qualifies as such in terms of regulation 3(1)(b)(iii) of the regulations. It is apparent from the heading to part 5 of form RAF4 that the assessment of an injury as serious within the meaning of regulation 3(1)(b)(iii) is done on what is called '*the narrative test*'.

[87] The uncontested evidence is that the cost of obtaining a serious injury assessment report currently stands at approximately R7000. That being so, it is evident that for the majority of South Africans the cost of compiling a claim for

[34] See reg. 1 of the Road Accident Fund Regulations, 2008.

compensation for non-pecuniary loss is very high, if not prohibitive, according to their means. The provision directed at redressing the inaccessibility to social security that this cost barrier might otherwise present is regulation 3(2)(b) of the 2008 regulations, quoted above. As will be noted from a consideration of that provision, the Fund will pay for a serious injury assessment if it '*decides that there is a reasonable prospect that a medical practitioner may assess the injury to be serious and the third party lacks sufficient funds to obtain an assessment*'. It almost goes without saying that in making a decision in terms of regulation 3(2)(b), the Fund is obliged to act reasonably.

[88] The AMA Guides, which counsel informed us was a voluminous and complicated document,[35] were not placed before us. The application of the AMA Guides and the narrative test were centrally under consideration in *Law Society of South Africa and others v Minister of Transport and another* 2010 (11) BCLR 1140 (GNP). In that matter, Fabricius AJ - with particular reliance on the affidavit of the Minister of Transport and the supporting answering affidavits of one of the editors of the AMA Guides and of a legal practitioner with extensive experience of the application of an earlier edition of the AMA Guides in the context of comparable statutory compensation legislation in Victoria, Australia - summarised the operation of regulation 3(1)(b)(ii) and (iii) at para 69-72 of the judgment. It would be a supererogation to repeat that summary; and we are in

[35] In *Law Society of South Africa and others v Minister of Transport and another* 2010 (11) BCLR 1140 (GNP) at para 59, Fabricius AJ describes the document as comprising some 615 pages. The extracts from the document, which are appended as annexures A – C to form RAF4, confirm that the AMA Guides would not be readily comprehensible in important respects to anyone who was not proficient in the medical assessment of bodily impairment.

any event not qualified, on the material before us, to be so bold as to differ from what the learned judge had to say there. The first and second respondents before us were also the respondents in the matter before Fabricius AJ. What, for current purposes, is of particular relevance is the learned judge's observation (at para 71) that '*First Respondent* [i.e. the Minister of Transport] *also points out that it is not possible to predict with certainty the outcome of an assessment under the AMA 6 with reference to hypothetical examples as the Applicants have sought, to do. The AMA 6 allows for significant adjustment of the percentage WPI* ['Whole Person Impairment'] *in various ways with reference to the circumstances of the individual.*' The inherent unpredictability, arising out of the effect of the peculiar circumstances of the individual concerned, which affects the potential characterisation of an injury as serious is emphasised by the fact that the narrative test, with its focus on the consequences of an injury for a particular individual, affords an alternative means, by way of a 'safety net', of 'a gateway' to qualification for compensation for non-pecuniary loss.

[89] The third applicant contends that she is unable to afford the cost of a serious injury assessment. (If she is indeed, as alleged, the recipient of a social grant in terms of the Social Assistance Act 13 of 2004, that, in my view, is a clear indication of the probable cogency of the applicant's contention.[36]) She submitted a request to the Fund for financial assistance in respect of the required serious injury assessment on 4 September 2009. When no response had been

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[36] See the provisions of s 9 read with s 5 of the Social Assistance Act read with regulations 2, 3, 19 and annexure A of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance GNR 898 dated 22 August 2008 published in Government Gazette 31356 of 22 August 2008.

received to her request more than two months later, the third applicant's attorney made enquiries. The attorney was informed that the matter was being dealt with at the Fund's head office and was given certain contact details to assist in further communications on the matter. After two further letters to the claims handler at the Fund's head office, the Fund sent the applicant's attorney a pro forma acknowledgement of receipt of the third applicant's request that the Fund bear the cost of her serious injury assessment on 17 February 2010 – that some five and a half months after the request had been submitted. The pro forma acknowledgement of receipt letter requested information concerning the third applicant's claim which had been in the Fund's possession since early August 2009. When the attorney pointed out to the claims handler that the requested information was already in the Fund's possession, a further delay of nearly two months intervened before the Fund addressed a letter, dated 9 April 2010, requesting essentially the same information that had been requested in its letter of 17 February 2010. It is therefore clear that the third applicant's request was not enjoying conscientious attention from the officials at the Fund who were responsible for dealing with it.

