REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3178/2007

In the matter between

ALFRED VISSER	**PLAINTIFF**

And

THE MINISTER OF FINANCE	**1ST DEFENDANT**
MOTOR VEHICLE ACCIDENT FUND	**2ND DEFENDANT**
EUROPCAR	**3RD DEFENDANT**
ATTORNEY-GENERAL	**4TH DEFENDANT**

Neutral citation: *Visser v The Minister of Finance (I 3178/2007) [2014] NAHCMD 321 (29 October 2014)*

Coram:	Smuts, J
Heard:	28, 29 and 31 July 2014
Delivered:	29 October 2014

Flynote: The plaintiff sustained serious injuries in a motor vehicle accident in 2004 which resulted in his losing his sight. He was driving a motor cycle and

the accident was caused by the negligent driving of a foreign national in a car hired from the third defendant, Europcar. The plaintiff's claim against the MVA Fund was limited in the amounts as set out in the regulations promulgated by the Minister of Finance under s10(2) of the Motor Vehicle Accident Fund Act, 4 of 2001. The plaintiff claimed that those limitations are unconstitutional and invalid and claimed the full amount of his damages from the Fund. An alternative claim was included against Europcar. The Constitutional challenge was separated from the other issues under the erstwhile rule 33(4). Section 10(2) and the regulations were challenged on the grounds that Parliament unconstitutionally delegated law making powers to the Minister in s10(2) and on the grounds of offending against art 10 and other Constitutional provisions. The plaintiff failed to establish the Constitutional conflicts contended for and the Constitutional challenge is dismissed with costs.

ORDER

(a) The Constitutional challenge to s10(2) and the regulations is dismissed with costs. Those costs include the costs of one instructing and on instructed counsel.
(b) The matter is postponed to 19 November 2014 at 15h15 for further case management.

JUDGMENT

SMUTS, J

(a) At issue in these proceedings is the constitutionality of s10(2) of the Motor Vehicle Accidents Fund Act 4 , 2001[1] (the Act) and the regulations

[1]Act 4 of 2001.

promulgated under that section. That subsection empowers the Minister of Finance (the Minister) to impose limitations on the liability of the MVA Fund (the Fund') in different categories. The regulations in turn capped the liability of the Fund under different categories in certain amounts.

(b)

Backgrounds facts

(c) The challenge to s10(2) and the regulations arises in the following way.

(d) On 28 November 2004 the plaintiff, then 16 years old, was severely injured in a motor vehicle accident in Windhoek. His motor cycle collided with a motor vehicle rented out by the third defendant (Europcar) to and driven by a certain Christoff Freuzel, a visiting German national.

(e) The plaintiff sustained severe head injuries and fractures to both legs. As a result of the former injuries, the plaintiff lost his sight in both eyes. His sense of smell was also adversely affected.

(f) The plaintiff lodged a claim against the Fund on 19 July 2006 under the Act which had come into force on 8 October 2001. It had repealed Act 30 of 1990 (and has itself since been repealed by Act 10 of 2007).

(g) Under the regulations promulgated by the Minister under s10(2)[2], the plaintiff's claim against the Fund is limited to N$380 000.

(h)

(i) The plaintiff instituted an action against the defendants on 30 October 2007. In his action, the plaintiff attacks the constitutional validity of s10(2) and the regulations and claims damages against the Fund in the amount of N$9 081 281 and has a delictual claim against Europcar for N$8 701 281 in the alternative. This claim against the fund is for a full recovery of his damages. His claim against Europcar is reduced by N$380 000, being the sum to which his claim against the Fund is limited under the regulations.

(j)

[2]In Government Notice GN 5 of 2003 in Government Gazette No. 2893 on 2 January 2003.

(k) In the course of case management, the parties agreed that the constitutional issue should first be determined separately from the other issues. The court sanctioned that approach. Europcar did not participate in this round of the proceedings. Nor did the Fund. The challenge was opposed by the Minister, first defendant and the Attorney-General, the fourth defendant, both represented by Mr N Marcus.

(l) The plaintiff's challenges to s10(2) and the regulations are to be considered in the context of the pleadings which are first referred to together with what transpired in case management. The evidence is then briefly dealt with. The parties respective submissions are then referred before turning to s10(2) and the regulations and the challenges to them.

Pleadings

(m) The particulars of claim of October 2007 (when the action was instituted) underwent considerable subsequent amendment.

(n) In a nutshell, it is alleged that the collision of 28 November 2004 was caused solely by the negligent driving of Mr Freuzel, the driver of the vehicle which he had rented from Europcar. The respects in which that driver was negligent are also listed. The injuries sustained by the plaintiff are also specified, comprising serious head and brain injuries, the loss of sight and fractures. The claim is made up as follows:

(a) past medical expenses N$121 295
(b) future medical expenses N$150 000
(c) pain suffering loss of amenities of life, disfigurement and permanent disability N$750 000
(d) loss of future income N$8, 059 986
Total N$9, 081 281

(o) It was also alleged that the plaintiff was unable to confirm the identity of Mr Freuzel who was unknown at the address he provided to the Namibian Police. It is further alleged that the regulations limited his claim to:

(a) N$100 000 for past hospital expenses
(b) N$80 000 for past medical expenses
(c) N$100 000 for future loss of earning; and
(d) N$100 000 for general damages

(p) It was contended that s10(2) and the regulations were unconstitutional:

(a) by infringing on the plaintiff's right to dignity protected in Art 8 and capacity in Art 10 as the driver of the vehicle was a foreigner as oppose to an incola of the court;
(b) by infringing on the plaintiff's right to have his case determined by an independent impartial and competent court, 'particularly in circumstances where the driver of the vehicle is a foreigner';
(c) by authorising the Minister of Finance to legislate whereas such action can only be taken by Parliament; and
(d) 'the legislation were in any event made *ultra vires* the powers conferred by the Act.' (sic)

(q) The claim against Europcar is in the alternative, alleging the breach of a duty of care to provide the plaintiff with all information of Mr Freuzel so to enable the plaintiff to pursue the balance of his claim against him. The case against Europcar was subsequently amended after Europcar raised an exception in June 2008. The amendment in July 2008 expanded upon the allegations relating to Europcar. Those aspects are not relevant for present purposes and are not further referred to.

(r)

(s) After these amendments, there was little activity in the matter from September 2008 until the withdrawal of the plaintiff's erstwhile legal practitioners in January 2010. The current legal practitioners of the plaintiff soon applied for a trial date (in January 2010) after they took over the matter. The matter was set down in June 2010 but did not then proceed to trial.

(t) Further procedural steps then followed. Europcar sought further particulars for trial purposes in 2011. An order compelling their delivery was

granted in September 2011. The parties thereafter discovered in early 2012. The matter was allocated for case management in June 2012. Shortly afterwards the Minister applied for the separation of the constitutional issue from the merits of the claim under the erstwhile Rule 33(4). That application was not opposed and was granted on 1 August 2012. The Attorney-General was joined as the fourth defendant shortly after that.

(u)

(v) The matter was set down for February 2013 for this purpose. But in November 2012 at a status hearing, the plaintiff indicated that he wanted to present expert evidence at the hearing of the constitutional issue and that more time would be needed for the experts to prepare reports and that the plaintiff would not be ready for trial until late 2013 for that reason and because of the availability of experts. The matter was postponed to 3 October 2013 but later set down for 17 to 19 February 2014. In November 2013, the plaintiff indicated an intention to amend his particulars of claim to amplify his challenges to the impugned provisions on the *ultra vires* and constitutional grounds. The plaintiff was put on terms to do so by 4 December 2013 and the defendants were required to plead to the amplified challenges by 22 January 2014. The parties were also ordered to exchange witness statements which would constitute evidence-in-chief (including expert witnesses) in advance of the hearing. The trial did not however proceed then and the matter became postponed to this date of hearing.

(w) The plaintiff served his further amended particulars of claim on 21 January 2014 after giving notice to that effect the previous month.

(x)

(y) Both the constitutional and the *ultra vires* challenges were amplified. The art 10 challenge was expanded to contend the provisions 'failed to recognise the disproportionate position of disabled persons as a previously disadvantaged and vulnerable group in society.' It was also contended that the impugned provisions failed 'to recognise the special needs of persons who sustain permanent disability and the costs involved in maintaining their dignity and/or pursuing life liberty and happiness'. It was also contended that the provisions discriminated

on the basis of age. It was also contended that the provisions failed 'to provide any measure whereby persons with permanent disabilities (such as blindness) are enabled to pursue a life commensurate with abled persons' (sic). It was further contended that these differentiations were not rationally connected to a legitimate purpose and thus not authorised art 22 of by the Constitution and were 'contrary to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in the national institutions and the Constitution.'

(z) The claim of an infringement of the plaintiff's right to the determination of his case by an independent court (infringing art 12) was amplified by contending that the vast majority of Namibians are 'socially and economically unable to pursue claims in foreign jurisdictions' and that the failure to provide a mechanism to enable persons to pursue actions in foreign jurisdictions meant that the doors of the court are closed upon them.

(aa) The challenge to s10(2) on the grounds of impermissibly affording the Minister legislative powers was also amplified. It was contended that legislative power is vested in Parliament which could not validly delegate that power. It was contended that the Minister's powers under s10(2) offended against the principle of separation of powers and amounted to an abdication of powers by Parliament.

