**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 114/20

In the matter between:

**PHILLIPA SUSAN VAN ZYL N.O.** Applicant

and

**ROAD ACCIDENT FUND** Respondent

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| **Neutral citation:** | *Van Zyl N.O. v Road Accident Fund* [2021] ZACC 44 |
| **Coram:** | Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J |
| **Judgments:** | Pillay AJ (main): [1] to [90]<br>Jafta J (majority): [91] to [127]<br>Theron J (dissenting): [128] to [159] |
| **Heard on:** | 2 March 2021 |
| **Decided on:** | 19 November 2021 |
| **Summary:** | Road Accident Fund Act 56 of 1996 — section 23(1) — section 23(2)(b) and (c) — prescription of claim against the Road Accident Fund — claimants of unsound mind — prescription only begins to run from date of appointment of curator ad litem<br><br>Interpretation — impossibility principle — the law does not require impossibilities |

## ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Division, Grahamstown):

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following order:
   "The special plea of prescription is dismissed with costs."
4. The respondent must pay the applicant's costs in the High Court, the Supreme Court of Appeal and this Court, with the costs in this Court to include the costs of two counsel.

## JUDGMENT

PILLAY AJ (Mogoeng CJ and Khampepe J concurring):

*Introduction*

> "An unjust law is not a law."[1]

[1] On May Day 2010, Mr Koos Jacobs was seriously injured in a motor vehicle accident. As a result of the accident, he suffered severe head injuries that impaired his mental capacity. He was unable to manage his own affairs. More particularly, he was unable to lodge his claim against the Road Accident Fund (RAF). Acting on his behalf,

[1] Kretzmann "Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience" (1988) 33 *The American Journal of Jurisprudence* 99 at 101. Kretzmann discusses the maxim *lex iniusta non est lex* (an unjust law is no law at all) with reference to Aquinas' writing.

his mother lodged his claim for damages with the RAF on 18 January 2017, some seven years after the accident.

[2] On 28 November 2017, Mr Jacobs' mother secured a court order appointing Ms Phillipa Susan van Zyl N.O., the applicant, as his curatrix ad litem.[2] Ms van Zyl instituted an action against the RAF for payment of damages on his behalf on 8 March 2018.

[3] In terms of section 23(1) of the Road Accident Fund Act (RAF Act),[3] the claim should have been filed within three years of the accident, that is, by 30 April 2013. However, section 23(2)(b) and (c) of the RAF Act protect persons against prescription if they have mental disabilities, and consequently, are detained in terms of mental health legislation or placed under curatorship. People with mental disabilities who are neither so detained nor under curatorship, and who are therefore not expressly protected by section 23(2)(b) and (c) of the RAF Act, will be referred to as "affected persons".

[4] Mr Jacobs' injuries from the accident rendered it impossible for him to know about the requirements of section 23 of the RAF Act and to act on his own to lodge his claim. Although he qualified for the appointment of a curatrix ad litem to assist him with the litigation, he neither knew nor had the capacity to have a curatrix appointed timeously to qualify for the protection against prescription under section 23(2)(c) of the RAF Act. Consequently, Mr Jacobs, like other affected persons, did not fall within the classes of persons expressly protected against prescription under section 23(2) of the RAF Act. Can Mr Jacobs' claim against the RAF be saved from prescription?

[2] A "curatrix ad litem" or "curator ad litem" is a court-appointed individual who manages court proceedings on behalf of another.

[3] 56 of 1996.

*Litigation history*

[5] In the High Court of South Africa, Eastern Cape Division, Grahamstown, the RAF raised a special plea of prescription. In response to the special plea, the applicant, relying on Mr Jacobs' mental incapacity, submitted first that he would have qualified for the appointment of a curatrix ad litem, and second, that sections 12(3) or 13(1)(a) of the Prescription Act[4] would apply to suspend the running of prescription.[5]

[6] Following Rule 37 exchanges,[6] and purely for the purposes of determining the special plea of prescription, the RAF admitted the contents of certain medico-legal reports, which expressed an opinion that Mr Jacobs was mentally incapacitated because of the injuries he had sustained in the accident.[7] However, the RAF reserved its rights to contest liability on the merits, including the cause of his injuries and quantum, if the special plea was dismissed.

[7] The High Court upheld the special plea. Because the applicant did not raise any constitutional issue, the High Court awarded costs against her.[8] With the leave of the High Court, the Supreme Court of Appeal heard the appeal. Unanimously, it held:

> "In the present case the incidence of prescription should have been managed by the timeous detention of Mr Jacobs in terms of the mental health legislation and/or by the appointment of a curator ad litem who could have instituted his claims timeously. This would have suspended the running of prescription in terms of section 23(2)(c) of the RAF Act. The construction that I have placed on section 23 of the RAF Act does not have the effect of preventing the dispute between the appellant and the RAF from being resolved by a court of law nor does it undermine the purpose of the RAF Act. Regrettable as this result may be, the Constitutional Court has already considered the

[4] 68 of 1969.

[5] *Van Zyl v Road Accident Fund*, unreported judgment of the High Court of South Africa, Eastern Cape Division, Grahamstown, Case No 761/2018 (11 December 2018) (High Court judgment) at para 2.

[6] Rule 37 of the Uniform Rules of Court. This exchange includes all notices filed and admissions sought and obtained before, during and after the pre-trial conference.

[7] High Court judgment above n 5 at para 3.

[8] Id at para 27.

> interpretation of the RAF Act and held that claims under the Act are governed exclusively by the provisions of the said Act to the exclusion of any other law.
>
> For these reasons, I hold that the Prescription Act does not apply to claims for compensation under the RAF Act. It is excluded because its provisions are inconsistent with those of the RAF Act relating to prescription. Section 23 of the RAF Act was intended to be fully comprehensive on the subject of claims for compensation under the RAF Act and was intended to exhaust its subject matter. The High Court was therefore correct in upholding the special plea of prescription."[9]

Having regard to Mr Jacobs' impecunious circumstances, the Supreme Court of Appeal made no order for costs.

[8] Relying on *Mdeyide II*,[10] the Supreme Court of Appeal held that Mr Jacobs' situation should have been managed by detaining him timeously in terms of mental health legislation or by appointing a curator ad litem to institute his claims within the prescribed period. This, it said, would have suspended the running of prescription in terms of section 23(2)(c) of the RAF Act.[11]

[9] However, the picture of poverty and illiteracy painted in *Mdeyide II* militates against the likelihood of people with disabilities being able to help themselves, or being helped by others, to prevent their claims from prescribing. Hence, this appeal against the judgment of the Supreme Court of Appeal is as much about restoring the human dignity of people with disabilities as it is about compensating them financially.

[9] *Phillipa Susan van Zyl N.O. v Road Accident Fu*nd [2020] ZASCA 51; 2020 (4) SA 503 (SCA) (Supreme Court of Appeal judgment) at paras 33-4.

[10] *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) (*Mdeyide II*).

[11] Supreme Court of Appeal judgment above n 9 at para 33.

*Jurisdiction*

[10] This matter involves the interpretation of the Prescription Act and the RAF Act and their intersection with sections 34[12] and 39(2)[13] of the Constitution. The right to dignity of the affected persons is also in issue.[14] There is some debate as to whether the matter at hand engages this Court's jurisdiction on the basis that the questions that arise may not be novel and may have already been decided. This is because this Court was faced with a similar challenge in *Mdeyide II*. On the facts, Mr Mdeyide was blind and illiterate, but not mentally incapacitated. He was unaware of the law. Two years and six months before his claim prescribed, he found out that he could claim against the RAF. Unlike Mr Jacobs, Mr Mdeyide was aware of his rights before his claim prescribed. Consequently, in *Mdeyide II*, this Court limited the issues it had to decide to whether section 12(3) of the Prescription Act applied to claims under section 23(1) of the RAF Act, by virtue of section 16 of the Prescription Act.[15] It answered that

[12] Section 34 of the Constitution reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[13] Section 39 of the Constitution provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
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> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[14] Section 10 of the Constitution. See also *Mdeyide II* above n 10 at paras 4, 6, 63, 125, 128 and 139.

[15] *Mdeyide II* id at paras 41, 46 and 52. Section 16 of the Prescription Act reads as follows:

> "(1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.
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> (2) The provisions of any law—
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> (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or

question in the negative. This case is about the application of section 13(1) of the Prescription Act to claims under section 23(2) of the RAF Act. Therefore, novel issues of law arise concerning the availability of protective measures for affected persons.[16] As such, this litigation transcends the interests of the parties.[17] Jurisdiction is established.

*Leave to appeal*

[11] *Mdeyide II* is the springboard for this appeal because the facts of that matter align closely with the facts presently under consideration. Both claimants were impeded by their disabilities. However, a significant difference is that Mr Mdeyide was aware that he had to lodge his claim before it prescribed. As stated above, this Court defined the issue for its determination in *Mdeyide II* to be whether section 12(3) of the Prescription Act applied to claims made under the RAF Act.[18] By distinguishing that the event triggering the running of prescription under the RAF Act was the motor vehicle accident itself, and not knowledge of the identity of the debtor, this Court found that section 12(3) of the Prescription Act and section 23(1) of the RAF Act were inconsistent with each other. It declined to apply section 12(3) to save the claim from prescribing.[19]

[12] In this case, based on its reading of *Mdeyide II*, the Supreme Court of Appeal upheld the plea of prescription. It interpreted *Mdeyide II* to mean that "the question of prescription of third party claims is solely governed by the RAF Act".[20] As described

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(b) which, if this Act had not come into operation, would have applied to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974,

shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation."

[16] *Mdeyide II* id at paras 4, 6, 63, 80, 90, 125, 128 and 139.

[17] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 26.

[18] *Mdeyide II* above n 10 at para 41.

[19] Id at paras 52-3.

[20] Supreme Court of Appeal judgment above n 9 at para 31.

more fully below, the applicant challenges that decision by asserting principally that *Mdeyide II* is distinguishable both on the facts and the law applied. Furthermore, that interpretation, she contends, excludes the affected persons from protection against prescription; it limits their rights under section 34, without having regard to section 39(2) of the Constitution. Pitched with these challenges, questions arise about whether *Mdeyide II* ousts the application of the Prescription Act for all road accident claimants, including the affected persons, and ultimately, whether the Supreme Court of Appeal's reliance on *Mdeyide II* was justified. For these reasons, this matter has reasonable prospects of success. Consequently, leave to appeal against the judgment of the Supreme Court of Appeal is granted.

*Submissions*

[13] Before this Court, the applicant claims that this matter implicates the affected persons' right of access to courts under section 34 of the Constitution. Counsel for the applicant urges us to extend the application of section 13(1)(a) of the Prescription Act to the affected persons by adopting a harmonious reading of its provision with that of section 23(2) of the RAF Act.

[14] For support, the applicant looks to Supreme Court of Appeal jurisprudence on the interplay between section 13(1)(a) of the Prescription Act and the RAF Act. By way of illustration, the applicant directs this Court to *Smith N.O.*[21] There the claimant, Mr Sibiya, who had been injured in a motor vehicle accident, was mentally impaired. Five years after the accident, Mr Sibiya's curator ad litem lodged his claim for compensation with the Multilateral Motor Vehicle Accidents Fund (MMVAF), the predecessor to the RAF. Applying section 13(1)(a) of the Prescription Act, the majority dismissed the MMVAF's special plea of prescription on the basis that Parliament would have used clearer language if it had intended to deprive road accident victims suffering from disabilities of the protection against prescription under section 13(1)(a).[22]

[21] *Road Accident Fund v Smith N.O*. [1998] ZASCA 86; 1999 (1) SA 92 (SCA) *(Smith N.O.)*.

[22] Id at 102B-F and 103D-F.