[90] After, Mr Kruger, the third applicant's attorney, had written an understandably pointed response to the Fund's letter of 9 April 2010, the Fund replied on 19 April 2010 declining the request for financial assistance in respect of the serious injury assessment. In its letter of 19 April, the Fund contended that it was liable to pay the costs of a serious injury assessment only in the event that the claimant had sustained serious injuries that resulted in not less than '30%

permanent body impairment'. The author of the Fund's letter continued that upon a consideration of the content of the statutory medical report in the third applicant's completed claim form it had been concluded that the applicant's injuries were not serious enough to warrant the Fund accepting liability for the costs of a serious injury assessment.

[91] It has to be said in the Fund's defence that the statutory medical report completed in respect of the third applicant's claim was singularly uninformative. It did, however, serve to alert the reader to the fact that the claimant had been treated at the JG Jooste Hospital; and the hospital notes had also accompanied the claim form. A consideration of the hospital notes would, as far as we are able to discern, inform the reader that the third applicant had sustained a fracture at the lower part of her leg and that some complications had arisen in the course of the treatment of the applicant within the month following the date of the collision. Assuming that a fractured leg falls well short of founding a finding of 30% whole body impairment on the AMA Guides - as seems likely - the information given in the hospital notes seems to be insufficient to permit an assessment of whether or not the narrative test might provide a viable alternative gateway to general damages. It must be said, therefore, that the application to the Fund to carry the cost of the serious injury assessment would probably have been assisted by some form of cogent motivation in support of the allegedly serious effect of the injury sustained on the applicant's amenities of life. The attorney's letter in terms of which the applicant's request in terms of regulation 3(2)(b) was submitted to the Fund was sadly lacking in this respect.

[92] The Fund's letter of 19 April 2010 contained no indication that its author had considered that a narrative assessment might affect the conclusions reached on a consideration of the statutory medical report. A telephonic enquiry by the applicant's attorney obtained confirmation from the relevant functionary at the Fund who had been dealing with the matter that she had not considered the narrative test. The Fund reiterated its refusal to pay for the third applicant's serious injury assessment in a communication sent through its attorney of record in November 2010. The applicant contended that what it called '*the second refusal*' was void because, so it was argued, the Fund was *functus officio*. In my view, there is no merit in that contention as there is no bar to an administrative functionary reconsidering an earlier decision if the reconsideration will not alter adversely the existing rights of the party who sought the decision or affect the rights of third parties, or if the reconsideration might result in an altered decision to the benefit of all concerned,[37] but since the argument takes the matter no further there is no need to decide the question.

[93] In the Fund's answering affidavit in respect of the third applicant's request for assistance in terms of regulation 3(2)(b), Mr Gernandt averred that the Fund has a 'protocol' in place in terms of which such requests are processed.[38]

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[37] Cf. *Reader and Another v Ikin and Another* 2008 (2) SA 582 (C) especially at para.s [20]-[21] and [31]-[32] and *Loghdey and others v City of Cape Town and others; Advanced Parking Solutions CC and another v City of Cape Town and others* 2010 (6) BCLR 591 (WCC) at para 30.