(bb) It was also in paragraph 16.3.3.4 of the particulars of claim contended that the regulations were invalid because 'they were too wide, unreasonable and inconsistent with the rule of law, the common law and Art 18 of the Constitution in that the procedure prescribed:

' (i) excludes the range of factors relevant to the substance of a decision of and concerning the determination of compensation;

(ii) fails to give effect to the rules of natural justice, more particularly the right to be heard which may influence the decision;

(iii) does not allow for a fair and transparent procedure in determining compensation;

(iv) prohibits and or allows the decision maker from applying his mind to the question of compensation;

(v) does not provide for reasons to be given for any decision;

(vi) diminish and/or abolishes in effect article 18 and 12(1)(a) of the Constitution;

(vii) negates the right of an individual to be adequately compensated for his loss.'(sic)

(cc) These were then followed a number of repeated challenges involving articles 8, 10, 12, 16, 22 and 23(2) of the Constitution. It was however again further contended that:

'The legislation were in any event made *ultra vires* the powers conferred by the Act.' (sic)

The reference to 'legislation' presumably meant subordinate legislation in the form of the regulations.

(dd) Discrimination on the grounds of 'social status as to the plaintiff's age' was also contended for, as well as contending that the provisions infringed the plaintiff's right to property (under art 16) (in the form of damages) and the 'right to the freedom to study at institutions of higher learning' in conflict with art 21(i)(b) and 21 (i)(j) to practise a profession or carry on a trade or business.

(ee) The first and fourth defendants amplified their pleas to address this further substantial amendment. Apart from denying the amplified challenge of an impermissible delegation of law making power to the Minister, they pleaded that the plaintiff had unreasonably delayed in challenging the regulations on review grounds and that this delay would preclude the plaintiff from relying on review grounds.

Evidence

(ff) The plaintiff gave evidence. He testified that he was 16 years old and in grade 10 at the time of the accident. He said that he had lost his sight completely as a consequence as well as his sense of smell. He managed with considerable application and some difficulty to successfully complete grade 12. He confirmed his personal details and

circumstances which he had provided to the experts to be called on his behalf.

(gg) The plaintiff also confirmed that enquiries had revealed that the driver of the vehicle hired from Europcar involved in the collision could not be traced. It would appear that he had supplied an incorrect address to Europcar and his whereabouts could not be established. He also said that he did not in any event have the means to prosecute a claim against that driver in Germany.

(hh) The plaintiff had intended to study engineering before the accident. But this was no longer possible after the loss of his sight. He worked in his father's workshop and earned a monthly salary of N$4 500 from his father's small business. He said he felt frustrated that the capping of claims had been introduced in the regulations. It was put to him by his counsel, Mr R Heathcote SC assisted by Mr J Schickerling, that the regulations discriminated against young persons as an older person would not be as adversely affected by a limitation in respect of loss of earnings in the regulations.

(ii) In his brief cross-examination, the plaintiff stated that he had first become aware of the capping of claims in the regulations towards the end of 2005.

(jj)

(kk) The governmental defendants called three witnesses and provided an affidavit by the current Minister of Finance, which attached some documentation including the record of the parliamentary debate on the Act when it was presented in and was debated in the National Assembly.

(ll)

(mm) The chairperson of the Fund at the time the regulations were promulgated, Mr Philip Amunyela, gave evidence. He had served the Fund in that capacity since 8 December 2001. He testified that the Minister of Finance who had made the regulations was Mr Nangolo Mbumba.

(nn) Mr Amunyela said that he was a non-executive board member and confirmed that the Fund had kept minutes of meetings during his tenure. But he said the Fund had moved from offices within the Ministry of Finance to two further premises before finally moving to their own premises. The minutes of

some meetings had become lost in the process. He confirmed that the Fund's board had met to make a recommendation to the Minister on the question of capping the categories of claims referred to in the regulations. He confirmed that the recommendation was in writing.

(oo) Mr Amunyela stated that at the time the issue was considered, the Fund faced claims of N$97 million but only had N$16 million in its kitty.

(pp)

(qq) In cross-examination it was put to him that an older person may receive adequate compensation for loss of earnings if claiming close to retirement and that the limitation on loss of earnings discriminated against younger persons. Mr Amunyela said experts had provided calculations at the time for the limitations in the regulations. He could not recall who had done so but said the calculations could have been prepared by the firm Alexander Forbes. Mr Amunyela had difficulty recalling any details of aspects considered at the time, given the intervening years and the fact that written records of the deliberations could not be traced. He was referred to a letter he had sent to the Minister on the issue which did not provide details as to how the amounts had been and arrived at. He said in response that a document would have been provided to the Minister, possibly in the form of an attachment, setting that out.

(rr) Mr Amunyela also could not recall whether a steering committee on capping, which had been established, was functional. He was asked several questions about the deliberations of the Fund's board at the time, but was unable to shed much further light on what had transpired because he could not remember.

(ss) A member of the Fund's legal services component, Ms Joline Kurz also gave evidence. She had joined the Fund in 2006. She had conducted a thorough search for relevant documentation without success. Despite directing enquiries to several persons, she was unable to trace any minutes for 2003 and at the time the matter would have been considered by the Fund.

(tt) She had consulted Ms Carmen Forster (previously Wormsbacher), an actuary attached to Alexander Forbes who had been appointed to the capping steering committee on the issue but the latter could not recall any details of the committee's work.

(uu) Mr Nangolo Mbumba, MP also gave evidence. He was the Minister of Finance at the time but shortly afterwards became Minister of Education and subsequently served as Minister of Safety and Security. He stated that after the Act had been put into operation in 2001, the Fund's resources were being rapidly depleted. He said it became clear that it would be necessary to cap the amounts which could be claimed from the Fund to ensure its solvency and viability.

(vv) Mr Mbumba confirmed that he had signed a letter dated 11 December 2002 addressed to the then Minister of Justice entitled 'Commencement of the implementation of the limitations on the liability of the Fund.' This letter together with the parliamentary debates when the 2001 Act was passed had been attached to an affidavit by the current Minister of Finance in opposition to the constitutional challenge. The text of that letter was as follows:

'On the recommendation of the Board, under section 10(2) of the Motor Vehicle Accident Fund Act, 200(Act 4 of 2001), I have made regulations in respect to limitations on the liability of the Fund.

I determine that limitations in the regulation will come into operation on the date of placement in the Government Gazette.'

(ww) Attached to this letter was the text of the regulation, setting out the limitations and bearing Mr Mbumba's signature which he confirmed.

(xx) The full text of the regulation is as follows:

'Limitation of liability

1. The liability of the Fund to compensate in respect of the different categories or

heads of damages or loss as contemplated in section 10(2) of the Act is limited to the sum of –

(a) N$100 000 for past hospital expenses;
(b) N$80 000 for past medical expenses;
(c) N$200 000 for future medical expenses;
(d) N$150 000 for past loss of earnings;
(e) N$150 000 for past loss of support;
(f) N$100 000 for future loss of earnings;
(g) N$100 000 for future loss of support;
(h) N$20 000 for funeral expenses; and
(i) N$100 000 for general damages.

Costs excluded.

2. The amounts referred to in regulation 1 do not include any sum of money awarded as costs in any legal proceedings instituted under this Act.'

(yy)

(zz) Mr Mbumba testified that he would not have signed that letter and the regulations without a recommendation to that effect. He recalled the figures very well which were set out in the regulations, and would not have created the figures himself without following a process within the Ministry and ensuring that 'everything was done'. He said that he saw from the records that he had appointed a capping committee with his deputy as chairperson of it. But he could not remember any details of the committee's work.

(aaa) In cross-examination, it was put to him that the power to regulate under s10(2) was so wide as to undermine Parliament's legislative function and power. He disputed that. He further said that the capping contained in the regulations was 'as worked out by the community' (which was a reference to the capping committee) and with reference to the availability of funds in the Fund as determined with reference to projections as to the number of claims annually.

(bbb) The former Minister was referred to a memorandum addressed to him by Mr Amunyela on behalf of the Fund dated 10 December 2002, recommending the capping of liability of the Fund. The addendum referred to in the memorandum was however not attached

to it. Mr Mbumba accepted that it was possible that the legal drafters had worked on draft regulations in advance of the memorandum being sent to him on 11 December 2002 because of an indication contained in the draft regulations that it was prepared on 29 November 2002. He explained that as Minister of Finance he would invariably only sign an item of that nature after being approved in advance by the Ministry of Justice. He said this was standard procedure.

(ccc) It was put to Mr Mbumba that the limitations in the regulations would not adequately compensate richer persons, such as Ministers, whilst those earning very little may be sufficiently compensated. Mr Mbumba stressed in response that the regulations would need to take into account a broad base of issues, including that rich people would be able to take out their own insurance and not have to rely solely on the Fund. He indicated that a loss of earnings claim by a rich person or the child of a rich person could wipe out all the funds of the Fund and leave no compensation for poor children. It was then put to him that the fund discriminated against rich people. Mr Mbumba responded that at least it was not alleged that it discriminated against the poor but said it was not his intention to discriminate.

(ddd) Counsel proceeded to put to Mr Mbumba that the regulation discriminated on the grounds of economic status because of its impact on the rich. He denied that it was ever the intention to do so. In counsel's follow-up, it was put to Mr Mbumba that the result was discrimination on (the grounds of) colour. The court enquired from counsel as to the factual basis for this proposition. This was met with a response to the court that it was obvious. When the court questioned that retort, counsel stated that 'the previously advantaged persons in this country . . . a large group of the are still of the white race.' Mr Mbumba stated that he had never acted on the basis of race and took offence to the proposition.