[15] Additionally, the applicant continues, in *Mdeyide I*,[23] this Court in adopting the view in *Smith N.O.*, suggested that claimants with mental disabilities, who have not been detained in a mental institution or placed under curatorship, might be protected against prescription. When the case returned to this Court in *Mdeyide II*, it was about the application of section 12(3) of the Prescription Act to RAF claims. In *Mdeyide II*, this Court was required to determine whether a creditor (Mr Mdeyide) had to know of the identity of the debtor (RAF), as set out in section 12(3) of the Prescription Act, before a cause of action arose and prescription began to run in terms of section 23(1) of the RAF Act.[24] The applicant acknowledges that this Court held that the Prescription Act and the RAF Act are inconsistent in that section 12(3) of the Prescription Act cannot apply to RAF claims.[25] Nevertheless, she perseveres with the submission that this case is about section 13(1)(a) of the Prescription Act; furthermore, *Mdeyide II* is distinguishable and does not purport to lay down a general rule on the relationship between the RAF Act and the Prescription Act.

[16] Lastly, the applicant contends that the Supreme Court of Appeal should have, but did not, consider the common law even though it was pleaded. Nor did it have regard to *Montsisi*[26] to which it was referred. *Montsisi* is the classical case on the application of the impossibility principle, albeit in the context of prescription under section 32(1) of the Police Act.[27] The applicant argues that, as Mr Jacobs is incapable of managing his own affairs, and lacks capacity or ability to institute action, the following maxims apply:

[23] *Road Accident Fund v Mdeyide (Minister of Transport Intervening)* [2007] ZACC 7; 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC) *(Mdeyide I).*

[24] *Mdeyide II* above n 10 at paras 20 and 47.

[25] Id at paras 50 and 53.

[26] *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A).

[27] 7 of 1958.

(a) *contra non valentem agere non currit praescriptio*, which means that prescription does not run against one who has no capacity to institute action (the incapacity principle); and

(b) *lex non cogit ad impossibilia*, which means that the law cannot compel one to do the impossible (the impossibility principle).

[17] In opposition, the RAF relies on *Mdeyide II*, where this Court found that the Prescription Act and the RAF Act are inconsistent.[28] The inconsistency turns on their differing approaches to when prescription starts to run. Under section 12(3) of the Prescription Act, prescription starts to run as soon as the debt is due. That is, when the creditor knows the identity of the debtor. Under section 23(1) of the RAF Act, prescription starts running as soon as the cause of action arises, which usually means the date of the accident.[29] As a result of this inconsistency, this Court held that section 12(3) of the Prescription Act cannot apply to claims under the RAF Act.

[18] This finding, continues the RAF, led this Court to "address the constitutional validity of section 23(1) of the RAF Act . . . on its wording as it stands".[30] Material to its wording is the prelude to section 23(1) of the RAF Act, namely, "[n]otwithstanding anything to the contrary in any law".[31] After finding that section 23(1) of the RAF Act is a limitation on the right of access to courts,[32] this Court found the limitation to be "proportional to its purpose and thus reasonable and justifiable".[33] The majority concluded that section 23(1) of the RAF Act was constitutional.

[19] Furthermore, the RAF contends that the purpose of the RAF Act is to regulate, specifically and separately, claims for compensation against the RAF regardless of any

[28] *Montsisi* above n 26 at para 53.

[29] Id at para 52.

[30] Id at para 54.

[31] Id at para 46.

[32] Id at para 62.

[33] Id at para 93; see para 104 for dissenting opinion.

other legal rules relating to prescription. Effectively, the RAF Act ousts the provisions of the Prescription Act and any protection offered under that legislative scheme. Additionally, section 23(2) of the RAF Act protects mentally incapacitated claimants against prescription only if they are detained in terms of mental health legislation or placed under curatorship, before the expiration of the three years specified in section 23(1) of the RAF Act. The protection found in section 13(1)(a) of the Prescription Act is, according to the RAF, inconsistent with the RAF Act.

[20] Finally, the RAF submits that the resultant exclusion of the affected persons from the protection against prescription is justified. To include them would impose intolerable economic and administrative burdens, jeopardising the RAF and those it is meant to serve. The medical history of the affected persons is not readily available and the process of obtaining it can result in delays. Removing the affected persons from the adjudication of a late claim simplifies and expedites the claim process. In *Mdeyide II*, this Court found that the expeditious, cost-effective finalisation of claims was a legitimate governmental purpose.[34] Consequently, the RAF submits that the affected persons' exclusion in section 23(2) is rationally connected to that purpose. Furthermore, people with mental disabilities typically live with family members or caregivers who are presumed to know of the RAF and its purpose. Thus, the RAF concludes, the affected persons are not removed from society, and their family members and caregivers should take the requisite steps to ensure their protection against prescription.

*Issues*

[21] Having regard to the parties' submissions above, the singular issue for determination is whether Mr Jacobs' claim against the RAF can be saved from prescription. Getting there is a journey through four questions. First, does section 23 of the RAF Act suspend the running of prescription against the affected persons? Second, is the running of prescription against a claim for damages governed exclusively

[34] Id at para 79.

by section 23 of the RAF Act, or does section 13(1) of the Prescription Act complement the RAF Act? Third, does the impossibility principle which originates in the common law suspend the running of prescription? Fourth, does the Convention on the Rights of Persons with Disabilities[35] (CRPD) apply? These questions arise against the backdrop of harsh socio-economic conditions, and the countervailing considerations of managing public finances earmarked to compensate claimants to restore to them "some quality of life and human dignity".[36] Emphatically, what this case is not about is the constitutional validity of any provisions of the RAF Act. Nor are we asked to find that *Mdeyide II* was wrongly decided.

*RAF Act*

[22] Section 17 of the RAF Act provides that the RAF is liable to compensate persons for any loss or damage suffered because of bodily injuries or death, caused by, or arising from, the driving of a motor vehicle, if such injury or death was due to the negligence or other wrongful act of the driver or owner of the motor vehicle. Section 23(1) and (2) of the RAF Act circumscribe the RAF's liability as follows:

> "(1) *Notwithstanding anything to the contrary in any law contained*, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.
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> (2) Prescription of a claim for compensation referred to in subsection (1) shall not run against—
>
> (a) a minor;
>
> (b) *any person detained as a patient in terms of any mental health legislation;* or
>
> (c) *a person under curatorship.*" (Emphasis added.)

[35] Convention on the Rights of Persons with Disabilities, 13 December 2006.

[36] *Mdeyide II* above n 10 at para 4.

[23] The italicised provisions above foreshadow the questions for consideration in this matter. The ordinary meaning of the prelude "[n]otwithstanding anything to the contrary in any law contained", is that the RAF Act supersedes any other law where claims arise for compensation under section 17.[37] Qualifying the running of prescription in subsection (1) are the exceptions in subsection (2).[38] It follows from the ordinary meaning of the text in section 23(2)(b) and (c) that the RAF Act suspends the running of prescription against persons who are either detained as patients in terms of any mental health legislation or who are under curatorship. Section 23(2) is silent about suspending prescription for the affected persons. Does the silence create a gap for this judgment to fill?

*Mdeyide II*

[24] The constitutional validity of section 23(1) of the RAF Act fell under the spotlight in *Mdeyide II*.[39] Unanimously, this Court found that prescription under section 23(1) of the RAF Act limited the right of access to courts under section 34 of the Constitution. The point of departure between the majority and minority was whether the limitation was justifiable in circumstances of a deprived socio-economic reality. The majority held that it was justifiable, but the minority concluded otherwise.

[25] However, that decision was made in respect of Mr Mdeyide, a poor, illiterate and uneducated man who, for six months after sustaining injuries in an accident, had no knowledge of his rights. Knowledge, as a function in determining prescription, was the cornerstone of the reasoning in *Mdeyide II*. Knowledge set the prescription clock ticking under the Prescription Act but was utterly irrelevant for triggering prescription under the RAF Act. This Court observed that there was a real risk that claimants may explain their lateness by relying on "their ignorance of the law".[40]

[37] Id at para 46.

[38] Id at para 17.

[39] Id at para 41.

[40] Id at para 78.

[26] For the majority, the country wide prevalence of poverty and illiteracy yielded to concerns for "the functioning and financial sustainability of a hugely important public body which renders an indispensable service to vulnerable members of society".[41] The majority concluded:

> "The RAF Act was legislated for a specific area and purpose. It limits the right of access to courts, but the importance of the purpose, the nature and extent of the limitation and the relation between the limitation and its purpose render the limitation proportional to its purpose and thus reasonable and justifiable."[42]

[27] For the minority, the absence of a knowledge requirement for prescription to start running, or provision for condonation to counter the socio-economic realities, rendered the limitation of the right of access to courts in section 23(1) of the RAF Act "too inflexible to be justified".[43]

[28] The socio-economic reality in which this Court decided *Mdeyide II* persists unmitigated. Against this reality, we must determine the right of access to courts of the affected persons.

*Prescription Act*

[29] Does the prelude "[n]otwithstanding anything to the contrary in any law contained" in section 23(1) of the RAF Act also occlude the affected persons from protection against prescription under the Prescription Act? *Mdeyide II* considered section 12(3) of the Prescription Act in relation to section 23(1) of the RAF Act. The question is: would section 13(1)(a) of the Prescription Act attract a different outcome?

[30] Section 16 of the Prescription Act states that the provisions relating to the prescription of debts—

[41] Id at para 79.

[42] Id at para 93.

[43] Id at para 141.

> "shall, save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made . . . apply to any debt arising after the commencement of this Act."

Consistency between the Prescription Act and the RAF Act, therefore, comes into play.

[31] Section 13(1)(a) of the Prescription Act provides for the completion of prescription being delayed if—

> "the creditor is a minor or is a person with a mental or intellectual disability, disorder or incapacity, or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1) . . . the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[32] The applicant submits that the prelude in section 23(1) of the RAF Act would, if section 13(1)(a) was "to the contrary" or otherwise inconsistent with section 23(2) of the RAF Act, occlude the application of section 13(1)(a) of the Prescription Act. She submits that it is not. She argues that section 13(1)(a) of the Prescription Act protects creditors who are minors, persons with mental disabilities, persons under curatorship, or persons prevented from instituting action by superior force, including any law or any order of court. Section 23(2) of the RAF Act protects minors, any person detained as a patient in terms of any mental health legislation or a person under curatorship. Viewed mathematically, section 23(2) of the RAF Act is a subset of section 13(1)(a) of the Prescription Act. Section 23(2) of the RAF Act contains some of the elements of section 13(1)(a) of the Prescription Act but is silent on others, particularly about the affected persons.

[33] The applicant perseveres, arguing that approached from these perspectives, section 13(1)(a) of the Prescription Act would not conflict with, but would instead

complement section 23(2) of the RAF Act. The provisions can be read together harmoniously. This would be a way of saving both section 23(2) of the RAF Act, if it is indeed invalid, and the affected persons from the hardships of being excluded from protection against prescription.[44]

[34] As attractive as the applicant's argument is, it skirts the *ratio* (reasoning) in *Mdeyide II*. In *Mdeyide II* this Court remarked *obiter* (in passing) that the prelude "may well be sufficient to oust the provisions of the Prescription Act".[45] However, it went on to find "further reasons why the provisions of the Prescription Act cannot apply to claims under the RAF Act":[46]

> "There is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. The Legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the very reason that the Prescription Act was not regarded as appropriate for this area. Looking for consistency in this context is a quest bound to fail."[47]

[35] This Court found inconsistency between the RAF Act and the Prescription Act.[48] As stated above, the RAF Act provides for prescription to run from the time of the accident, whereas the Prescription Act suspends prescription until the claimant knows about the claim. *Mdeyide II* jettisoned the application of the Prescription Act to claims under section 23(1) of the RAF Act.

[36] In its *obiter* remarks, this Court in *Mdeyide II* referred to the common law:

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[44] See *Telkom SA SOC Ltd v Cape Town City* [2020] ZACC 15; 2021 (1) SA 1 (CC); 2020 (10) BCLR 1283 (CC) (*Telkom SA*) at para 34 and *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* [1996] ZACC 17; 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC) (*Ex parte Speaker of the KwaZulu-Natal Provincial Legislature*) at para 24.