[38] A copy of the 'protocol' was subsequently put in under an affidavit by the third applicant's attorney, who had obtained it in terms of discovery procedures under uniform rule 35. The document is entitled 'Regulation 3(2)(b) Procedure Manual'. It professes to be 'neither binding nor exhaustive' and according to its tenor it is intended only to be of assistance to the staff of the Fund 'in handling requests in terms of Regulation 3(2)(b) consistently and equitably'. The content of the procedure manual makes it clear that further information should be sought from persons

According to Mr Gernandt, once a request is received that the Fund pay for a serious injury assessment, the claimant's attorney is requested to substantiate why the injuries are presumed to be serious. (This was in fact not done in respect of the third applicant's request.) The claimant is also requested to provide copies of hospital records, clinical notes and any medico-legal reports setting out the injuries sustained by the claimant and describing the *sequelae* thereto. Detailed information concerning the claimant's financial status is also required, including a written consent for the Fund to investigate the information provided in this respect.

[94] Mr Gernandt proceeded: '*The* [Fund] *considers that its limited resources must be applied as effectively as possible. It does not fund the completion of other medical reports on behalf of indigent claimants and is of the opinion that, except where there is, prima facie, an indication that the injury or injuries qualify as serious, it is for the claimant to fund such reports, if they and their advisors are of the opinion that such investigation will indeed establish that fact. The so-called narrative test is there to cover those isolated and rare cases where the objective criteria of the AMA6 are not met. It is a fallback position*'.

[95] It is misdirected to compare a serious injury assessment report with a medico-legal report. A so-called medico-legal report is ordinarily an expert witness summary of the nature contemplated by Uniform Rule 36(9)(b). The provision of a medico-legal report is not in a general sense a *sine qua non* to

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requesting assistance in terms of regulation 3(2)(b) when the need for such further information is apparent.

found a claim for compensation. A serious injury assessment report, by contrast, is a statutory pre-requisite to the prosecution of a claim for general damages. Its requirement is an incidence of the limitation of constitutional rights discussed earlier in this judgment. Consequently, there is an obligation on the Fund, as the relevant organ of state, to conscientiously consider requests for funding in terms of s 3(2)(b), and, when the information submitted in support of such requests appears deficient, to request that it be supplemented before any decision is made in respect of the application. I have already remarked on the inadequacy of the information to support the request, but the very nature of the inadequacy called out for further information to be provided before the request was declined. No attention appears to have been given in the exercise to the averment by the third applicant in the affidavit accompanying her statutory claim form to the effect that she was unable to continue with her work. The affidavit was made quite soon after the collision and was obviously not conclusive on the subject, but enquiry should have been made by the Fund of the applicant as to whether the sequelae of her injuries still prevented her from working. In the context of a claimant engaged in a menial or unskilled occupation, the indication of an inability to work as a consequence of the effect of injuries sustained bears possible implications in respect of the impact on the claimant's life going wider than only loss of earning capacity. There is no indication that the staff member of the Fund responsible for processing the third applicant's request in terms of regulation 3(2)(b) applied his or her mind to the need to ask the applicant for further information before the request could properly be determined.

[96] It is also apparent that the Fund's consideration of requests in terms of regulation 3(2)(b) does not give proper recognition to the role of the narrative test. The averments by Mr Gernandt in respect of the role of the narrative test appear to me to be wholly inconsistent with the description thereof given by the respondents in their answering papers in *Law Society of South Africa and others v Minister of Transport and another*. (GNP) supra. The impression derived from Fabricius AJ's judgment in that matter is that the Fund contended before the North Gauteng High Court that the AMA Guides and the alternative or narrative test fall to be '*used collectively*'.[39] The contention that the narrative test falls to be applied as an integral part of any serious injury assessment is indeed confirmed by the content of part 5 of the RAF4 form, which gives effect to regulation 3(1)(b)(iii). There is nothing in regulation 3(1)(b) which suggests that the narrative test should be applied only in '*rare and isolated cases*'. As mentioned, the functionary who declined the third applicant's request in terms of regulation 3(2)(b) gave no consideration whatsoever to the possible effect of the application of the narrative test and plainly did not consider that the narrative test fell to be applied together with AMA Guides as '*a collective*'.[40] It goes almost without saying that the narrative test, seen as a complement to assessment in terms of the AMA Guides, fulfils an essential role in rendering the prescribed method of assessment in terms of regulation 3(1)(b)(ii) and (iii) compliant with the requirement of s 17(1A)(a) of the Act that the assessment be '*reasonable in*

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[39] See *Law Society of South Africa and others v Minister of Transport and another* (GNP) supra, at para 59, 63-64 and 69.