(eee) The court again enquired as to the factual basis for the proposition. Counsel responded by stating that it was 'exactly what happened in the Johannesburg case that people have indirectly and unintentionally . . . (where

there was discrimination based on race . . .'[3]

(fff) The court again directed that counsel should lay a basis for the proposition put to Mr Mbumba that the regulations discriminated on the grounds of race. Counsel reiterated that it was on the basis of 'the previously advantaged in this country are still white people . . .'[4] Mr Mbumba was asked why he did not invoke art 23 of the Constitution. He responded that he was 'dealing with financial matters and the financial limitations of this country.' Counsel then put it to Mr Mbumba that it is a fact that 'previously advantaged persons are still the more wealthy' in Namibia. Mr Mbumba replied that he would not know as he was not a 'racial sociologist.'

(ggg)

(hhh) It was also put to the former Minister that the regulation discriminated on the grounds of age as younger persons would be discriminated against as they would have much more earning capacity than an older person on the verge of retirement. He responded that the regulation did not discriminate on the basis of age or gender.

(iii)

Submissions of the parties

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[3]Counsel presumably intended reference to *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) ('*Walker*'), which was referred to subsequently when making oral submissions.

[4]The *Walker* case does not form a basis for what was put to the former Minister. *Walker* related to municipal charges for the period from July 1995 to April 1996 being. Challenged because different charges were applied to the 'old' Pretoria (which by law precluded black people from living there) and the former black townships. The people who resided in 'old' Pretoria were then (in 1995) overwhelmingly white and those in the townships predominantly black. The majority of the court found that although geographic demarcation (seemingly neutral) was used, the effect was racially discriminatory given its impact. The facts of that case (charges in 1995-96 after democratization and the end of apartheid in 1994) are entirely distinguishable from the proposition advanced by counsel to the former Minister in 2014 (although presumably with reference to the position in 2003) that the previously advantaged are still 'white people'. Despite putting his to the former Minister, this form of discrimination was not pleaded. Nor was it understandably pursued in argument. In fact, it was put to the former Minister that Ministers are wealthy. The less further said on this, the better, except to stress that it is the duty of counsel to have a proper basis in putting propositions to witnesses which are also relevant.

(jjj) After the conclusion of the evidence, the parties requested and were afforded the opportunity to prepare and file written argument and to present oral argument two days later.

(kkk)

(lll) It was submitted on behalf of the plaintiff that s10(2) and the regulations are *ultra vires* and are unconstitutional. It was argued that s10(2) amounted to the abdication of the constitutionally allocated law making function of the legislature and in conflict with the doctrine of separation of powers and thus unconstitutional for that reason. It was further argued that s10(2) afforded an unfettered and unguided discretion to the Minister which is likewise in conflict with the Constitution and that the section and regulations promulgated pursuant to it were thus *ultra vires* and in conflict with the Constitution and thus invalid.

(mmm) It was also submitted on behalf of the plaintiff that s10(2) and the regulations violated the plaintiff's right to human dignity by subjecting him to degrading treatment by limiting his claim in the manner set out in the regulations. This is by reason of the impact of those regulations upon his right to pursue happiness, a profession or trade and pursue tertiary studies.

(nnn) It was also argued on behalf of the plaintiff that the Act and regulations were unconstitutional for unfairly discriminating against the plaintiff on the basis of age in conflict with art 10(1) of the Constitution and on the basis of disability which, it was contended, constituted a social status and thus in conflict with art 10(2) of the Constitution.

(ooo) It was also the plaintiff's case that the Act and regulations violated the plaintiff's constitutional right to property protected under art 16 of the Constitution and infringed his rights to study at an institution of higher learning in conflict with art 21(1)(b) and to practise a profession carry on an occupation, trade of business in conflict with art 21(1)(j) of the Constitution.

(ppp) In the course of oral argument, most of the argument on behalf of the plaintiff focused on the challenge based upon the equality clause of the Constitution and the contention of an impermissible delegation of law making powers to the Minister in s10(2).

(qqq) Plaintiff's counsel argued that the Constitution was premised upon a separation of powers between the executive, legislature and the judiciary, and the principle of legality. Reference was made to the executive power of the State being vested in the Cabinet consisting of the President, Prime Minister and other ministers appointed by the President.

(rrr) The reference was also made to constitutional provisions which vested judicial power in the courts. Counsel referred to article 78(3) which prohibits any interference in the powers of the judiciary by the executive.

(sss)

(ttt) Counsel also referred to the legislative power of the State being vested in the legislature, comprising the National Assembly subject in certain respects to the powers of the National Council and to assent by the President.

(uuu)

(vvv) It was contended that in making laws, members of the National Assembly are guided by the objectives of the Constitution, the public interest and by their consciences. [5] It was argued that the regulations made by the Minister under s10(2) are also not subject to those considerations or to the procedural requirements of the National Assembly such as a quorum and assent by the President. It was argued that in passing s10(2), Parliament had abdicated its powers to the Minister under the guise of regulation by permitting him to undo what the legislature had done in the Act of Parliament. It was argued that this was compounded by exercising that power upon the recommendation of a parastal which had no safeguards like those embodied in the Constitution with respect to the law making function. Counsel

[5]Article 45 of the Constitution.

pointed out that none of the nine categories in respect of which compensation claims were limited under the regulation were referred to in the Act itself.

(www) In support of their argument, plaintiff's counsel referred to *Executive Council, Western Cape Legislature v President RSA*[6] where the South African Constitutional Court dealt with a challenge to legislation as well as subordinate legislation on the grounds of constituting unconstitutional delegations of legislative power.

(xxx)

(yyy) Counsel submitted that in order to amount to a lawful delegation, Parliament could only delegate the right to make regulatory laws within the confines of valid statutes. It was submitted that Parliament could not delegate its rights and constitutional obligations or to limit rights without complying with the provisions of art 22 and furthermore that the conferment of the power to regulate upon the Minister in s10(2) amounted to an unconstitutional delegation of legislative power. Counsel also submitted that the position was compounded by the breadth of the discretion vested in the Minister to make regulations under s10(2), with reference to cases decided in the South African Constitutional Court[7]

(zzz) Turning to the plaintiff's challenge to s10(2) and the regulations on the grounds on being in conflict with art 10 of the Constitution, plaintiff's counsel first referred to what they termed as 'the policy framework'. Reference was made to the Principles of State Policy and in particular art 95(g) in Chapter 11 of the Constitution. This provision exhorts the State to promote and maintain the welfare of the people of Namibia by adopting policies aimed at enacting legislation to ensure that the 'unemployed, incapacitated the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State.' Plaintiff's counsel correctly accepted that the system

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[6]1995 (4) SA 877 (CC) ('Western Cape Legislature').

[7]*Janse Van Rensberg NO and Another v Minister of Trade and Industry NO and Another* 2000 (11) BCLR 1235 (CC); *Dawood, Shalbi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).

compulsory third party motor vehicle insurance is a social benefit and also correctly accepted that the Principles of the State Policy are non-binding.

(aaaa) Counsel further referred to the National Disability Policy, included as the schedule to the National Disability Council Act.[8] Although this Act was passed after the promulgation of the regulations, and only put in operation on 30 October 2009, counsel pointed out that the National Disability Policy, was already adopted by the National Assembly in July 1997.[9] Pursuant to that policy, counsel pointed out that 'the State undertook a duty and was under obligation that became binding upon it upon its adoption.' The implications of this duty and obligation were however not fully spelled out by counsel. There was however extensive reference in counsel's heads and in oral argument to the terms of the National Disability Policy which stressed disability as a human rights and development issue by stating:

> 'In the past, disability was regarded as an issue with the responsibility of "caring" for disabled people falling on the family. Intervention was channelled through welfare institutions with little or no commitment to addressing disability in other areas of government responsibility, for example, access to healthcare, education, training, employment, service delivery, sport and recreation and public transport. The dependency which this welfare model created disempowered disabled people, isolated marginalised them from the main stream of society.
>
> In contrast, human rights and development approach to disability would face a better chance of creating equal opportunities. This is the process through which the various systems of society and the environmental are made available and accessible to all citizens.'

(bbbb) Counsel also referred to art 8 which entrenches the right of all persons to human dignity. It was submitted that there was an increased social responsibility on the State to protect the rights of citizens from unconstitutional treatment and that this in turn places a positive responsibility on the State to protect the fundamental rights of citizens.

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[8] Act 26 of 2004.

[9] As per the definitions section, s1 of Act 26 of 2004.

(cccc)

(dddd) Plaintiff's counsel also referred to the Act's successor, Act 10 of 2007 which repealed the 2001 Act. Counsel referred to the fact that the 2007 Act catered for disability which was not referred to in the 2001 Act and that the 2007 Act placed much emphasis on the provision of medical treatment, injury management, rehabilitation and for life enhancement assistance and continuous assessment and assistance to victims of motor vehicle accidents. Counsel argued that this was to give effect to 'contemporary norms, aspirations and expectations and sensitivities of the Namibian people' in the context of compensation for motor vehicle accidents. Plaintiff's counsel also referred to the Convention on the Rights of Persons with Disabilities, 2006, (the Convention) the leading international instrument which dealt with persons with disabilities. This Convention expressly refers to discrimination in this context and requires the international community in the form of nation states to adopt legislative, administrative and other measures for the implementation of the rights of the disabled and to prevent discrimination against them. Counsel pointed out that the Republic of Namibia had acceded to this Convention.