[45] *Mdeyide II* above n 10 at para 46.

[46] Id.

[47] Id at para 50.

[48] Id at paras 52-3.

> "[S]ection 23(1) of the RAF Act purports to apply 'notwithstanding anything to the contrary in any law'. This seems to indicate that the RAF Act was drafted with the knowledge that other provisions on prescription might exist on the statute book *and in common law*, and that the purpose of the Act is to regulate a specific and separate area, namely claims for compensation against the RAF, *regardless of any other legal rule*. This may well be sufficient to oust the provisions of the Prescription Act."[49] (Emphasis added.)

[37] The reference to the common law arose in the context of the prescription period of 30 years under the common law which was codified in the Prescription Act.[50] More about this in a bit.

[38] The Supreme Court of Appeal cannot be faulted for applying *Mdeyide II* to hold that the Prescription Act did not apply in this case. However, that is not the end of the matter. The Prescription Act is not the only "other legal rule" regulating prescription. Nor is the RAF Act the only law implicating prescription, the right of access to courts of the affected persons, their dignity and compensation.

[39] The minority in *Mdeyide II* was alive to the circumstances of the affected persons when it delved into the impact of excluding people who are incapable of knowing about the RAF.[51] If *Mdeyide II* disavowed, absolutely, lack of knowledge as a basis for suspending prescription for all classes of persons, particularly the affected persons, that would have been a step too far. Not least because it recognised that the RAF Act aims to compensate poor, disadvantaged groups.[52] Cases like those of the affected persons were not before this Court in *Mdeyide II*. Typically, treading cautiously, this Court tends to decide issues "one case at a time".[53] Consequently, it cannot be inferred,

[49] Id at para 46.

[50] Id at para 7.

[51] Id at paras 115-7.

[52] Id at para 131.

[53] Moseneke "Courage of Principle: Reflections on the 30th Anniversary of the Assassination of Ruth First" (2013) 5 *Constitutional Court Review* 91 at 101. For a useful exposition of judicial minimalism, albeit in the

without more, that *Mdeyide II* denied the affected persons protection against prescription if the common law came to their rescue.

*Interpretation*

[40] Parliament made a policy choice to exclude certain categories of claimants for efficiency as well as for other considerations as advanced by the RAF above. It had to have been aware of judgments that found succour in the Prescription Act when the RAF Act ousted the claims of vulnerable road accident victims.[54] Equally, Parliament had to have been aware that in appropriate instances, legislation can be saved from its unjust effects by the application of common law principles and maxims because an unjust law is no law at all. And if obligations are impossible to fulfil, Parliament cannot intend them to be fulfilled. Furthermore, if two reasonable interpretations of legislation are possible, a court is constitutionally mandated to "prefer the interpretation that better promotes the spirit, purport and objects of the Bill of Rights".[55] Thus, if one interpretation denies the right of access to courts, while another interpretation has the opposite effect, a court is obliged to adopt the latter meaning that promotes access to courts.

[41] This rule of interpretation is enshrined in section 39(2) of the Constitution, which provides:

context of the United States of America, see Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, Cambridge 1999).

[54] In this regard, see the discussion succinctly set out in *Smith N.O.* above n 21 at 97A-100B with reference to *Kotze N.O. v Santam Insurance Co Ltd* 1994 (1) SA 237 (C); *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd* 1990 (2) SA 693 (A) (*Standard General*); *van Rhyn N.O. v AA Onderlinge Assuransie Assosiasie BPK* 1986 (3) SA 460 (O); *Terblanche v South African Eagle Insurance Co Ltd* 1983 (2) SA 501 (N); *SA Mutual Fire & General Insurance Co Ltd v Eyberg* 1981 (4) SA 318 (A) (*Eyberg*); and *Apalamah v Santam Insurance Co Ltd* 1975 (2) SA 229 (D).

[55] Section 39(2) of the Constitution. See also *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) (*Independent Institute of Education*) at paras 1-3 and *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) at para 27.

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[56]

[42] In *Independent Institute of Education*, this Court located the task of interpretation firmly under the rubric of the Constitution when it held:

> "And this is what this application is really about – giving an interpretation to a legislative provision primarily concerned about its consistency, not with another legislation but with the Bill of Rights. This should be done in recognition of the ever-abiding guiding or instructive hand of our Constitution."[57]

[43] Consequently, in *Makate* this Court declared:

> "The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning."[58]

[44] In the following extract from *Hyundai*, this Court recognised its role in interpreting legislation in accordance with the Constitution:

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[56] In *Independent Institute of Education* id at para 2, this Court held:

> "[S]ection 39(2) of the Constitution dictates that 'when interpreting any legislation . . . every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights'. Meaning, every opportunity courts have to interpret legislation must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself."

[57] Id at para 3. See also Ngcobo J's concurrence in *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 43:

> "Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights'. Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred."

[58] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 89.

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[59]

[45] Case law on the approach to interpretation encourages harmony. In *Garvas*, this Court held that "where a legislative provision is reasonably capable of a meaning that keeps it within constitutional bounds, a court must, through the use of legitimate interpretative aids, seek to preserve that provision's constitutional validity".[60]

[46] If the consequence of the interpretative exercise results in Mr Jacobs and other affected persons not being protected against prescription, such an interpretation would seriously impede the right of vulnerable persons to access courts under section 34 of the Constitution. As social legislation, the RAF Act must be interpreted "to give the greatest possible protection and to promote the socio-economic rights of victims of motor vehicle accidents. It must be construed at all times to give access to courts and justice rather than to limit access to justice."[61] Section 23(2) of the RAF Act would be inconsistent with constitutional values if it could not be interpreted to promote the affected persons' right to access courts. To ascertain whether such an interpretation is possible, the meaning, ambiguities and uncertainties implicit within section 23(2) must be elicited and considered.

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[59] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 24.

[60] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 37.

[61] *Mbele v Road Accident Fund* [2016] ZASCA 134; 2017 (2) SA 34 (SCA) at para 17.

[47] Of "gaps, conflicts, and ambiguities" Davis and Klare observe:

> "Conventional work with legal materials often reveals them to be pliant and filled with gaps, conflicts, and ambiguities. A 'gap' is a situation of uncertainty as to which authoritative norms, if any, govern a particular legal problem."[62]

[48] Filling gaps is not new, they say. "Courts regularly fill interstitial gaps in statutes to carry out the Legislature's goals and intentions."[63] Between Parliament's policy choice of excluding certain categories of people and its constitutional obligation of recognising the rights of people, particularly to dignity and access to courts, is the gap in which the rights of the affected persons fall. This gap emerges in section 23(2) of the RAF Act, because it is silent about the claims of the affected persons. To fill the gap, two tools of interpretation come into play.

[49] First, if two interpretations are possible, one that upholds the validity of legislation and the other that does not, the interpretation that upholds its validity must be preferred over the opposite.[64] Second, as mentioned above, if two interpretations are possible, one that upholds and promotes constitutional rights and values and another that does not, recognising constitutional rights must be preferred over the opposite.[65] To bridge this gap, the principles of justice and natural law offer themselves. These

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[62] Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *South African Journal on Human Rights* 403 at 436-7. See also at 437, the description of "a conflict" and "an ambiguity":

> "A 'conflict' is a situation in which two or more conflicting lines of authority can be shown by respectable legal argument to govern a problem. An 'ambiguity' is a situation of uncertainty as to the meaning and/or application of a norm."

[63] Id at 422.

[64] For legislation to be valid, it must be consistent with the Constitution. Section 2 of the Constitution provides that law which is inconsistent with the Constitution is invalid. See for instance *Investigating Directorate: Serious Economic Offences* above n 59 at para 23, where this Court held that "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section". See also *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 20 where this Court stated that—

> "when the constitutionality of legislation is challenged, a court ought first to determine whether, through 'the application of all legitimate interpretive aids', the impugned legislation is capable of being read in a manner that is constitutionally compliant."

[65] See [40] above, specifically fn 55.

principles are more than aids to interpretation. As the authorities cited below will show, they are fundamental principles of equity, fairness and reasonableness that infuse constitutions, including our own, and international law. If applying principles of natural justice to bridge the gap in section 23(2) of the RAF Act would strike a path to giving the affected persons access to their rights to dignity and to the courts, then that is the course to pursue.

*The impossibility principle*

[50] Counsel for the applicant urged us to apply the common law principles that "no one can do the impossible" and that "prescription does not run against one who has no capacity to institute action". Both originate in the principles of natural justice,[66] which "is part of the common law".[67] These principles are consistently applied by our courts. However, not every principle of natural justice necessarily finds application in our Courts.[68] Ordinarily they would find easy application in a matter such as this where

[66] See *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 75, where this principle was stated to derive from the principles of justice and equity which underlie the common law. See also Campbell's translation of de Groot *On the Law of War and Peace* (Batoche Books, Ontario 2001) at 107, where de Groot states, in his writings on the law of nature, that "[w]e have said to do all he can: for no one is bound to an impossibility".

[67] See the majority and the minority judgments in *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 74-5 (quoted below) and paras 187-190.

[68] Id at paras 74-5:

> "The applicant argues that the dismissal falls to be reviewed and set aside on the grounds of procedural unfairness. The gist of this contention is that nothing in section 209(2) expressly excludes the common law right on the part of the head of the Agency to be heard before dismissal. For this proposition the applicant relied on the seminal passage to be found in *Administrator, Transvaal v Traub*:
>
> > 'The maxim [*audi alteram partem*] expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter . . .), unless the statute expressly or by implication indicates the contrary.'
>
> It is so that the *audi* principle or the right to be heard, which is derived from tenets of natural justice, is part of the common law. It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision. It was recognised in *Zenzile* that the power to dismiss must ordinarily be constrained by the requirement of procedural fairness, which incorporates the right to be heard ahead of an adverse decision. In my view, however, the special legal relationship that obtains between the President as head of the national Executive, on the one hand, and the Director-General of an intelligence agency, on the other, is clearly distinguishable from the considerations relied upon in *Zenzile*. One important distinguishing feature is that the

compliance with the provisions is naturally impossible for the affected persons. The difficulty arises when one considers the prelude to section 23(1) of the RAF Act. Does the prelude to section 23(1), namely, "[n]otwithstanding anything to the contrary in any law" exclude the application of the impossibility principle? A formal, textual interpretation of this section may suggest an affirmative response. A response in the affirmative presupposes that the impossibility principle is no more than "any law".

[51] The impossibility principle was recognised, in this Court and others,[69] as the route to take to excuse non-compliance with the impossible. Its acceptance in South Africa is not at issue; only its status and whether it can be successfully and implicitly excluded by section 23(1) of the RAF Act. Before we can delve any further, we are enjoined to consider whether the impossibility principle is distinguishable from "any law".

[52] The impossibility principle originates as a rule of natural law and justice.[70] Of natural justice, Finnis writes:

> "Principles of this sort would hold good, as principles, however extensively they were overlooked, misapplied, or defied in practical thinking, and however little they were recognised by those who reflectively theorise about human thinking. That is to say, they would 'hold good' just as mathematical principles of accounting 'hold good' even when, as in the medieval banking community, they are unknown or misunderstood."[71]

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power to dismiss is an executive function that derives from the Constitution and national legislation." (Footnotes omitted.)

[69] *Montsisi* above n 26 and *Barkhuizen* above n 66.

[70] See for instance Davitt "Law as Means to End" (1960) 14 *Vanderbilt Law Review* 65 at 68-9, where Davitt states, in his study of the writings of Aquinas that—

> "[t]he content of law for Aquinas is, in general, justice or that which is just. . . . [I]t may be distributive justice which should exist between those who govern and the governed concerning the administration of the common good; for instance, benefits such as social security . . . . *Implicit in the concept of a just law*, then, is its necessity for the common welfare and its *possibility of fulfilment by the people*." (Emphasis added.)

[71] Finnis *Natural Law and Natural Rights* 2 ed (Oxford University Press Incorporated, New York 2011) at 24.