[40] The expression apparently used by the respondents in their answering papers in *Law Society of South Africa and others v Minister of Transport and another* (GNP) supra. See para 69 of the judgment.

ensuring that injuries are assessed in relation to the circumstances of the third party'.

[97] Thus it is evident that in declining the third applicant's request in terms of regulation 3(2)(b), the Fund (i) acted in a manner that was procedurally unfair, (ii) was materially influenced by an error of law, (iii) acted in a manner not rationally connected to the empowering provision and (iv) exercised its power unreasonably in the sense contemplated in s 6(2)(h) of PAJA. The decision by the Fund to refuse the third applicant's request in terms of regulation 3(2)(b) consequently falls to be reviewed and set aside. The request must be reconsidered by the Fund with proper regard to the provisions of regulation 3 of the Road Accident Fund Act Regulations (2008) and in the light of this judgment. Lest there be any misunderstanding in the latter regard, it bears emphasis that this judgment has, in the respects relevant, gone only to the manner in which the third applicant's request was dealt with by the Fund. It has not purported in any way to suggest what the result of the request should be on a proper consideration.

Striking out application

[98] In conclusion it should be mentioned that the Fund applied for the striking out of certain matter in the applicants' replying papers. The exchange of further affidavits between the parties appears to have cured any prejudice to which the Fund might have been exposed in consequence of the matter sought to be struck

out, and it has therefore not been necessary to determine the striking out application. There will be no order as to costs in the striking out application.

Costs

[99] The applicants have achieved substantial success and are entitled to recoup their costs of suit from the Fund. They sought the costs of three counsel. A useful compendium of principle in respect of the award of the costs of more than two counsel was set out by Margo J in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (W) at 172. This enjoyed the endorsement of the Appellate Division in *Compagnie Interafricaine de Travaux v South African Transport Services and Others* 1991 (4) SA 217 (A) at 242A—B.[41] Margo J's conclusion was '*that, to justify the fees of a third counsel, the case must be one in which, by reason of exceptional or extraordinary difficulty, complexity, heavy documentation or multiplicity of issues, it would be reasonable to employ third counsel, and it would be fair for the purpose of doing justice between both or all the parties to allow third counsel*'. Without any disrespect to the assistance rendered by the applicants' counsel in the current matters, I do not consider that the cases were of such exceptional or extraordinary nature as to justify an order for the costs of three counsel. The costs of two counsel will be allowed.

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[41] Compare also *Grove Primary School v Minister of Education and Others* 1997 (4) SA 982 (C) at 1012C-H and *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others* 2009 (6) SA 513 (WCC) at para 59.

Orders

[100] The following orders are made:

(a) In respect of the applications by the first and second applicants:

(i) It is declared that the failure by the Road Accident Fund to timeously, in accordance with the provisions of the Road Accident Fund Act 56 of 1996, investigate and determine its liability in respect of the third party claims submitted by the applicants resulted in an unlawful infringement of the applicants' rights under the Bill of Rights to equality, human dignity, security of the person, social security and just administrative action.

(ii) The first respondent is directed to pay the applicants' costs of suit, including the costs of two counsel.

(b) In respect of the application by the third applicant:

(i) The decision by the first respondent to decline the third applicant's request in terms of regulation 3(2)(b) of the Road Accident Fund Regulations (2008) is reviewed and set aside.

(ii) The first respondent is directed to reconsider the said request with proper regard to the provisions of regulation 3 of the Road Accident Fund Act Regulations (2008) and in the light of this judgment.

(iii) The first respondent is directed to pay the third applicant's costs of suit, including the costs of two counsel.

(c) No order is made in respect of the first and third respondents' application to strike out, dated 3 February 2011.

A.G. BINNS-WARD

Judge of the High Court

I concur.

D.H. ZONDI

Judge of the High Court

Before : ZONDI J and BINNS-WARD J

Heard: 16 February 2011

Judgment 28 April 2011

Applicant's counsel: JC Heunis SC

M. Osborne

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