(eeee)

(ffff) Having sketch this background, plaintiff's counsel submitted that s10(2) and the regulations discriminated against the plaintiff on the grounds of social status, one of the proscribed grounds of discrimination contained in art 10(2) of the Constitution, as well as amounting to discrimination on the grounds of age which offended against the general provision ensuring equality before the law, embodied in art 10(1) of the Constitution.

(gggg)

(hhhh) In developing the former argument, I enquired from plaintiff's counsel as to whether they were able to cite any authority to support the contention that being disabled amounted to a social status. Counsel was not able to point to any authority but merely reiterated the contention that being disabled did amount to a social status as contemplated by art 10(2).

(iiii)

(jjjj) Plaintiff's counsel however submitted that the impugned provisions in any event amounted to a conflict with art 10(1) of the Constitution because the regulations discriminated on the grounds of age because of the impact of the differentiation between categories in the regulation amounted to unfair discrimination on the grounds of age and did not have a rational connection to a legitimate purpose.

(kkkk)

(llll) Counsel did not present much argument in support of the challenges made to s10(2) and the regulations on the grounds of being an infringement of the plaintiff's property rights or his rights under art 21 to study at an institution of higher learning and to carry on an occupation trade or business or practise a profession. In their written heads, there was merely an unsupported contention to this effect. No oral argument was advanced in support of these grounds.

(mmmm)

(nnnn) Mr Marcus who appeared for the Minister and the Attorney-General contended that the plaintiff's claim rested on the false premise of an antecedent right to be sufficiently compensated for damages sustained as a result of the accident. He submitted that the plaintiff's approach was then based upon the impugned provisions (s10(2) and the regulations) limiting the right to be sufficiently compensated or for the State to provide sufficient means for him to pursue his claim in Germany and that the plaintiff's constitutional rights were thus violated as a consequence.

(oooo)

(pppp) He correctly pointed out that this premise is incorrect. The plaintiff does not have antecedent right to be sufficiently compensated by the State for damages resulting from the accident. The scheme amounts to social legislation, as is spelt out below. But, as I stress below, this was not the only basis upon which the plaintiff challenged the provisions.

(qqqq)

(rrrr) Mr Marcus also contended that the policy choice made by the Minister to limit the liability of the Fund was done in accordance with the empowering provision of s10(2) and could not on

account of that limitation alone amount to the violation of the constitutional rights of the plaintiff or of the Constitution itself.

(ssss)

(tttt) Mr Marcus further contended that the regulation did not discriminate directly or indirectly against the plaintiff.

(uuuu)

(vvvv) Mr Marcus also submitted that the delegation to the Minister of the law making power and function embodied in s10(2) did not delegate a plenary law making function and that the process was thus lawful. He also submitted that the plaintiff was precluded from challenging the subordinate legislation in the form of the regulations as violating his rights under art 18 or on common law review grounds by reason of the delay in making that attack upon them.

(wwww)

(xxxx) In developing his argument, Mr Marcus referred in some detail to the legislative history which preceded the passing of the Act, including the Parliamentary debates, the referral of the bill to the Parliamentary Standing Committee on Economics by Parliament for scrutiny and report back, the report which was then provided by that Committee to Parliament. That included the need identified by that Committee for certain limitations on compensation and the liability of the Fund to protect it against exposure and adverse economic consequences of an increase in claims. He referred to the ministerial speech in support of the bill when it served before Parliament (although delivered by the Deputy Minister) which stressed sustainability for the Fund to be achieved by limiting or capping claims.

(yyyy)

(zzzz) Mr Marcus pointed out that the Act was put into operation on 8 October 2001. The regulations which are challenged in these proceedings were not promulgated at the same time but were only decided upon at the end of 2002 (and promulgated in early January 2003) when it became apparent that the Fund would not be able to meet the claims made against it following the continued financial deterioration of the Fund. As a consequence, the board then recommended to the Minister to limit the Fund's liability pursuant to s10(2) of the Act, taking into account the claims

history of the Fund which included medical bills, the financial situation of the Fund and expected future income of the Fund.

(aaaaa)

(bbbbb) Mr Marcus also referred in detail to the legislative scheme of the Act. He submitted that the Minister was entitled to enact the regulations as Minister ultimately responsible for the finances of the Fund. He had the power to control its finances. The character and extent of compensation which the Fund would then compensate victims for were, he argued, germane to that function. He further pointed out that the Fund afforded injured parties the right to recover the balance from a wrong-doer or owner of a vehicle. Mr Marcus accordingly submitted that the Minister entitled to enact the regulations to cap damages in order to curb its financial exposure and ensure its viability.

(ccccc)

(ddddd) Mr Marcus submitted that the plaintiff's complaint that there were other options than capping damages to curb financial exposure is not the test when the regulations are considered for their rationality. He submitted that the court would merely examine the means chosen in order to decide whether they are rationally connected to the public good sought to be achieved, with reference to the recent Supreme Court decision in *Trustco Limited v Deeds Registry Regulation Board*.[10] He further referred to the nature of the regulation itself as being an economic regulation based upon policy and argued that there were limited grounds upon which a court would interfere with the policy choices made by the executive branch in those circumstances.[11]

(eeeee)

(fffff) He submitted that the Minister's purpose was to ensure that the Fund would not become insolvent and that there would be money available to compensate the victims by limiting the exposure of the Fund in accordance with the legislative objective. He submitted that the

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[10]2011 (2) NR (SC) at par 24-27.

[11]*Namibia Insurance Association v Government of the Republic of Namibia* 2001 NR 1 (HC) (full bench) at p11-12 approved in *MWeb Namibia Pty Ltd v Telecom Namibia Limited & Others* 2011 (2) NR 670 (SC) at 685.

means thus devised by the Minister were permissible, given the changing circumstances of the Fund.

(ggggg)

(hhhhh) Mr Marcus further submitted art 10 was not violated as the categories of compensation set out in the regulation set limitation which were the same for all people in those categories. He argued that the regulations did not discriminate against the young people as a group in contravention of art 10(1) of the Constitution. He submitted that this was not established as all young people would not share the demographic profile of the plaintiff. He argued that it was not established that young people as a group would also have the opportunity to obtain a degree and the prospect of securing a highly paid position in support of a claim for the future loss of income and that many young people in Namibia simply did not have those prospects (of obtaining that form of education or a well paid position or indeed any position at all). He submitted that even if a differentiation on the grounds age were to have been established that, it had not established that this offended against art 10.

(iiiii)

(jjjjj) In his oral submissions, he disputed that disability constituted a social status for the purpose of art 10(2). He also submitted that the complaints based on arts 21 and 16 had not been established.

(kkkkk)

(lllll) Mr Marcus argued that s 10(2) amounted to a permissible delegation of law making. He also referred to *Western Cape Legislature* and submitted that the delegation by Parliament is permissible with reference to arts 40(3) and 40(k). He further submitted that compensation by the Fund was to a large extent dependent on funds being available and that it was necessary for Parliament to leave the question as to the limitation of claims and the extent of the limitations to the Minister, acting upon the recommendation of the Board.

(mmmmm)

(nnnnn) I turn now to deal with the issues in dispute.

Unreasonable delay

(ooooo) Mr Marcus referred to the insertion of paragraph 16.3.3.4 in the particulars of claim[12] and contended that in so far as it sought to challenge the regulations on constitutional (art 18) and common law review grounds, the plaintiff was barred from doing so by reason of the unreasonable delay in raising those review grounds. Mr Marcus pointed out that the amendment raising those review grounds had only been introduced in January 2014. The plaintiff on his own admission was however aware of the regulations capping the funds liability towards the end of 2005 having been advised by his then lawyer to that effect. Mr Marcus submitted that the delay in raising these review grounds was thus inordinate in the circumstances and precluded a challenge to the regulations on those grounds.

(ppppp)

(qqqqq) Despite the manner in which the amendments embodied in paragraph 16.3.3.4 of the particulars of claim have been couched, I did not understand plaintiff's counsel to challenge the regulations on art 18 and common law review grounds, as referred to in paragraph 16.3.3.4 of the particulars of claim. I rather understood the challenge to be based upon the constitutional grounds outlined in *Dawood* which require that rules be stated in a clear and accessible manner and that limitations of rights can only be justifiable if authorised by way of general application.[13] Mr Heathcote submitted that the legislature had failed to set out guidelines in s10(2) within which the legislative power of the Minister was to be effected and that the failure to do so resulted in an invasion of rights under Constitution.

(rrrrr)

(sssss) I deal with this argument when in discussing the challenge upon the delegation of that legislative function to the Minister as a constitutional matter. I understand the argument raised by plaintiff's counsel in this regard to be more a species of that overall challenge rather than raising art 18 and common law review grounds in challenging the regulations.

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[12]Quoted in par 22 above.

[13]See Dawood par 47, 48, 49 and 51.

This even though the pleadings[14] referred to the regulations being invalid because they were 'too wide, unreasonable and inconsistent with the rule of law, the common law, article 18 of the Constitution' with reference to the prescribed procedure – and not the manner in which the decision to make the regulations was taken.