[53] Grounded in nature, science and reality, the impossibility principle is an extension of logic. Like Einstein's laws of gravity and Pythagoras' theorem, the impossibility principle enjoys a natural durability. Fundamental to the impossibility principle is an awareness of the human condition, our capacities and, indeed, possibilities. The impossibility principle flourishes because it distinguishes rationality, logic and reasonableness from the opposite. It extricates what is always reasonable from what is reasonable in certain circumstances.[72] Drawing on the writings of Aquinas, Davitt writes:

> "The construction that a judge will give to a piece of legislation should be guided by humane discretion, because the best of enactments can not possibly include all the imaginable cases that could arise under it. Hence, where a literal construction of a statute would work harsh injustice in individual cases, the judge's decision should . . . . be according to equity – the intention of the law."[73]

[54] For a law to be applied as law, compliance must be possible. Conversely and by necessary implication, a law which is impossible to comply with cannot be applied as law. It is this which sets the impossibility principle apart from other principles of the common law. Finnis embraced the impossibility principle when he distinguished between "acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered".[74] The impossibility principle would apply not only to tasks "which are absolutely impossible but tasks which, in the circumstances, are not reasonably capable of performance".[75]

[55] This case is much narrower. It concerns the absolute impossibility to perform tasks. The impossibility is determined by objective conditions, by science, nature and reality. Determining impossibility in this instance is not an exercise of discretion

[72] Id at 23.

[73] Davitt above n 70 at 72.

[74] Finnis above n 71 at 23.

[75] *Winsor v Dove* 1951 (4) SA 42 (N) at 45H.

informed by subjective opinions and world views. It is this condition that distinguishes the impossibility principle from "any law". In turn, it is impossibility that informs incapacity in the context of this case.

[56] Together, the impossibility principle partners with the incapacity principle to beg the question: how does one distinguish just from unjust law? Writing from his jail in Birmingham, Martin Luther King Jr declared that—

> "[a]ny law that uplifts human personality is just. Any law that degrades human personality is unjust."[76]

[57] The exposition above brings the impossibility principle squarely within the aspirations espoused in the Constitution, the preamble to which promises to "[i]mprove the quality of life of all citizens and free the potential of each person". Drawing on the universality of human rights espoused in several international instruments, the *Certification* judgment iterates their inalienable qualities and how they might work for our democracy:

> "The method the drafters of the Constitutional Principles adopted to give content to the Bill of Rights was to refer to 'all universally accepted fundamental rights, freedoms and civil liberties'. There are two components to this: 'fundamental rights, freedoms and civil liberties' and 'universally accepted'.
>
> The phrase 'fundamental rights, freedoms and civil liberties' should not be broken down into separate words and examined in isolation. Each word does bear a meaning, but the phrase as a whole conveys a composite idea that is firmly established in human rights jurisprudence. What the drafters had in mind were those rights and freedoms recognised in open and democratic societies as being the *inalienable entitlements of human beings*. Viewed in that light one should not read 'fundamental', 'rights', 'freedoms' and 'civil liberties' disjunctively. There is of course *no finite list of such rights and freedoms.* Even among democratic societies what is recognised as fundamental rights and freedoms varies in both subject and formulation from country

[76] King Jr "Letter from a Birmingham Jail" African Studies Center – University of Pennsylvania (16 April 1963), available at https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

> to country, from constitution to constitution, and from time to time. For that reason, the drafters qualified the phrase by the words 'universally accepted'."[77] (Emphasis added.)

[58] The rights to human dignity and access to courts are engaged in the case of the affected persons. If the impossibility principle can be used to provide equitable relief in this instance, the prelude to section 23(1) cannot implicitly exclude this relief. This is because the impossibility principle is distinguishable from "any law"; it is, instead, right reason to which all law aspires. It lives through expressions of public policy and the principles of equity and fairness. To conclude that the preamble to section 23(1) implicitly excludes the application of the impossibility principle would be a perversion of justice. A legislative provision seeking to exclude the precepts of the impossibility principle would have to do so explicitly and constitutionally. Without an express exclusion, an interpretation that favours an implicit exclusion would conflict with the Constitution.

[59] Against this backdrop, the impossibility principle flourishes.[78] Variations of the concept of impossibility, like *nemo tenetur ad impossibilia* (nobody must keep a commitment to do impossible things) and *impotentia excusat legem* (impossibility excuses the law), are related and frequently interlinked concepts, emanating from the underlying principles of not only justice and equity, but also science, reality, reasonableness and fairness which suffuse our legal system.[79]

[60] The impossibility principle is used to neutralise partial impossibility or over and under inclusiveness of rules.[80] For example, it may be applied to a rule which states "[s]ons and daughters must obey their own parents" – a rule which, self-evidently,

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[77] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification* judgment) at paras 49-50.

[78] *Administrator, Cape v Ntshwaqela* [1989] ZASCA 167; 1990 (1) SA 705 (A) (*Ntshwaqela*) at 720C-H.

[79] *Gassner N.O. v Minister of Law and Order* 1995 (1) SA 322 (C) at 326A-C.

[80] Zorzetto "Thinking of Impossibility in Following Legal Norms: Some Brief Comments about Bartosz Brożek's Rule-Following" (2013) 20 *Journal for Constitutional Theory and Philosophy of Law* 47 at 58-9.

cannot be applied to orphans.[81] Rules may prescribe conduct to a class of persons which, while possible for some, may be impossible for a sub-class to perform.[82] In contrast, in this case, section 23(2) of the RAF Act is underinclusive of the rights of the affected persons.

*Case law*

[61] In the apex court in India, the impossibility principle and similar legal maxims[83] were recognised to mean that, where law creates duties that a party is unable to perform, and the party has no remedy, the law will excuse him.[84] India is not alone in applying these maxims.

[62] In South Africa, the impossibility principle has its roots in pre-democracy jurisprudence. When the Legislature exercises statutory powers, the courts will presume that the Legislature required the principles of natural justice to be observed.[85] Referring to another impossibility principle,[86] the Appellate Division acknowledged:

> "The law itself and the administration of it . . . must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."[87]

[63] In *Montsisi*, the Appellate Division applied the impossibility principle to prescription of claims under section 32(1) of the Police Act. Under section 6 of the

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[81] Id.

[82] Id at 58.

[83] Including "*impotentia excusat legim*" and "*neon tenatur ad impossibilia*".

[84] *Cochin State Power and Light Corporation Ltd v State of Kerala* 1965 AIR 1688; 1965 SCR (3) 187 cited in *Inter College v The State of Uttar Pradesh, India* (6 January, 2006) at paras 30-1.

[85] Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 221.

[86] Specifically "*nemo tenetur ad impossibilia*" (nobody must keep a commitment to do impossible things).

[87] *Ntshwaqela* above n 78 at 720F with reference to Broom and Kersley (ed) *Broom's Legal Maxims* 10 ed (Sweet & Maxwell, London 1939) at 162.

Terrorism Act,[88] political detainees were held *incommunicado* (without access to family and lawyers).[89] Consequently, lodging a claim for damages for assaults by the police during detention within the stringent six-months prescribed in the Police Act was impossible for as long as the conditions of detention persisted.

[64] The Court in *Montsisi* observed that, framed in general terms without any technical limitations, the language of the impossibility principle is wide enough to excuse any non-compliance with a legal requirement when compliance is impossible.[90] The principle served simply to ensure that people are not punished or made to suffer any disability or disadvantage merely because it was impossible for them to comply with some legal requirement through no fault of their own.[91] *Montsisi* held that—

> "[t]he proper approach is firstly to ask whether the appellant has a right; secondly, to ask whether before the appellant can enforce that right he has an obligation and, thirdly, to ask whether the performance of that obligation has been rendered impossible, owing to no fault of the appellant. If the answers to these three questions are in the affirmative, the appellant's non-compliance with his obligation during the period of his involuntary disability must be excused."[92]

[65] In light of the long-standing common law authorities,[93] the Court held that the impossibility principle excused the failure of the appellant to comply strictly with the

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[88] 83 of 1967.

[89] Section 6(6) of the Terrorism Act.

[90] *Montsisi* above n 26 at 623G.

[91] Id at 624D-F.

[92] Id at 626G-H.

[93] Id at 623H-624A-D citing Voet *Commentarius ad Pandectas* (1698) Trans: Gane (Butterworth, Durban 1955-8) at 434 and 782; Lee *An Introduction to Roman Dutch Law* 3 ed (Oxford University Press, Oxford 1953) at 268 and 284; Moyle *Imperatoris Iustiniani Institutiones, Libri Quattuor* 5 ed (Oxford University Press, Oxford 1931) at 411; Sohm *Institutes of Roman Law* 3 ed (Clarendon Press, Oxford 1907) at 439; Scott *The Civil Law* (Central Trust Co, Cincinnati 1932) wherein Scott provides translations for works including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo at D 45.1.23l; D 45.1.137(6); D 19.2.33; D 46.3.107; D 50.17.185; Burchell and Hunt *South African Criminal Law and Procedure* 2 ed (Juta & Co Ltd, Cape Town 1970) at 352-4; Snyman *Strafreg* (Butterworth, Durban 1981) at 102-4; Joubert *The Law of South Africa* (Butterworth, Durban 1976) at paras 55-9; *R v Mohammed* 1938 AD 30; *S v Moeng* 1977 (3) SA 986; *Bayley v Harwood* 1954 (3) SA at 503; *Rex v Hargovan* 1948 (1) SA at 770 (*Hargovan*); *R v Jetha* 1929 NPD 91; *R v De Jager* 1917 CPD 558; *R v Mostert* 1915 CPD 266; and *Goldberg v Nante* 1903 TH 150.

provisions of section 32 of the Police Act.[94] It held that where – because of *incommunicado* detention under section 6 of the Terrorism Act – it was impossible for a detainee to comply with the requirements of giving written notice of a contemplated action as prescribed by section 32(1) of the Police Act, the provision would not apply for as long as the detainee remained detained.[95]

[66] *Montsisi* is direct authority supporting the application of the principle which prevents time limits from running against litigants where they, due to no fault of their own, find it impossible to comply with time limits set by statute for the prosecution of a claim.[96] The principle evolved to apply "in general to all statutory enactments which may require compliance with an impossible condition or provision".[97] It applies in both civil and criminal cases. In *Gray N.O.*, where there was proof that the original will was lost, the Court did not insist on the production of the original document because that would be impossible and "would frustrate the true intention of the Legislature".[98] The principles set out in *Gassner N.O.* were applied in *Moosa* to hold that the principle "operates to excuse compliance with the provisions of section 35 of the KwaZulu Police Act".[99] However, the High Court went on to caution that the principle "operates to excuse compliance with the section only for so long as the impossibility lasts".[100]

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[94] Section 32(1) of the Police Act provided:

> "Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

[95] See also *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* [2004] ZASCA 38; 2004 (2) SACR 208 (SCA) at para 26 fn 31.

[96] *Montsisi* above n 26 at 624H and 625H-626H.

[97] *Gassner N.O.* above n 79 at 325I.

[98] *The Master v Gray, N.O.* 1958 (3) SA 524 (C) (*Gray N.O.)* at 528C.

[99] *Moosa v Minister of Police, KwaZulu* 1995 (4) SA 769 (D) at 773B.

[100] Id at 773D-E.