(ttttt)

(uuuuu) It is thus not necessary for present purposes to address the issue of an unreasonable delay in the sense raised by Mr Marcus in the circumstances, given the fact that art 18 and common law review grounds were not raised in argument and the point would rather seem to have been raised to the procedure prescribed in the Act at coming up with regulations themselves and not the decision itself to impose the regulations. The challenge is thus rather on the basis of the legislative power itself being impermissible and being without guidelines and thus being *ultra vires* Parliament's and the Minister's powers would not in my view be hit by the delay rule in the present circumstances. That is because of the confined nature of the *ultra vires* challenge mounted by the plaintiff, namely on the basis of a lack of rational connection in the context of an art 10(1) challenge between the differentiation raising from the regulations and legislative and statutory purpose, challenging its legality on the grounds of rationality, as understood in the *Pharmaceutical* matter[15] and being ultra vires Parliament's law making function, and not on art 18 and common law review grounds.

(vvvvv)

(wwwww) It is accordingly not necessary for me to further address the issue of the unreasonable delay point raised by Mr Marcus in any detail given the manner in which the plaintiff's case was argued and how I understand the manner in which it was pleaded, after hearing counsel's argument. But in so far as there is a reference to a conflict with art 18 and common law review grounds (excluding the narrow *ultra vires* challenge) even if not argued and to avoid any doubt on the issue, it would certainly seem to me that the delay of some eight years to mount a challenge on art 18 and

[14]Paragraph 16.3.3.4.

[15]*Pharmaceutical Manufacturers Association of SA and Others: in re Ex parte the President of the RSA and Others* 2000(2) SA 674 (CC).

common law review grounds would be precluded by the delay rule. That would in my view clearly amount to an inordinate and impermissible delay.[16] The prejudice to the governmental defendants is self evident and is demonstrated by the evidence of the erstwhile chairperson of the Fund, Mr Amunyela, as well as the former Minister who also gave evidence. Their memories as to the process followed at the time and considerations which had moved them had faded with time.

(xxxxx)

(yyyyy) Review grounds relating to the actual procedure followed, including failure to take into account material at the time and the application of the mind are not open to the plaintiff to raise some eight years after becoming aware of the regulation in question, which had in any event been promulgated some three years before that. But this was not how the matter was argued or pleaded. It was thus not contended that the Minister was unreasonable in failing to take into account the terms of the disability policy which had been previously adopted by Parliament. The reference to that policy was rather in the context of the challenge based upon art 10 of the Constitution. Nor was it ever put to the then Minister in cross-examination that he had failed to do so. Indeed the existence of that policy was not even put to the Minister at all. The question of whether regulations were reasonably enacted thus only arises in the narrower context of the test as to rationality as I set out below and not as an art 18 issue.[17]

Delegation of law making function

(zzzzz) I have already referred to the argument advanced on behalf of the plaintiff in respect of this challenge. There are essentially two components to it. Firstly, it is contended that the Parliament had impermissibly delegated plenary legislative power to the Minister in s10(2)

[16] *Camps Bay Rate Payers and Residents Association v Harrison* 2011 (4) SA 42 (CC) at par [53]; *Khumalo v MEC for Education* 2014 (5) SA 579 (CC) at par [68].

[17] *Camps Bay Rate Payers and Residents Association v Harrison* 2011 (4) SA 42 (CC) at par [53]; *Khumalo v MEC for Education* 2014 (5) SA 579 (CC) at par [68].

and that the provision was unconstitutional on this basis alone. The second component of the argument, forcefully raised during oral argument, was that the delegation legislative power itself was unfettered in its nature and ambit and restricted rights and was invalid for this reason as well. This challenge, as I have pointed out, was raised with reference to *Dawood*[18] with Mr Heathcote stressing that the absence of any guidelines set out in s10 or elsewhere in the Act rendered the delegation invalid and impermissible – and as the resultant regulations invalid. In considering these arguments, the scheme of the Act is first to be discussed and thereafter the applicable principles.

The scheme of the Act

(aaaaaa) The long title of the Act is as follows:

> 'To provide for the establishment, management and administration of the Motor Vehicle Accident Fund; payment of compensation to victims of motor vehicle accidents and incidental matters.'

(bbbbbb) The Fund is established in s2. The purpose for which it is established is set out in s2(2), namely 'to pay compensation to a person who has suffered loss or damage as contemplated in section 10.'

(cccccc) The Fund is thus established to pay compensation as contemplated in s10. Section 10 in turn sets out the circumstances in which the Fund would pay compensation. In essence, the Fund, under s10 is to pay out compensation to persons who have suffered loss or damage as a result of bodily injury to themselves or bodily injury to or the death of a person caused by or arising out the driving of the motor vehicle by any person at any place in Namibia. For compensation to be payable, the injury or death must have been due to the negligent or unlawful act of the driver of the motor vehicle, owner of the motor vehicle or employee of the owner of the vehicle. Section 10(1) thus set out the circumstances under which

[18]Supra at par 47, 52, 53 and 55.

compensation is to be paid.

(dddddd)

(eeeeee) Section 10(2), which is attacked in these proceedings, proceeds to qualify that obligation and provides:

> '(2) The Minister, on the recommendation of the Board, may by regulation, provide, in such cases and on such basis as he or she may stipulate –
>
> (a) the different categories or heads or damages or loss under which compensation is payable under subsection (1);
>
> (b) impose limitations on the liability of the Fund to pay compensation under any of the different categories or heads of damages or loss referred to in paragraph (a).'

(ffffff) This sub-section empowers the Minister, upon the recommendation of the Fund's Board, to impose limitations on the liability of the Fund to pay compensation in respect of different categories or heads of damages or loss for which compensation would otherwise be payable under s10(1). This the Minister is to do by way of regulation.

(gggggg)

(hhhhhh) The further sub-sections of s10 are not relevant for present purposes.

(iiiiii)

(jjjjjj) Section 11 provides that where claimants would be able to claim compensation from a 'wrong doer' under s10(1), they would no longer be entitled to claim for compensation for loss or damage from that wrong-doer unless the Fund is unable to pay the compensation for that loss or damage. Under s11(2) claimants may then claim against the wrong-doer for the difference, if the amount of compensation payable under Act is less than the actual amount of compensation due for the loss or damage sustained to those claimants as a result of the limitations imposed under the s10(2).

(kkkkkk)

(llllll) The Act further provides that the Fund resorts under the ultimate control of the Minister who appoints its Board. In

terms of s4 of the Act, the revenue of the Fund consists of money derived from a different fund established under the Petroleum Product and Energy Act, 1990[19] and made available to the Fund under that Act as agreed between the Minister and Minister of Mines and Energy. The Fund's revenue may also derive from investments made or money borrowed or made available for that purpose of the Fund by Parliament or any other money which accrues to the Fund.

(mmmmmm)

(nnnnnn) The Act vests in the Minister, as Mr Marcus submitted, responsibility for the finances of the Fund being its revenue and by ultimate determining the extent of compensation which with the Fund would compensate claimants under the Act.

(oooooo)

Impermissible delegation?

(pppppp) The question arises as to whether s10(2) amounts to an impermissible delegation or an abdication by Parliament of its legislative power to the Minister, as is contended by the plaintiff.

(qqqqqq)

(rrrrrr) Compensation for victims who sustain loss or damages resulting in bodily injury or death caused by the driving of motor vehicles had originated in the form of compulsory third party motor vehicle insurance devised by the legislature over the years. The legislative history of that form of social benefit up to 1989, was similar to that in South Africa. It is usefully described in *Law Society of South Africa Others v Minister of Transport and Another*[20] in the following way:

> '[17] The statutory road accident compensation scheme was introduced only in 1942, well after the advent of motor vehicles on public roads. And even so, it came into effect only on 1 May 1946. As elsewhere in the world, statutory intervention to regulate compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain

[19] Act 13 of 1990.

[20] 2011 (1) SA 400 (CC) at par 17-21.

outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the State. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants.

[18] Ever since, the system of compensation has been under frequent investigation and legislative review. This became necessary, presumably because the scheme was considered to be ever evolving and less than perfect. In an apparent search for a fair, efficient and sustainable system of compensation, no less than five principal Acts were passed and over decades government established at least nine commissions to review the funding, management and levels of compensation under the scheme.

[19] The first principal Act was the Motor Vehicle Insurance Act, 1942, which unsurprisingly was amended at least five times and was the subject of no fewer than four commissions of inquiry. That legislation introduced a comprehensive scheme of compulsory third party motor insurance. Its expressed object was to provide for compensation for certain loss or damage caused unlawfully by means of motor vehicles. The scheme was originally underwritten and administered by a consortium of private insurance companies and funded by compulsory annual premiums payable by motorists.

[20] Nearly 30 years later, the second principal Act, the Compulsory Motor Vehicle Insurance Act, 1972, was adopted. It was amended on at least seven occasions before its repeal in 1986. This Act shifted the requirement for insurance from the owner or driver to the vehicle itself. It provided cover, for the first time, for loss occasioned by uninsured or unidentified motor vehicles. It introduced prescription of claims and excluded the liability of the Fund in certain instances and increased the benefits for passengers. It too was the subject of at least two commissions of inquiry.

[21] Some 14 years later, the third principal Act, the Motor Vehicle Accidents (MVA) Act, 1986, was passed. The important change it introduced was a fuel levy to fund the system of compensation. Another significant change was that private insurance agents ceased to deal with hit-and-run claims. These were dealt with exclusively by the MVA Fund. This principal Act too was the subject of at least one commission of inquiry.'