[67] In road accident cases, the application of the incapacity principle was already part of our jurisprudence by 1963, if not before.[101] In *Yu Kwam*, it was emphasised that although the principles of prescription were discussed by numerous Roman Dutch writers who were "not in complete agreement on all aspects . . . one principle in particular seems to have been universally accepted, namely that prescription did not run against a minor or other person under disability during such disability".[102]

[68] Similarly, in relation to the predecessor to the RAF Act, the Supreme Court of Appeal recognised in *Smith N.O.* the presumption that Parliament will not be taken to have overridden the common law protections afforded to affected persons, such as Mr Jacobs.[103] *Smith N.O.* reinforced the common law incapacity principle, asserting that if the Legislature had intended to deprive persons with mental and other disabilities, who had been protected from the running of prescription under the long-standing common law doctrine, it would have used clearer language than that which was used.[104] The application of these common law principles cannot be easily overridden. Rather, Farlam AJA remarked that Parliament would need to expressly and unequivocally remove the protections they afford.[105] The majority rejected the inference that Parliament would have legislated "the unjust intent contended for by the [MMVAF]".[106] Such an interpretation would be "profoundly unjust. It is one that is to be avoided by the application of the presumption against unjust legislative intent."[107] Consequently, the Supreme Court of Appeal concluded that the protection of section 13(1)(a) of the Prescription Act was available to persons with mental disabilities who had instituted claims against the MMVAF.

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[101] *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) (*Yu Kwam*).

[102] Id at 773F.

[103] *Smith N.O.* above n 21 at 102B-G.

[104] Id at 102B-D.

[105] Id at 102G-H.

[106] Id at 103D.

[107] Id at 102E.

[69] After *Smith N.O.* there was *Smith*, a judgment which also presented compelling reasoning.[108] The Supreme Court of Appeal held that non-compliance with the erstwhile regulations regarding notice to the RAF of an accident in a "hit and run" case did not mean that there was no claim, but rather that a claim existed, enforceable at the instance of the RAF.[109] Importantly, the regulation served "to protect the Fund against fraudulent and other non-verifiable claims – not to provide it with a technical defence".[110]

[70] In another action against the RAF, the High Court cautioned against ignoring the impossibility principle for it risks violating the maxim "*ubi jus ibi remedium*" (where there is a right, there is a remedy).[111] In passing, *Mdeyide I* embraced the impossibility principle, subject to the claimant proving that it was impossible for him to comply with the RAF Act.[112]

[71] The High Court in *van Rooyen* concluded that *Mdeyide II* did not overrule *Smith N.O.* "more so because those, in my view obvious examples [specifically, persons suffering from mental disabilities] were not even referred to, let alone examined by the Constitutional Court in *Mdeyide* [*II*]".[113] The Court held that under the common law, prescription did not run at all against persons with disabilities. This was because the policy underpinning the common law was that prescription did not run against a person who had no capacity to institute action.[114] In dismissing the RAF's special plea of prescription, the Court recognised that "even under the pre-democratic dispensation, the failure of a person to do the impossible could constitute an answer to a defence that the plaintiff's action was time-barred".[115]

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[108] *Road Accident Fund v Smith* [2006] ZASCA 172; 2007 (1) SA 172 (SCA) (*Smith*).

[109] Id at paras 9-10.

[110] Id at para 8.

[111] *Strauss v RAF* 2006 (1) SA 70 (T) at paras 14-5.

[112] *Mdeyide I* above n 23 at para 40.

[113] *Van Rooyen obo Motau v Road Accident Fund* 2019 (2) SA 290 (GP) (*van Rooyen*) at paras 18-9.

[114] Id at para 8.

[115] Id at para 17.

[72] However, in this case, the Supreme Court of Appeal held that *van Rooyen* "was clearly wrong to the extent that it sought to create an exception, in respect of incapacitated persons, to the rule that the Prescription Act and the RAF Act are inconsistent and that the question of prescription of third party claims is solely governed by the RAF Act".[116] It declined to take the route of section 39(2) of the Constitution because, in its view, "[s]ection 23 of the RAF Act does not affect mentally incapacitated persons' right of access to a court if they are detained as patients in terms of the mental health legislation or are under curatorship".[117] It is this aspect of the reasoning of the Supreme Court of Appeal that unravels its decision.

[73] Had the Supreme Court of Appeal considered *Montsisi*, it would have become clear that Mr Jacobs could not be expected to do the impossible, that is, manage his "timeous detention . . . in terms of the mental health legislation and/or by the appointment of a curator ad litem who could have instituted his claims timeously".[118] The Supreme Court of Appeal erred in omitting to apply *Montsisi*, to which it was referred.

[74] In *Barkhuizen*, this Court acknowledged that the impossibility principle "derives from the principles of justice and equity that underlie the common law".[119] Over the years the impossibility principle has become entrenched in our law. It has been applied to avoid or ameliorate "the guillotine-like effect of an expiry period"[120] in time bar provisions in statutes. This Court held further that, "[t]he [impossibility] principle enunciated in *Montsisi* has since been recognised and, where appropriate, applied".[121] To confirm that we have one system of law, this Court went on to add:

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[116] Supreme Court of Appeal judgment above n 9 at para 31.

[117] Id at para 33.

[118] Id.

[119] *Barkhuizen* above n 66 at para 75.

[120] *Pizani v Minister of Defence* [1987] ZASCA 73; 1987 (4) SA 592 (A) at 602G, citing *Montsisi* above n 26.

[121] *Barkhuizen* above n 66 at para 78.

> "Under our legal order all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law . . . is no exception."[122]

[75] *Montsisi* and now *Barkhuizen* authoritatively support the application of this principle. It is clear that the principle operates to ensure that, where a litigant, due to no fault of her or his own, finds it impossible to comply with time limits set by statute for the prosecution of a claim, the time limits do not run against her or him.[123]

[76] As a defence against a plea of prescription, impossibility was recognised under apartheid to protect detainees, who were another category of vulnerable persons. Legally conceived as a defence then, it must be fortified now in a constitutional democracy protected by a Bill of Rights, which promotes the right of access to courts. Additionally, as a person with a mental disability, Mr Jacobs lacks the legal and physical capacity to prosecute his claim personally.[124] Mr Jacobs could not be compelled to lodge a claim with the RAF as prescription did not run until a court had appointed the applicant to represent him.

[77] Consequently, I find that the prelude to section 23(1) of the RAF Act cannot occlude the impossibility principle because for any law to be just, including the RAF Act, it must be underpinned by justice, equity and reasonableness. If this were not so, then the validity of the RAF Act would come into question. So might the State's liability for compliance with its international obligations under the CRPD. Neither of these two issues are before us, but this does not detract from this Court's duty to interpret legislation consistently with international law. Doing so in this instance fortifies the application of the impossibility principle and spares this Court from

[122] Id at para 35.

[123] See *Montsisi* above n 26 at 624C-H where this principle is discussed.

[124] *Smith N.O.* above n 21 at 101I-102A-B.

enquiring into the validity of sections 23(1) and (2)(b) and (c) of the RAF Act. To this interpretation I now turn.

*Interpretation in accordance with international law*

[78] When interpreting sections 23(1) and 23(2)(b) and (c) of the RAF Act, this Court must prefer a reasonable interpretation: one that is consistent rather than inconsistent with international law, as mandated under section 233 of the Constitution.[125]

[79] On 17 February 2021, the Chief Justice issued directions for further submissions on, amongst other things, the following:

> "On 30 November 2007, South Africa ratified the Convention on the Rights of Persons with Disabilities (CRPD) adopted by the United Nations. Does the CRPD apply in this case?"

[80] The applicant welcomed the reference to the CRPD while the RAF resisted it, primarily because of inadequate notice to prepare for and prove its application by having the Minister testify. As neither the content of the CRPD nor its ratification was disputed, the CRPD will be considered. Furthermore, since South Africa has duly signed and ratified the CRPD, it is binding as a matter of international law, imposing obligations on South Africa in the international sphere.

[81] To give effect to its international and constitutional obligations, the Ministry of Social Development published its White Paper on the Rights of Persons with Disabilities.[126] It will take time for the State to implement "deliberate [and] reasonable measures"[127] to realise its obligations under section 7(2) of the Constitution to "respect,

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[125] Section 233 of the Constitution states:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[126] White Paper on the Rights of Persons with Disabilities, GN 230 *GG 39792*, 9 March 2016.

[127] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at paras 105 and 189.

protect, promote and fulfil the rights in the Bill of Rights". Whilst the legislative process takes its course, the rights of the affected persons must be determined on the available legal materials. This means testing whether the approach to interpretation adopted above[128] results in consistency of sections 23(1) and 23(2)(a) and (b) of the RAF Act with the CRPD.

[82] The overarching purpose of the CRPD is—

> "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[129]

[83] Included under the general obligations in article 4(1) are undertakings by State Parties—

> "(a) [t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention; [and]
>
> (b) [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities."

[84] Article 12(1)-(4) confers equal recognition before the law in the following terms:

> "1. State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

[128] See [40] to [49].

[129] Article 1.

> 3. State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> 4. State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law."

[85] In addition to providing support to enable people with disabilities to exercise legal capacity, the CRPD provides that State Parties must "ensure effective access to justice for persons with disabilities on an equal basis with others".[130]

[86] The application of the impossibility principle and section 39(2) of the Constitution to interpret sections 23(1) and 23(2)(b) and (c) of the RAF Act achieves consistency with the CRPD. It affords the affected persons access to courts. This interpretation enables the affected persons to exercise legal capacity, preserve their dignity and access courts under section 34 of the Constitution. Ultimately, it protects the affected persons against losing their claims for compensation to prescription. Importantly, it also saves the State, as a party to the CRPD, from claims of discrimination and abuse. Insofar as there are categories of persons with disabilities unprotected under the RAF Act, I agree with Jafta J that it would raise questions about State liability for breach of the CRPD. However, as stated above, that enquiry falls beyond the scope of this judgment. So does the validity of the RAF Act.

*Conclusion*

[87] In conclusion, this Court recognises that the Prescription Act does not apply to suspend the running of prescription under the RAF Act. However, the common law impossibility and incapacity principles apply to rescue Mr Jacobs' claim from prescribing in this instance. They also save the State from exposure to claims of violating its international obligations. To fortify protection against prescription, this

[130] Article 13.

Court interprets sections 23(1) and 23(2)(b) and (c) of the RAF Act consistently with the CRPD.

[88] This approach simultaneously recognises the validity of the RAF Act and the rights of the affected persons to human dignity and to access courts, without over-burdening the RAF. As the RAF pointed out, people with mental incapacities who are assisted by caregivers are usually able to lodge claims before they expire. Therefore, the affected persons who are unassisted would be few and far between. Nevertheless, they would also be the most marginalised. While it may not be easy to gain access to the records of persons with mental incapacities, this is a small inconvenience for the RAF to bear comparatively to the huge burden on the affected persons if their claims prescribe. This is required of the RAF, as a social institution, to accommodate the affected persons. After all, this is what it means to be a caring society.

*Costs*

[89] The applicant has succeeded and should be awarded costs in the High Court, the Supreme Court of Appeal and this Court.

*Order*

[90] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following order:
   "The special plea of prescription is dismissed with costs."
4. The respondent must pay the applicant's costs in the High Court, the Supreme Court of Appeal and this Court, with the costs in this Court to include the costs of two counsel.

JAFTA J (Madlanga J, Majiedt J, Mhlantla J, Tlaletsi AJ and Tshiqi J concurring):

[91] I have had the benefit of reading the judgment of my colleague Pillay AJ (first judgment). I agree with the order proposed in the first judgment but for different reasons.

[92] I have difficulty in appreciating the role played by the CRPD in the interpretation of the relevant provision of the RAF Act and the link between that interpretation and the common law maxim *lex non cogit ad impossibilia*.[131]

[93] But I agree with the first judgment that a statutory provision which affects any of the rights in the Bill of Rights must be construed in accordance with the injunction in section 39(2) of the Constitution. However, there is a limitation to that approach. A provision may be given a meaning that promotes the objects of the Bill of Rights if its text is reasonably capable of such meaning. The language used in the provision must not be strained in order to achieve a meaning that promotes the Bill's objects.[132]

[94] I also agree that the Prescription Act is not incorporated into the RAF Act through section 23 of the latter Act. In fact, this Court in *Mdeyide II*[133] came to the conclusion that the Prescription Act does not apply to matters governed by the RAF Act.

[95] At the heart of this matter lies the question whether Mr Jacobs' claim has prescribed because it was instituted more than three years from the date of the accident from which it arose. The three years' limitation on the period within which he could

[131] First judgment at [86].