(ssssss)

(tttttt) After independence, the

Namibian legislature passed the Motor Vehicle Act, 1990[21] which was repealed by the Act. As I have already said, the Act has since been repealed and replaced by the Motor Vehicle Accident Fund Act, 2007.[22] The characteristics of ever evolving and less than perfect and requiring refinement referred to in the *Law Society* matter apply with equal force to the legislation after independence.

(uuuuuu)

(vvvvvv) The Act perpetuated the fundamental objective of providing a form of a social security for road users to compensate them for loss or damage if qualifying under circumstances set out in the Act. It was not disputed that when the Act came into operation the Fund's liability was equal to its assets. The Deputy Minister in moving the adoption of the Act referred to the limitation contemplated by the Act (in s10(2)) to ensure the sustainability of the Fund. He also pointed out that the Minister of Finance had consulted widely on the bill within Namibia and investigated similar schemes within the SADC region. At the request of members of Parliament, the bill was referred to the Standing Committee on Economics. That Committee noted that the vast majority of Namibians were unaware of the Fund and their right to claim from it. The Committee also noted Government concerns about massive claims been brought against the Fund and its potential insolvency, noting that this concern led to the inclusion of s10(2) to limit the liability of the Fund. It accepted that need to protect the Fund against over exposure so as to ensure that benefits could be paid to all victims entitled to compensation.

(wwwwww)

(xxxxxx) It was also not disputed that by November 2002 the Fund had essentially run out of funds whilst its claims against were in excess of N$92 million. Its investments had also been depleted by that time. The Fund's Board then recommended that the Minister impose the limitations set out in the regulations. The Minister accepted that recommendation and promulgated the regulations.

(yyyyyy)

(zzzzzz) Plaintiff's counsel submitted that

[21]Act 30 of 1990.

[22]Act 10 of 2007.

the sole provision in the Constitution authorising the Minister to make subordinate legislation is contained in art 25 of the Constitution. This is because there is reference in that sub-article to 'any subordinate legislative authority.' That article however does not authorise Parliament to delegate the power to pass subordinate legislation. It merely refers to it and rather accepts that as an implied power or as an incident of legislative power in a modern state which it is. This is eloquently explained in *Western Cape Legislature* in the following way (by Chaskalson P):

> [51] The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as s 16A does, the power to amend the Act under which the assignment is made.[23]

(aaaaaaa) At the heart of *Western Cape Legislature* was the power accorded in an act of Parliament to the President to amend parliamentary legislation. The Constitutional Court in different judgments held that an act of Parliament purporting to delegate to the President the power to make amendments to an act of Parliament was unconstitutional, although the reasoning in the judgments differed. What was crucial for most members of that court was that delegated lawmaking functions could not alter the provisions of the empowering Act (or of other Parliamentary legislation) in the context of regulating a process of local government transition. I certainly agree with that approach and respectfully subscribe to the approach that it would in principle make no difference if the power was confined to amending the legislation under

[23] *Western Cape Legislature* supra at par 51 per Chaskalson, P.

which the delegation occurs, as the power to delegate legislative powers is subordinate to acts of Parliament.[24]

(bbbbbbb)

(ccccccc) Section 10(2) does not in my view delegate a plenary lawmaking function to the Minister. It does not seek to assign to the Minister the power to amend the Act or other parliamentary legislation. It delegates to the Minister the power to set limitations upon the liability of the Fund and the extent of those limitations as is expressly contemplated by the Act itself.

(ddddddd)

(eeeeeee) The Act plainly contemplates that compensation payable under it is subject to s10. That section in turn expressly contemplates the imposition of limitations on the liability of the Fund to pay compensation under different categories or heads of damages or loss as stipulated by way of regulation by the Minister on recommendation of the Board. In making regulations of that nature, the Minister would not be amending the Act itself. Nor would he be 'undoing it.' The Act expressly contemplates the need to impose limitations which the Minister would then stipulate as to their extent and within categories. The Act appointed the Minister to make regulations to do so, given his pivotal position in relation to the control of the Fund's finances and revenue.

(fffffff)

(ggggggg) In making regulations to limit the liability of the Fund with respect to stipulated categories, the Minister was thus not assuming a plenary legislative function but rather implementing the legislative intention expressed in s2 read with s10 of the Act in providing for limitations to compensation in different categories or damages or heads or loss. This intention is further expressed in s11(2) where it is contemplated that the limitations may result in compensation from the Fund being less than the actual compensation due for the loss or damage sustained by a victim.

(hhhhhhh) Plaintiff's counsel argued that the delegation was unconstitutional because Parliament may not delegate its

[24]As stressed by Ackerman and O'Regan JJ in *Western Cape Legislative* at par [148].

constitutional legislative right and obligation to limit rights. They further contended that with reference to South African Constitutional court cases[25] that the delegation was unconstitutional because of the 'unfettered and unguided discretion' vested in the Minister, an official, to limit fundamental rights. Citing *Dawood*, they contended that those affected by the exercise of the broad discretionary powers would not know 'what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.

(iiiiiii)

(jjjjjjj) This argument encounters a fundamental difficulty at the first hurdle. It is premised upon the delegation limiting fundamental constitutionally protected rights. But that is not what is contemplated by s10(2) within the scheme of the Act.

(kkkkkkk)

(lllllll) The Act provides for the Fund to compensate for loss or damage as contemplated by s10. As I have already explained, s10 in turn provides for the circumstances under which compensation is payable which includes being subject to limitations imposed by the Minister in stipulated categories. Limitations upon compensation are thus part and parcel of the legislative scheme, unlike the rights limited in *Janse van Rensburg* and *Dawood*. There is no pre-existing right to compensation. The right to compensation is created in the Act which itself expressly contemplates limitations upon compensation. A limited form of compensation is thus created. The principle of limitation forms part and parcel of it and was decided upon by Parliament. The categories to be stipulated and the extent of limitations were then to be determined by the Minister.

(mmmmmmm)

(nnnnnnn) Secondly, the exercise of the discretion is not entirely unguided. The Minister may stipulate categories or heads of damages or loss and impose limitations under them. The fact that the actual categories are not specified does not render the discretion unfettered.

(ooooooo)

(ppppppp) The hypothetical scenario of a

[25]Dawood supra, Janse van Rensburg supra.

limitation of nil compensation does not arise on the facts of this matter. If the Minister sought to render the right to compensation entirely nugatory, different considerations may arise and that may, depending on the facts, amount to frustrating the intention of the legislature. But that did not occur and need not be considered.

(qqqqqqq)

(rrrrrrr) Furthermore, the nature of the powers exercised in both *Janse van Rensburg* and *Dawood* differ vastly from that raised in this matter. In *Dawood*, a provision in immigration legislation relating to the issuing of permits was found to be unconstitutional because the discretion it conferred it upon officials infringed and limited a range of constitutional rights. That decision concerned the interpretation of that provision and how it operated to limit fundamental rights. In *Janse van Resnburg* the legislative provision concerned the right of entry upon business premises and inspection, search and seizure without a warrant, limiting rights to privacy. Those considerations do not apply in this matter. As I have indicated, compensation, as limited, is what is contemplated in the Act. What is limited is compensation under the Act and not constitutional rights as occurred in these matters.

(sssssss) The passages relied upon from these cases are to be seen within their own specific legislative, factual and constitutional context.

(ttttttt)

(uuuuuuu) Section 10(2) in any event does not place an entirely unfettered and unguided discretion in the Minister. It contemplates that compensation for damages or loss be stipulated in categories and that imitations may be imposed in respect of those categories. Categories for compensation for damages or loss are well established in the law of damages. The categories stipulated by the Minister also follow those which are recognised and established. The Minister is then accorded a discretion to impose financial limitations in respect of those categories. Plaintiff's counsel did not suggest how guidance should be provided for the exercise of that discretion. Given the intention of the legislature to pay compensation, as may be limited, for victims as contemplated by s10, it would follow that the imposition of limitations

would relate to the ability of the Fund to pay compensation in the context of the Act construed as a whole. As was also, with respect, aptly said in *Dawood*:

> '[53] Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here.'

(vvvvvvv) Unlike the entirely different factual, legislative and constitutional context in *Dawood*, it would not seem to me that the nature of the Minister's discretion posited by s10(2) is entirely unfettered or unguided in relation to the determination to be made by the Minister within the statutory framework of the Act. This is apart from the further distinguishing feature of the imposition of the limitations not themselves limiting constitutional rights in the sense contemplated in *Dawood* as well the different wording in the South African Constitution in its provision dealing with the limitation of constitutional rights.

(wwwwwww) The discretion of the Minister to impose limitations furthermore is subject to review, although review upon art 18 and common law grounds would be precluded in this matter by the inordinate delay in instituting it.

(xxxxxxx)

(yyyyyyy) It follows that the challenge upon s10(2) and the regulations and the grounds of being an impermissible delegation of lawmaking powers must fail.

The equality challenge

(zzzzzzz) The plaintiff's challenge to the regulations is based on both art (10(10 and 10(2) of the Constitution. Art 10 provides:

'Equality and freedom from discrimination

(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

(aaaaaaaa)

(bbbbbbbb) As has been made clear by the Supreme Court,[26] the tests to be applied in determining whether there is discrimination under the two sub-articles differ. As was succinctly stated in *Muller,*[27] with reference to an earlier matter:

'Article 10, and more particularly subart (1), was only once before the subject of interpretation. The case to which I refer is *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH). The approach of a Court to the article was set out as follows (at 1132E - H):

". . . article 10(1) . . . is not absolute but . . . it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of "intelligible differentia" and allows provision therefor".