[132] *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at paras 33 and 97-8.

[133] *Mdeyide II* above n 10 at para 50.

institute his claim is imposed by section 23 of the RAF Act. Relying on this provision, the RAF raised a special plea against Mr Jacobs' claim. It is that special plea which was upheld by the Supreme Court of Appeal and against whose order Mr Jacobs is now appealing.

[96] The facts are not in dispute. It is accepted that the claim was instituted after a period of three years had lapsed from the date on which the cause of action arose. But what is in dispute is whether, in the special circumstances of this matter, the claim had become prescribed. Those circumstances relate to Mr Jacobs' state of mind. Since the accident Mr Jacobs had become a person of unsound mind. This means that he could not institute legal proceedings on his own because he lacked legal standing and could not instruct others to do so on his behalf due to his mental condition.

[97] Until a curatrix ad litem was appointed for him in November 2017, no legal proceedings could be instituted on his behalf. Following her appointment, the curatrix instituted a damages action on his behalf for the injuries he sustained in the accident that occurred in May 2010, hence the special plea by the RAF.

[98] As the RAF relied on section 23 of the RAF Act for the defence of prescription, we must interpret that provision to determine whether Mr Jacobs' claim has indeed prescribed. The section is divided into five subsections and subsections (2) to (5) address exceptions to the extinctive prescription imposed by the provision in subsection (1). The exceptions in subsections (4) and (5) are not relevant to his case.[134] Section 23 provides:

[134] Section 23(4) and (5) provides:

> "(4) Notwithstanding section 36 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), any right under subsection (1)(b) of that section to recover an amount which under the said Act is required to be paid to a third party in circumstances other than those mentioned in section 18(2) of this Act shall for the purposes of subsections (1) and (3) be deemed to be a right to claim compensation under section 17 of this Act arising on the same date as the cause of action of such third party under the said section 17: Provided that if the recovery of any such amount has been debarred by virtue of this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount concerned.

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

(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against—

(a) a minor;

(b) any person detained as a patient in terms of any mental health legislation; or

(c) a person under curatorship.

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose."

[99] Textually, section 23(1) tells us that the right to claim compensation from the RAF in respect of loss or damage arising from the driving of a motor vehicle, becomes prescribed on the expiry of three years from the date of the accident. In other words, such claim must be lodged within a period of three years if the identity of the driver or owner of the offending vehicle was established. Prescription starts running under the section from the date of the accident, regardless of any provision to the contrary in any other law.

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(5) Notwithstanding section 149 of the Defence Act, 1957 (Act 44 of 1957), or of a similarly worded section of another Act of Parliament governing the South African National Defence Force, any right under the said sections to recover an amount which under the said legislation is required to be paid to a third party in circumstances other than those mentioned in section 18(3), shall for the purposes of subsections (1) and (3) be deemed to be a right to claim compensation under section 17 of this Act arising on the same date as the cause of action of such third party under the said section 17: Provided that if the recovery of any such amount has been debarred by virtue of this subsection, any compensation thereafter awarded to the third party under this Act shall be reduced by the amount concerned."

[100] However, section 23(1) has internal exceptions and these are to be found in subsections (2) and (3). Subsection (2) declares that the prescription provided for in subsection (1) shall not run against persons listed in it. These are (a) minors; (b) persons detained as patients under mental health legislation; and (c) persons under curatorship. But significantly, the exceptions in (b) and (c) must have occurred before the expiry of three years from the date of the accident for them to interrupt the running of prescription or before the date of the accident, for them to prevent prescription from commencing to run.

[101] While subsection (2) prevents and stops prescription from running against persons mentioned in it, subsection (3) extends the prescription period by a further two years in respect of certain claims. These are claims lodged in terms of section 17(4) or section 24 of the RAF Act. These claims become prescribed upon the expiry of five years from the date of the accident. Mr Jacobs did not lodge his claim under section 17(4) or section 24. Nor was he one of the persons listed in subsection (2). Therefore, the exceptions to the rule that where the driver or owner of the offending vehicle is known, a claim for compensation prescribes within three years, did not apply to him.

[102] On a literal interpretation of section 23, Mr Jacobs' claim had become prescribed. The decision of the Supreme Court of Appeal was based on that interpretation. That Court first determined that the Prescription Act could not save Mr Jacobs' claim from prescription because that Act did not apply to the present matter. The Court proceeded to point out that since Mr Jacobs did not fall within the exceptions in section 23(2) and (3), his claim had prescribed upon the expiry of the three years from the date on which the cause of action arose. That was the date of the accident.

[103] With regard to the contention that section 23 should be interpreted in a manner that promotes the objects of the Bill of Rights, the Supreme Court of Appeal held:

> "Section 23 of RAF Act does not affect mentally incapacitated persons' right of access to a court if they are detained as patients in terms of the mental-health legislation or are under curatorship. Prescription of the claims of such persons is suspended for the duration of their detention as patients in terms of any mental-health legislation, if they were detained, or, if they were placed under curatorship, for the duration of such curatorship. In the present case the incidence of prescription should have been managed by the timeous detention of Mr Jacobs in terms of the mental-health legislation and/or by the appointment of a *curator ad litem* who could have instituted his claims timeously. This would have suspended the running of prescription in terms of s 23(2)(c) of the RAF Act. The construction that I have placed on s 23 of the RAF Act does not have the effect of preventing the dispute between the appellant and the RAF from being resolved by a court of law nor does it undermine the purpose of the RAF Act. Regrettable as this result may be, the Constitutional Court has already considered the interpretation of the RAF Act and held that claims under the Act are governed exclusively by the provisions of the said Act to the exclusion of any other law."[135]

[104] Evidently the Supreme Court of Appeal misconceived the argument. The argument was not that the interpretation advanced should promote the rights of those who qualify for an exception under section 23(1). Instead, that Court was asked to give the section a wider meaning which would promote the rights of access to court by claimants whose claims are taken to have prescribed, because for some reason they failed to institute their claims within three years. Therefore, the reason advanced by the Supreme Court of Appeal to the effect that the section "does not affect mentally incapacitated persons' right of access to a court if they are detained as patients in terms of the mental health legislation or are under curatorship", misses the point. With regard to those persons, the right of access to court needed no promotion in excess to what the provision was already providing.

[105] It was the rights of persons like Mr Jacobs which were limited and which required promotion if the language of the provision was reasonably capable of a meaning that could have brought Mr Jacobs within the ambit of those whose claims had

[135] Supreme Court of Appeal judgment above n 9 at para 33.

not prescribed. However, based on the language employed in section 23(1), it does not appear that the provision may reasonably bear a meaning that would permit persons with mental disability to pursue claims after the expiry of three years, unless they were formally detained as patients or were under curatorship. Under the section, claims which do not satisfy the exceptions it lists, become prescribed after a period of three years from the date on which the cause of action arose.

[106] It does not seem that section 23(1) might reasonably carry a meaning that is consistent with the CRPD.[136] That is because the CRPD ensures that all persons with disabilities must have "full and equal enjoyment of all human rights and fundamental freedoms"[137]. More importantly, the CRPD imposes an obligation on South Africa to make sure that all persons with disabilities enjoy "legal capacity on an equal basis with others in all aspects of life"[138]. The restricted exceptions in section 23(2) are not consistent with this injunction by the CRPD. Questions relating to liability for the breach of this international law obligation are not before us. What arose before us was whether, at the level of interpretation, section 23 was reasonably capable of a construction that was consistent with the CRPD. This is what section 233 of the Constitution requires.[139]

[107] In the notice of appeal filed in the Supreme Court of Appeal Mr Jacobs had, in addition to the contention that section 23 must be read as incorporating section 13 of the Prescription Act, raised the point that the special plea should have been dismissed on the basis of the maxim *lex non cogit ad impossibilia*. He submitted that as a result of injuries he sustained from the accident, he had become a person of unsound mind

[136] CRPD above n 35.

[137] Id at article 1.

[138] Id at article 12.

[139] Section 233 of the Constitution provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

and consequently, it was impossible for him to institute action for damages within the period prescribed by section 23.

[108] The Supreme Court of Appeal did not address this argument. There can be no gainsaying that Mr Jacobs became a person of unsound mind as a result of the accident, giving rise to his claim. Nor can it be disputed that as a consequence of his mental condition, he lost his capacity to litigate and was not in a position to initiate proceedings for the appointment of a curator to manage his affairs. Therefore, it was impossible for him to institute action before the expiry of three years from the date of the accident.

[109] Based on these facts, the question that arises is whether, despite the impossibility, Mr Jacobs' claim prescribed in May 2013, in terms of section 23(1) of the RAF Act. This requires us to determine whether the maxim *lex non cogit ad impossibilia* applies here. For if it does, the special plea should have been dismissed.

[110] Like the Prescription Act, the RAF Act recognises that there may be circumstances under which it becomes impossible for creditors to institute legal proceedings within the prescribed period. The RAF Act provides for this in the exceptions contained in section 23(2). But unlike the Prescription Act, section 23(2) affords insane persons a limited protection that is restricted to those who are admitted to a mental institution or are under curatorship. This leaves persons like Mr Jacobs in limbo. The law says that they have no legal capacity and yet section 23(1) requires that they should initiate legal proceedings before the expiry of three years.

[111] In passing section 23, Parliament could not have intended people like Mr Jacobs to do what was impossible to perform. The objective of the prescription in the section is to promote legal certainty while protecting creditors who are unable to institute legal proceedings during the prescribed period. However, the section is under-inclusive of creditors who truly need its protection. If legislation like the RAF Act itself fails to make provision for the protection of creditors who, for circumstances beyond their control, find it impossible to institute proceedings within the fixed period, the common

law comes to their rescue. This happens through the maxim *lex non cogit ad impossibilia*.

[112] However, the anterior question is whether section 23(1) excludes the operation of the maxim. The opening words of this section read: "notwithstanding anything to the contrary in any law contained". This plainly suggests that when enacting the RAF Act, Parliament was aware of the existence of other laws which regulated prescription of claims arising from motor vehicle accidents like the Prescription Act. The purpose of those opening words was to give pre-eminence to prescription imposed by section 23(1) which is subject only to the exceptions in subsections (2) and (3).

[113] This means that section 23(1) supersedes all other laws which govern prescription of the claims in question, even if those laws say something that contradicts what section 23 stipulates with regard to prescription. The section is not directed at the applicability of the maxim. On the contrary, in the provision, Parliament sought to address the difficulty arising from impossibility to institute a claim within three years from the date on which the cause of action arose. Section 23(2) excludes the running of prescription against minors and persons of unsound mind who are under curatorship or detained as patients under mental health legislation. And section 23(3) extends the period of prescription to five years for claims lodged under section 17(4)(a).

[114] To hold that the opening phrase of section 23(1) excludes the operation of the maxim is not only unsupported by its language, but also leads to a grave absurdity that could never have been contemplated by Parliament. Indeed, it would have been extraordinary for Parliament to deprive people of claims in circumstances where it was impossible to institute those claims within the prescribed period. It is a well-established principle of our law that even in the case of clear language of a statute, a court is entitled to depart from that language if its meaning would lead to an absurdity which could not have been intended by Parliament.[140]

[140] *Minister of Health N.O. v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 232.

[115] Moreover, reading the section as excluding the operation of the maxim will not only lead to an absurdity, but will also give it a meaning which is inconsistent with section 9(1) of the Constitution.[141] This section enshrines the right to equal protection and benefit of the law. For no reason section 23 if so construed, would treat Mr Jacobs differently from other claimants of unsound mind purely on the ground that he was not detained in a health institution as a patient and that he was not under curatorship. It is a principle of our law that where a statutory provision is reasonably capable of a meaning which does not lead to inconsistency with the Constitution, such meaning should be preferred over the one that is inconsistent with the Constitution.[142]

[116] I have read the judgment of my colleague Theron J (third judgment) and for obvious reasons I take issue with its paragraph 146. It holds that section 23(1) unequivocally excludes the expectation of any law which allows for a prescription period "different to that which it specifies". So far so good. But it proceeds to suggest that this statement is a basis for concluding that the relevant maxim's operation is excluded as well. This is incorrect. It is true that section 23 supersedes other laws on prescription. But it does not exclude the operation of the maxim because the maxim does not regulate prescription. It merely relieves a person from complying with the requirements of a law in circumstances where it was impossible to comply.

[117] The third judgment suggests that Parliament may exclude the operation of the maxim and implies that this was the case in respect of section 23(1). But we are not told what legitimate government purpose is to be served by a provision that requires individuals to do the impossible. No sensible Parliament would ever do that. Moreover, on that interpretation, section 23(1) would constitute a violation of section 9(1) of the Constitution.

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[141] Section 9(1) of the Constitution provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[142] *Democratic Alliance* above n 132 at para 33.

[118] Therefore, section 23(1) does not exclude the operation of the *lex non cogit ad impossibilia* maxim, applied in various decisions of our courts. In *Mtokonya* the following formulation of the principle was made:

> "According to the maxim *lex non cogit ad impossibilia*, the law does not require a person to do the impossible. If performance in terms of a particular law has been rendered impossible by circumstances over which the person with interest had no control, those circumstances are taken as a valid excuse for not complying with what such law prescribes."[143]

[119] More than 100 years before *Mtokonya*, the principle was formulated in these terms:

> "[W]hen a duty is imposed upon anyone by law, there must always be an implied condition that it is in his power to perform it. *Lex non cogit ad impossibilia* and *impotentia excusat legem* (*Coke on Littleton*) are very old maxims of law."[144]

[120] And yet four years before *Hay*, Mellish LJ had formulated the same principle in *Nichols*:

> "The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God or the Queen's enemies, the law will excuse him."[145]

[121] The formulation closest to the one in *Mtokonya* is to be found in *Craies on Statute Law*:

> "Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, *lex non cogit ad impossibilia*, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over

[143] *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at para 137.

[144] *Hay v the Divisional Council of King William's Town* (1880-1881) 1 EDC 97 at 100.

[145] Id at 104 quoting *Nichols v Marsland* (1876) 2 EXD 1 at 4.

> which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse."[146]

[122] The principle is well-established in our law and has been applied for over a century.[147] In *Montsisi,*[148] this principle was applied where a statutory provision had required that legal proceedings against the police must be commenced within a certain period, but it was impossible for the plaintiff to comply with the provision because he was in detention under a different statute. There the Court held that the maxim *lex non cogit ad impossibilia* applied and concluded that the relevant prescription did not run against such plaintiff for as long as he was detained. In simple terms the maxim means that the law may not be enforced during the period in which it is impossible to comply with its requirements, and the person excused from compliance had no control over the circumstances that rendered performance impossible.

[123] Our courts draw a distinction between impossibilities. Where an impossibility arises from conditions in a will, those conditions are regarded as *pro non scripto* (as not written).[149] If the impossibility arises from a contract, the maxim that applies is the *impossibilium nulla obligatio est* (there is no obligation to perform impossible things) and if it flows from a statute the *lex non cogit ad impossibilia* maxim applies. In *Gassner N.O.* it was stated:

> "Impossibility is pre-eminent in the law of contract on the one hand and in criminal law on the other. In the former case, however, the maxim applied is invariably *impossibilium nulla obligatio est* whereas, in the latter, it is *lex non cogit ad impossibilia*. The latter maxim is not restricted to criminal law, however, but applies in general to all statutory enactments which may require compliance with an impossible condition or provision."[150]

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[146] Craies *Craies on Statute Law* 7 ed (Sweet and Maxwell, London 1971) at 268.

[147] *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427 and *Hargovan* above n 93.

[148] *Montsisi* above n 26.

[149] Corbett et al *The Law of Succession in South Africa* 2 ed (Juta & Co, Cape Town 1980) at 129.

[150] *Gassner N.O.* above n 79 at 325I-J.

[124] It is therefore important to bear in mind the genesis of the impossibility in a given case because that determines which maxim applies. If it is a statutory condition that renders performance impossible, *lex non cogit ad impossibilia* would apply. The *pro non scripto* and the *impossibilium nulla obligatio est* maxims cannot apply to an impossible performance required by a statutory provision. Since here we are concerned with a statutory requirement, the *lex non cogit ad impossibilia* maxim applies. But the latter does not apply to impossibilities arising from wills and contracts.

[125] As it appears in *Nichols*, the *lex non cogit ad impossibilia* maxim is part of the rule of law, one of the foundational values of our Constitution. In that way the principle forms part of the Constitution.[151]

[126] By parity of reasoning, the maxim equally applies to this matter and for as long as the disability arising from Mr Jacobs' mental condition persisted, prescription did not begin to run. Under section 23(1), prescription also did not begin to run against Mr Jacobs. This is because before the curatrix was appointed, it was impossible for him to comply with the section, and upon the appointment of the curatrix prescription could not run against him because he was then placed under curatorship in terms of section 23(2).

[127] It follows that the courts below erred in upholding the special plea that was grounded on Mr Jacobs' failure to institute legal proceedings where it was clearly impossible for him to do so. For these reasons I support the order made in the first judgment.

[151] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 48.

THERON J:

*Introduction*

[128] I have had the pleasure of reading the first and second judgments. Regrettably, I am unable to agree with the reasoning and conclusion in either judgment.

[129] This matter requires a determination of whether section 23 of the RAF Act exclusively regulates the prescription of claims brought in terms of that Act. In context, this means that the sole question before this Court is whether, interpreted in accordance with section 39(2) of the Constitution, section 23 of the Act allows for the applicant's cause of action to be rescued from prescription by section 13(1)(a) of the Prescription Act or the common law principles of *contra non valentem agere non currit praescriptio* (incapacity principle) or *lex non cogit ad impossibilia* (impossibility principle). Put differently, the question is whether there is any reasonable reading of section 23 of the RAF Act in terms of which section 13(1) of the Prescription Act, or these common law principles, have application in this matter.

[130] It is trite that interpretation is a unitary process, in which the triad of text, context, and purpose are considered at once, with none having greater significance than the other.[152] This process can, of course, deliver a variety of interpretations which, to varying extents, are reasonably supported by the text, context and purpose of the impugned provision. Section 39(2) of the Constitution requires that, of the reasonable interpretations or, put differently, of the interpretations that are not unduly strained,[153]

[152] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 65; *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18; and *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) at para 25.

[153] *Hyundai* above n 59 at paras 21-3.

the one that best promotes the spirit, purport and objects of the Bill of Rights is adopted.[154]

[131] The section 39(2) inquiry therefore presupposes that, before that section is applied, a court is able to identify those interpretations which are not unduly strained. This means, of necessity, that the section 39(2) injunction can only be applied after the reasonable interpretations of a provision have been set out through the unitary process of interpretation. To hold that section 39(2) itself informs the context or purpose of a provision is to put the cart before the horse.

[132] Sections 23(1) and (2) of the RAF Act provide:

> "(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.
>
> (2) Prescription of a claim for compensation referred to in subsection (1) shall not run against—
>
> (a) a minor;
>
> (b) any person detained as a patient in terms of any mental health legislation; or
>
> (c) a person under curatorship."

[133] It is common cause that Mr Jacobs does not fall within the scope of section 23(2) of the RAF Act. It is also not in dispute that Mr Jacobs failed to lodge his claim within the time period prescribed by section 23(1).

[134] Consequently, the applicant contends that section 13(1) of the Prescription Act applies in respect of claims under the RAF Act. That section provides in relevant part:

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[154] Id.

> "(a) If the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); . . . and
>
> (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) . . . has ceased to exist,
>
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[135] Section 16(1) of the Prescription Act provides:

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

[136] Relying on a series of decisions of the erstwhile Appellate Division[155] and the Supreme Court of Appeal,[156] the applicant argues that section 13(1) of the Prescription Act is not inconsistent with section 23(1) of the RAF Act. As a result, and on the strength of section 16(1) of the Prescription Act, the applicant argues that section 13(1) protects a person in the position of Mr Jacobs from the rigours of section 23(1) of the RAF Act. The basis for this argument is this: two provisions are inconsistent if they are incapable of operating alongside each other.[157] Section 23(1)

[155] *Standard General* above n 54; *Eyberg* above n 54; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A); and *Yu Kwam* above n 101.

[156] *Smith N.O.* above n 21; *Moloi v Road Accident Fund* [2000] ZASCA 53; 2001 (3) SA 546 (SCA); and *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA).

[157] *Telkom SA* above n 44 at para 34 and *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature* above n 44 at para 24.

suspends prescription in respect of mentally disabled people who are detained in terms of mental health legislation or who are under curatorship, whereas section 13(1) extends the prescription period for all mentally disabled persons. Section 13(1) can therefore operate alongside section 23(1), if it is applied in circumstances where the section 23(2) exceptions are inapplicable.

[137] The applicant contends that the Supreme Court of Appeal erred in concluding that, because of this Court's decision in *Mdeyide II*, this argument was unsustainable. She argues that *Mdeyide II* did not lay down a general rule that the RAF Act and the Prescription Act are inconsistent. Both the first and second judgments disagree. My Sister Pillay AJ holds that the argument "skirts the ratio in *Mdeyide II*" and my Brother Jafta J holds that "this Court in *Mdeyide II* came to the conclusion that the Prescription Act does not apply to matters governed by the RAF Act". Here, I disagree with my colleagues, and agree with the applicant. *Mdeyide II* decided the narrow question of whether section 12(3) of the Prescription Act was consistent with section 23(1) of the RAF Act and whether section 23(1) was constitutional.[158] Despite sweeping statements that the RAF Act was inconsistent with the Prescription Act,[159] it was only on this narrow issue that it did, or could, render a binding decision. *Mdeyide II* is therefore not decisive of the present appeal.

[138] The difficulty with the applicant's argument, and indeed with the Supreme Court of Appeal's decision in *Smith N.O.*,[160] and the various other authorities relied upon by the applicant, lies elsewhere. In particular, the applicant, and these authorities, fail to

[158] *Mdeyide II* above n 10 at paras 41-2. By virtue of section 12(3) of the Prescription Act, the prescriptive periods laid down in that Act begin to run when the creditor, amongst other things, has knowledge of the identity of the debtor. By contrast, section 23(1) of the RAF Act provides that prescription begins to run when the cause of action arises. The Court was therefore unanimous that, in this respect, the RAF Act and Prescription Act are inconsistent, and that section 23(1) therefore prevailed. A majority of the Court went on to hold that it was constitutionally permissible for prescription under the RAF Act to run from the point when the cause of action arises rather than from when the creditor has knowledge of the identity of the debtor.

[159] For instance, in *Mdeyide II* id at para 50, Van der Westhuizen J, writing for a majority of this Court, held that:

> "The Legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the very reason that the Prescription Act was not regarded as appropriate for this area. Looking for consistency in this context is a quest bound to fail."

[160] *Smith N.O.* above n 21.

explain how the section 23(1) proviso, that it applies "[n]otwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3)", can be rendered consistent with section 13(1).

[139] Section 23(1) imposes two substantive conditions: that the relevant prescription period is three years and that prescription will begin to run when the cause of action arises. As a result, a law which provides that prescription runs from a point other than when the cause of action arises, *or that the prescription period can exceed three years*, will be contrary to section 23(1). This conclusion is fortified by the phrase "but subject to subsections (2) and (3)", which indicates that those subsections, which suspend prescription, and thus, in effect, allow for a longer prescription period than that specified in section 23(1), are *contrary* to section 23(1), but nonetheless are not excluded. Section 13(1) of the Prescription Act allows for an extension of prescription periods, and if applied to section 23(1), would therefore deliver a prescription period contrary to that section. In this way, section 13(1) of the Prescription Act is inconsistent with, and thus inapplicable to, section 23(1) of the RAF Act. Put differently, the section 23(1) proviso means that the relevant prescription period is three years, save in the circumstances detailed in section 23(2). This provision therefore cannot operate alongside section 13(1) of the Prescription Act, since the latter provision would allow prescription to run beyond the three-year period, in circumstances other than those detailed in section 23(2). For this reason, section 13(1) is "contrary to" or "inconsistent with" section 23(1),[161] and section 23(1) therefore prevails.[162]

[140] The context and purpose of section 23 deliver the same conclusion. The crucial contextual indicator is section 13(1) of the Prescription Act itself.[163] As I have

[161] *Telkom SA* above n 44 at para 34 and *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature* above n 44 at para 24. I regard "contrary" and "inconsistent" as synonymous for present purposes.