In regard to subart (2) the Court stated the following:

"As far as art 10(2) is concerned it prohibits discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Apart from the provisions of art 23 any classification made on the grounds enumerated by the sub-article will either be prohibited or be subject to strict scrutiny. For purposes of the present case I need not decide the issue."'

(ccccccc) The Supreme Court in *Muller*[28]

[26]Muller v President of the Republic of Namibia and another 1999 NR 190 (SC) at 196 ('Muller').

[27]Supra at 199.

[28] Supra at 200.

proceeded to summarise the test in respect of each sub-article as follows:

> '*(a)* Article 10(1)
>
> The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose. (See *Mwellie's* case *supra* at 1132E - H and *Harksen's* case *supra* (54).)
>
> *(b)* Article 10(2)
>
> The steps to be taken in regard to this sub-article are to determine -
>
> (i) whether there exists a differentiation between people or categories of people;
>
> (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
>
> (iii) whether such differentiation amounts to discrimination against such people or categories of people; and
>
> (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution.'

(ddddddd) The proscribed ground of differentiation in art 10(2) contended for by the plaintiff is that of social status and thus contending that the regulations offend against art 10(2). As I have said, it was argued that the regulations discriminate against persons with disability and that disability constitutes a social status.

(eeeeeeee)

(fffffff) As I have also said, plaintiff's counsel could refer me to no authority in support of the proposition that disability amounts to a social status. Nor was there any evidence to that effect. Had the constitutional drafters intended to include disability as proscribed ground in art 10(2), they would have done so. The legislature has in fact done so in the context of employment in successive labour statutes.[29]

(gggggggg) To find that disability amounts to social status would also and in any event seem to me to be contrary to the tenor

[29] S10 of Act 6 of 1992, 5 of Act 11 of 2007.

and spirit of the policy relied upon by the plaintiff.

(hhhhhhhh)

[191] I am unpersuaded by the mere say so by counsel unsupported by any authority or evidence to find that disability constitutes a social status for the purpose of art 10(2).

(jjjjjjjj)

[193] As to the challenge based upon art 10(1), this court has in *Mwellie v Ministry of Works, Transport and Communication and Another*[30] held that in a constitutional challenge based on Art 10, the onus would be on an applicant to establish the constitutional infringement in these terms:

'If therefore, in the present case, the onus is on the plaintiff to prove the unconstitutionality of Section 30(1) on the basis that it infringes the plaintiff's right of equality before the law, it will, on the findings made by me, have to show that the classification provided for in the section is not reasonable, or is not rationally connected to a legitimate object or to show that the time of prescription laid down in the section was not reasonable. Until one or all of these factors are proved it cannot be said that there was an infringement of the plaintiff's right of equality before the law. This, in my opinion is because I have found that the constitutional right of equality before the law is not absolute but that its meaning and content permit the Government to make statutes in which reasonable classifications which are rationally connected to a legitimate object, are permissible.'

(lllllll) In the South African Constitutional Court in *Harksen v Lane NO* it was explained in the context of a similar provision:[31]

'[45] If the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of s 8(1) of the interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of s 8(2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.'[32]

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[30]1995 (9) BCLR 1118 (BmH) (per Strydom, JP as he then was)

[31]1998 (1) SA 300 (CC) and expressly approved and followed by the Supreme Court in *Muller.*

[32]Par 45. See also Jooste v Score Supermarkets Trading (Pty) Ltd 1999 (2) SA 1 (CC).

'The determination as to whether differentiation amounts to unfair discrimination under s 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination'. It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in s 8(2), which by virtue of s 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.'

(mmmmmmmm) The Court in *Harksen* further held[33] that if differentiation on an unspecified ground has not been found then the question as to discrimination and a conflict would immediately fall away. If differentiation is however found to be the case, then the court held that the second stage of the analysis would proceed in order to determine whether discrimination is unfair, finding that in the case of discrimination on an unspecified ground, unfairness must still be established before it can be found to be a breach of the constitutional provision.'[34]

(nnnnnnnn) Having found that there was no infringement of art 10(2) (on the basis of a proscribed category listed in that sub-article), I turn to the challenges based upon infringing art 10(1).

(ooooooo)

(ppppppp) The regulations do not contain any provision which refers to age as a condition for compensation. On the contrary, the regulations provide for the same financial limitation for all claimants under the different categories. The contention on behalf of the plaintiff is however that, although neutral in its wording, the effect of the regulations is to result in indirect discrimination on the basis of age.

(qqqqqqqq)

(rrrrrrrr) As this court in *Mwellie* found, the plaintiff bears the onus of establishing a differentiation provided for in the

[33]Supra at 322 B-F (par 48).

[34]*Van der Merwe v Road Accident Fund* 2006(4) SA 230 (CC) at 254-255 p42.

regulations and that it is not reasonable in the sense of not being rationally connected to a legitimate statutory object. The first difficulty to be encountered by the plaintiff is that the regulations do not directly provide for such a classification or differentiation. The plaintiff would need to show, because the regulations on their face did not differentiate on the basis of age or disability, they had a disparate impact on those categories of people which then amounted to indict discrimination.

(sssssss)

(ttttttt) As Mr Marcus pointed out, the plaintiff's case on age would be dependent upon the assumption that young people in Namibia, as a group, share his demographics and the impact of the regulations upon them – coming from a relatively privileged background, attending good schools, the opportunity to pursue a university degree and thereafter securing a highly paid position, resulting in the compensation for loss of future earnings as limited in the regulations as being insufficient. Mr Marcus contended that the reality for many if not most young people in this country is not reflected in that assumption because of their backgrounds.

(uuuuuuuu)

(vvvvvvvv) There is indeed a large income and wealth disparity in Namibia and very high unemployment amongst the youth of Namibia. These facts are so notorious that this court can take judicial notice of them. There was no evidence as to the impact of the categories on young persons as a class or category, but only the impact of the regulations upon the plaintiff in his own particular circumstances. The examples referred to of older persons also do not necessarily support the plaintiff's contention of indirect discrimination on the grounds of age. The limitation of compensation would also no doubt impact adversely on a 55 year old general manger in a top paying position unable to work as a consequence of a motor vehicle collision, as posited by Mr Marcus.

(wwwwwwww)

(xxxxxxxx) As was accepted in *Muller,* in approving of what was stated by Didcott, J in Prinsloo:[35]

> 'Having regard to the wording of our art 10(2), it seems to me that there is no

[35] *Prinsloo v Van de Linde and Another* 1997 (3) SA 1012 (CC) at par 52.

scope for applying the rational connection test. Article 10(1) requires the Court to give content to the words 'equal before the law' so as to give effect to the general acceptance that

> ". . . in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality, and freedom. . . . In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. . . . Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.'"

Budlender, AJ in *Rates Action Group v City of Cape Town*[36]*,* speaking for a full bench also stated in this context:

> 'If there are indeed cases in which a non-discriminatory policy impacts "fortuitously on one section of the community rather than another, with the result that there is no differentiation within the meaning of that term in *Harksen*, then this must be such a case. . ."

> If the property rates in this case amount to indirect differentiation, then the same must apply to the income tax. This illustrates the view expressed by Sachs J in his dissent in Walker, that 'an undue enlargement of the concept of indirect discrimination would mean that every tax burden, every licensing or town planning regulation, every statutory qualification for the exercise of a profession would be challengeable simply because it impacted disproportionately on blacks or whites or men or women or gays or straights or able-bodied or disabled people.'"

(yyyyyyyy) I conclude that the plaintiff has

[36]2004 (5) SA 545 (C) (full bench) and approved of on appeal in 2006 (1) SA 496 (SCA) although this aspect was not appealed against (par [1]).

not established a differentiation on the basis of age which indirectly discriminated against him. It would seem to me that this is rather a case where the limitations have 'impacted for tuitously' (or less fortuitously) on one section of the community rather than another, as posited by Lange DCJ in Walker [37]

(zzzzzzzz)

(aaaaaaaaa) Although the plaintiff's case was that disability amounts to a social status and thus discrimination on one of the proscribed grounds in art 10(2) (which I have not found to be the case), I turn to consider whether the regulations constitute indirect discrimination against persons with disability.

(bbbbbbbbb)

(ccccccccc) In the particulars of claim, as amended in 2014, it is alleged that s10(2) of the Act and regulations infringed against the plaintiff's right to dignity and equality by failing to recognise the 'disproportionate position of disabled persons as a previously disadvantaged and vulnerable group in society and for failing' to recognise the special needs of persons to sustain permanent disability and the costs involved in maintaining their dignity and/or pursuing life, liberty and happiness.' Plaintiff's counsel placed considerable reliance upon a judgment of the Court of Appeal in *Burnip v Birmingham City Council and Secretary of State for Work and Pension*[38] in oral argument and not referred to in their heads of argument. The plaintiff's counsel in essence argued that it would amount to discrimination when treating everybody the same under legislation and neglect those with disability who may require different and affirmative treatment.

(ddddddddd)

(eeeeeeeee) The *Burnip* matter concerned the treatment of severely disabled people under a housing benefit of a local authority which quantified a benefit with reference to a one bedroom rate which applied to able bodied tenants, whereas severely disabled bodied persons

[37]Walher supra at pr 33 and quoted in *Rates Action Group* at par [92].

[38]*Burnip v Birmingham City Council and Secretary for Work and Pension*; *Trengove v Representative of the State of Lucy* and *Representative of State of Lucy Trengove v Walsall Metropolitan Council and Secretary of State for Work and Pensions*; *Gorry v Wiltshire Council and Secretary of State for Work and Pensions and Equality and Human Right Commission intervening* [2012] EWCA Civ and 629.

would require a second bedroom and thus a two bedroomed flat was in accordance with their needs. The appellants in that matter relied on article 14 of the European Convention on Human Rights. Its wording is as follows:

> 'The enjoyment of the rights and freedom set forth in the convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with the national minority, property, birth or other status.'

(fffffffff) In view of the wording of article 14, the Court of Appeal found that disability is within the concluding words 'or other status', with reference to prior authority.[39] The court turned to consider whether there was discrimination or difference in treatment justified in respect of persons with disability. The court relied upon a decision of the European Court of Human Rights in finding that the right not to discriminated against and the enjoyment of rights guaranteed under the Convention is also violated when a State without an objective or reasonable justification fails to treat differently persons whose situations are significantly different.[40] This principle would appear to impose a positive obligation upon the State to make provision to cater for a significant difference.

(ggggggggg)

(hhhhhhhhh) The courts in Namibia have not recognised such an obligation, outside the perameters of art 23 entitled 'apartheid and affirmative action.' It authorises Parliament to pass legislation providing for the advancement of persons who have been disadvantaged by past discriminatory laws and practices in the context of the practice of racial discrimination and the ideology of apartheid. This obligation as contended for, on the basis of *Burnip*, would amount to requiring the State to take positive steps to allocate a greater share of public resources to a particular person or group. But this would not in my view arise outside the parameters of art 23. It was also

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[39] *Burnip* supra at par 8.

[40] *Thlimmenos v Greece* (2001) 31 EHRR 15, referred to in *Burnip* par 14. It was however acknowledged in Burnip (at par 17-18) that Thlimmenos concerned exclusionary rules (and not requiring the State to take positive steps to allocate greater share of public resources to a particular person or group).

stated in *Burnip*[41] that the limited instance in which this principle had been previously invoked concerned exclusionary rules such as in *Thlimnenos*. The court in *Burnip* acknowledged that a court would approach this issue with 'caution' and consider with care any explanation which is proffered by the public authority for the discrimination. The court however found that it was incumbent upon the State to treat differently persons whose situations are significantly different. The court proceeded to find that the local authority and Secretary of State failed to establish an objective and reasonable justification for the discriminatory effect of the statutory housing benefit criteria upon persons with serious disabilities.

(iiiiiiiii)

(jjjjjjjjj) In a concurring judgment, Henderson, J found that the Secretary of State was required to establish that there was at a material time an objective and reasonable justification for the discriminatory effect of the relevant housing benefit criteria as they applied to the particular circumstances of the appellant. Henderson, J found that this was not established.

(kkkkkkkkk)

(lllllllll) This case would appear to be distinguishable both on the basis of the legal provisions themselves and the context. As was correctly argued by counsel, the basis for the court's finding was discrimination on a proscribed ground because of the wording of article 14. Different treatment would then be presumptively unfair and require justification.

(mmmmmmmmm)

(nnnnnnnnn) The wording of that article is significantly different to that of art 10 read with art 23 of the Namibian Constitution. Article 10 does not have a catch all phase for other forms of discrimination in the form of 'any other status'. Article 10(2) specifically limits the enumerated proscribed grounds of discrimination to those which are contained in it. In doing so, the Constitution drafters ameliorated the effect of non inclusion into one of those categories by providing for article 10(1) which entitled all persons to equality before the law. There is a significant difference however with regard to the incidence of the onus and the consequences of establishing a

[41]Par 17-18.

direct or indirect infringement of art 10(1) or 10(2), as was pointed out by the Supreme Court in *Muller.* There can be no justification for differentiation which constitutes unfair discrimination under article 10(2). But there can be under art 10(1) where the incidence of the onus would appear to differ from the approach of *Burnip*.

(ooooooooo)

(ppppppppp) Apart from the difference in wording and structure between art 14 of the Convention and art 10 of the Constitution, art 23 makes express provision for directly or indirectly advancing persons disadvantaged by discriminatory practices by way of Parliament enacting legislation. That would be the manner in which a greater allocation of resources may arise to advance persons within that category under the Namibian Constitution. Art 23 does not apply in the present circumstances, given its wording enabling Parliament to take such action. Nor was it pleaded to have application. The plaintiff furthermore and in any event did not bring himself within its reach.

(qqqqqqqqq)

(rrrrrrrrr) As has already been pointed out, the onus is clearly upon the plaintiff to establish discrimination of a direct or indirect nature as a consequence of the s10(2) and the regulations. The fact that compensation is limited in the categories referred to in the regulations may result in persons who have become disabled as a consequence of a motor vehicle accidents receiving insufficient compensation, would not necessarily mean that the provisions themselves discriminate against persons with disability.

(sssssssss)

(ttttttttt) When I put it to counsel that this may mean that the State pension scheme may on that basis also be unconstitutional because old aged pensioners who have disability would have greater financial needs for a dignified existence than abled bodied pensioners, and thus need a greater allocation of resources, he immediately agreed that this should be the consequence of a ruling which followed the approach in *Burnip* which he pressed upon this court.

(uuuuuuuuu)

(vvvvvvvvv) It would seem to me that, as

may occur in circumscribing criteria for social benefits that, cases of hardship may be produced. But that would not necessarily render the limitations to be disproportionate or rationally unconnected with the statutory purpose where a plaintiff, as claimant, finds himself on the wrong side of the limitations of compensation to him. The provision of extra cash allowances for persons with disability, when it comes to social benefits under legislation, would furthermore in my view be more a matter for the legislature to consider, given the wide scope of deference to be accorded to legislative provisions relating to economic choices.[42]

(wwwwwwwww) The limitations set out in respect of the stipulated categories do not themselves differentiate on the grounds of age or disability. They subjected all claimants to the same limitations when claiming compensation from the Fund under that regime. By its nature and because the financial constraints then upon the Fund, it was by its statutory nature a regime which provided limited compensation and not full compensation. There would thus not be an obligation upon the Minister to take positive further steps to allocate greater share of already limited financial resources of the Fund to particular persons or groups as the Fund was by its nature limited and did not set out to provide full compensation to claimants. That the limitations would have an unfortuitous impact upon some claimants such as the plaintiff is the unfortunate consequence of its financial position at that time. The Act after all empowered the Minister to address the deteriorating financial position of the Fund by limiting its liability within stipulated categories. The Minister imposed the limitations to ensure the Fund's viability. There was thus a rational connection between the regulations and the statutory objective justifying any differentiation, even if that were the case. When it comes to economic regulation – as the decision determining the extent of limitations of liability of the Fund to ensure its financial sustainability would clearly have been – this is an area where large latitude is accorded to the executive (and legislature) by the courts and is a matter falling within the domain of the legislature or the executive and not the courts.[43] As was stressed in the legislative history, this form of social

[42] *Namibia Insurance Association v Government of Namibia* supra at 11-12.

[43] *Namibia Insurance Association v Government of Namibia* supra at 11-12.

legislation has been ever evolving and constantly under review in the quest for a fair, efficient and sustainable regime of compensation. The fact that the 2007 Act improves the position for persons with disability demonstrates this. But it does not follow that the limited compensation regime under the Act is unconstitutional.

(xxxxxxxxx)

(yyyyyyyyy) In this instance s10(2) was envisaged to ensure the financial liability of the Fund. The Minister's unchallenged evidence was that this was his motivating factor in making the regulations, to ensure the sustainability of the Fund and that victims be compensated commensurately with regard to its resources. Even though no differentiation was established it would in any event seem to me that there was thus a rational connection between the regulation and the statutory purpose of s10(2).

(zzzzzzzzz)

(aaaaaaaaaa) The plaintiff's also claims an infringement of his constitutional rights protected in art 16 and 21. The former would appear to be premised upon an assumption of an antecedent right to compensation which I have found not to be the case. It was thus not established. No was any conflict with art 21(j). The claim of an infringement of art 21(b) rests on a false premise. It does not create a right to higher education but academic freedom – an entirely different matter altogether.

Conclusion

(bbbbbbbbbb) It follows for the reasons set out above that the constitutional challenge to s10 (2) and regulations is to be dismissed with costs. Those costs include the costs of one instructed and one instructing counsel. This ruling may effectively dispose of the case against the Minister, the Fund and the Attorney-General. There remains the case against Europcar. The matter would then need to revert to case management for the further conduct of the matter. Part of the order includes this.

(ccccccccc)

(ddddddddd) I accordingly make the following order:

(a) The Constitutional challenge to s10(2) and the regulations is dismissed with costs. Those costs include the costs of one instructing and one instructed counsel.

(b) The matter is postponed to 19 November 2014 at 15h15 for further case management.

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DF Smuts

Judge

APPEARANCE

PLAINTIFF:	R Heathcote SC (with him) J Schickerling Instructed by Francois Erasmus & Partners
1st to 4th DEFENDANT:	N Marcus Instructed by Government Attorney