[162] Section 16(1) of the Prescription Act.

[163] In this case it is manifest that the Prescription Act is a crucial part of the context within which section 23(1) of the RAF Act must be interpreted. In any event, the general principle that other statutes inform the context in which a statutory provision must be interpreted has long been confirmed in our jurisprudence. See, for example, *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 18; *Principal Immigration Officer v Bhula* 1931 AD at 335; *Commander v Collector of*

indicated, that section extends prescription in the event of impossibility, minority, curatorship and disability. As a result, if section 23 were not inconsistent with section 13(1) of the Prescription Act, and thus did not exclude its applicability to RAF claims, there would have been no need for the inclusion of section 23(2). In other words, if section 23 were not inconsistent with section 13(1), section 23(2) would be superfluous. Trite principles of statutory interpretation tell us that such a conclusion is to be avoided.[164]

[141] This argument is not overcome by the observation that section 13(1) *extends* the period of prescription, whereas section 23(2) *suspends* prescription in specified instances. Instead, this provides further indication that section 23 is inconsistent with section 13(1). This is because section 13(1) applies where a person is mentally disabled. It emphatically does not provide that it only applies, in respect of RAF claims, if a person is mentally disabled and not detained in terms of mental health legislation or under curatorship. As a result, in respect of mentally disabled people detained under mental health legislation, section 13(1) of the Prescription Act and section 23(2) of the RAF Act deal with the running of prescription in different ways. For instance, under the RAF Act, if a person became mentally disabled immediately after his or her cause of action arose and, three years later, was alleviated of the disability, such a person would have a full three years within which to lodge a claim. By contrast, under the Prescription Act, in identical circumstances, and because section 13(1) extends rather than suspends prescription, the claimant would only have a single year within which to lodge the claim. As a result, the inconsistency between the two provisions is compounded, rather than attenuated, by the fact that section 13(1) extends rather than suspends prescription.

*Customs* 1920 AD 510 at 513 and 522; and *Chotabhai v Union Government (Minister of Justice)* 1911 AD 13 at 24.

[164] In *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 (2) SA 37 (A) at 43, it was held that "a Court should be slow to come to the conclusion that words [in a statute] are tautologous or superfluous".

[142] The purpose of section 23(2) also indicates that it operates to the exclusion of section 13(1). Minority, curatorship, and detention under mental health legislation are all capable of easy proof by the presentation of relevant documentation. This allows the RAF, generally without having to resort to litigation, to distinguish those claims in which prescription has been suspended, from those in which it has not. By contrast, it is notoriously difficult to prove impossibility or disability. In order to assess whether such impediments exist, the RAF would inevitably be required to assess substantial documentary and expert evidence and would, in many cases, be forced to litigate. This is precisely what section 23(2) is plainly designed to avoid. As a result, the text, context, and purpose of section 23 all point to the same conclusion: there is no reasonable reading of that section which allows for the application of section 13(1) to RAF claims.

[143] Is the applicant nonetheless able to find succour in the common law? The first and second judgments say yes. My Sister Pillay AJ reaches this conclusion by holding that the impossibility principle enjoys superior status to other laws, that it is not expressly excluded by section 23(1), and that it can only be rendered inoperative by express legislative dictate.

[144] The problem with this argument, with respect, is that it fails to explain why the impossibility principle is not expressly excluded by the phrase "[n]otwithstanding anything to the contrary *in any law* contained, but subject to subsections (2) and (3)". (Emphasis added.) My Sister does not suggest that the impossibility principle is not a law or that it does not operate to the contrary of section 23, and therefore fails to explain why it does not fall within the section 23(1) exclusion. In addition, to the extent that the first judgment suggests that the impossibility principle cannot be excluded by legislative stipulation because it is a principle of natural law, this is incorrect. This reliance on natural law is entirely alien to our legal system, and thus stands to be rejected.

[145] My Brother Jafta J holds:

> "In passing section 23, Parliament could not have intended people like Mr Jacobs to do what was impossible to perform. . . . However, the section is under-inclusive of creditors who truly need its protection. If legislation like the RAF Act itself fails to make provision for the protection of creditors who, for circumstances beyond their control, find it impossible to institute proceedings within the fixed period, the common law comes to their rescue. This happens through the maxim *lex non cogit ad impossibilia*."[165]

[146] Section 23(1) of the RAF Act, however, is not merely under-inclusive. Instead, it unequivocally excludes the operation of any law which allows for a prescription period different to that which it specifies. Moreover, whereas the first judgment suggests that the impossibility principle can be excluded by express legislative dictate, the second judgment seemingly does not. Respectfully, this is an unprecedented conclusion. This reasoning is, in addition, totally unsupported by *Montsisi*,[166] upon which both judgments place reliance. While *Montsisi* provides support for the proposition that the impossibility principle cannot be easily excluded, it provides no authority for the proposition that Parliament can never do so. And, indeed, Parliament must enjoy such a power. Where, for instance, Parliament enacts a statute with limited retrospective effect, it might render it impossible for certain persons to enjoy the benefits of that statute. In that instance, it could not seriously be contended that Parliament was precluded by the impossibility principle from limiting the retrospective effect of the statute.

[147] In the contractual setting, it is trite that the impossibility principle is subject to the intention of the contracting parties.[167] Similarly, in the statutory setting, Parliament

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[165] See [111].

[166] *Montsisi* above n 26.

[167] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda Ag* [1996] ZASCA 108; 1996 (4) SA 1190 (A) at para 41; *Wilson v Smith* 1956 (1) SA 393 (W) at 396C; and *Hersman v Shapiro* & *Co* 1926 TPD 367 at 373.

can exclude the impossibility principle by express provision. This was implicitly recognised in *Smith N.O.*[168] and is expressly recognised in foreign jurisdictions.[169]

[148] The second judgment also holds that section 23(1) does not exclude the impossibility principle because that principle does not regulate prescription. It reasons that it "merely relieves a person from complying with the requirements of a law in circumstances where it was impossible to comply".[170] Respectfully, for present purposes, that is a distinction without a difference. As the first and second judgments demonstrate, the application of the impossibility principle in a case like this means that prescription runs *contrary* to the section 23(1) time period in circumstances where the exceptions provided for in sections 23(2) and (3) have not been satisfied. Its applicability is therefore excluded by the proviso in section 23(1).

[149] The second judgment holds further that section 23(1) is not directed at the impossibility principle because through section 23(2) and (3), "Parliament sought to address the difficulty arising from impossibility to institute a claim within three years from the date on which the cause of action arose".[171] However, the inclusion of sections 23(2) and (3) demonstrate quite the opposite: Parliament sought to address the challenge of impossibility by providing subsections (2) and (3) in the stead of the broader common law principles.

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[168] *Smith N.O.* above n 21 at para 7.

[169] Bailey and Norbury in *Bennion on Statutory Interpretation* 5 ed (LexisNexis, London 2008) at 1132 explain that the impossibility principle is subject to "[t]he invariable caveat that interpretative criteria apply only unless the contrary intention appears". In *Winchester College & Anor, R (on the application of) v Secretary of State for Environment, Food and Rural Affairs* [2008] EWCA Civ 431; [2008] 3 All ER 717 (CA) at para 50, Dyson LJ held that "unless the contrary intention appears, an enactment by implication imports the principle of the maxim *lex non cogit ad impossibilia*". In Australia, in *Van Dongen v Northern Territory of Australia* [2005] NTCA 6 at para 14, Mildren J held:

> "[W]here a statute provides for the doing of a thing within a particular time or in a particular manner or by a particular individual the question is whether it was the intention of the legislature that the consequences of non-compliance must be visited upon the person affected by the statute even where it was impossible for the person to have complied with the statute."

[170] See [116].

[171] See [113].

[150] Is there, nonetheless, some other way in which section 23(1) can reasonably be interpreted so that it does not render the mentioned common law principles inapplicable to RAF claims? One possibility is that "any law" in section 23(1) refers only to "enacted law" and not to the common law. This interpretation finds some support in the Interpretation Act,[172] which defines "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law".[173] I accept that this definition defines "law" to exclude the common law. This follows from the fact that the inclusion of the phrase "other enactment", which qualifies the definition, indicates that the definition only includes "enactments". In addition, the phrase "any law", if it is not read subject to the "other enactments" qualification, would render the entire definition circular. However, the various definitions in the Interpretation Act only apply "unless the context otherwise requires". The pertinent question, therefore, is whether the context of section 23(1) indicates that "any law" does not include the common law.

[151] I accept my Colleagues' conclusion that, at common law, a person in the position of Mr Jacobs would be protected from the running of prescription, by either the impossibility or the incapacity principles. Section 23(2), however, qualifies this position. It provides that, in addition to mental disability, a person must be detained in terms of mental health legislation, or placed under curatorship, for prescription to be suspended. If the common law were to apply to section 23, this qualification would be rendered entirely superfluous. In other words, there would simply have been no need for Parliament to provide for the section 23(2) exceptions. This is a telling indication that section 23(2) is specifically designed to exclude the operation of the relevant common law principles.

[152] In addition, this conclusion is fortified by the manifest purpose of section 23(2). As I have said, the purpose of section 23(2) is to provide for a limited list of exceptions

[172] 33 of 1957.

[173] Id at section 2. See also *Torwood Properties v South African Reserve Bank* 1996 (1) SA 215 (W) at 226C; *Schuurman v Motor Insurers' Association of South Africa* 1960 (4) SA 316 (T) at 318A; and Devenish *Interpretation of Statutes* 1 ed (Juta & Co Ltd, Cape Town 1992) at 243, but compare *Rustenburg Platinum Mines Ltd v Molotlegi N.O.* 1954 (3) SA 871 (A) at 879C.

to the section 23(1) prescription period, which are all capable of easy proof. To hold that the section 23(1) prescription period is suspended in the event of impossibility or disability would be destructive of this purpose.

[153] I am therefore unable to conclude that "any law", as it appears in section 23(1), only refers to "enacted law". That interpretation is undermined by the text, context and purpose of section 23 and would therefore unduly strain its language. Such an interpretation would have the result of attributing to section 23(2) a meaning "which cannot be readily inferred from the text of the provision".[174] As a result, although that interpretation better coheres with section 34 of the Constitution, it cannot be adopted.

[154] The applicant herself accepts that section 23(2) was designed to provide an administratively efficient mechanism for determining when prescription does not run against a claimant. She goes on to say, however, that "this does not provide a rational basis for excluding persons who lack mental capacity, but who have not been detained or placed under curatorship". In this, the applicant might well be right. But the rationality or irrationality of the section bears on its constitutionality, and cannot, as I have explained, determine whether an interpretation of section 23 is reasonably supported by its text, context, and purpose.

[155] My Brother Jafta J says that the interpretation proffered in this judgment results in absurdity, could not have been intended by Parliament, is inconsistent with the Constitution, and would serve no legitimate governmental purpose. But, in reality, all this amounts to the same thing: that section 23(1) is unconstitutional. This is the stuff of frontal attack. Not interpretation in terms of section 39(2). In any event, the second judgment ignores the manifest purpose of section 23(1) and (2): to provide for the suspension of prescription *only* in the result of events capable of easy proof. A provision with that purpose might not survive frontal attack. But it is not one that Parliament could never have intended to enact. To hold otherwise is to say that

[174] *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 120.

Parliament can never intend to enact an unconstitutional provision and that every instance of constitutional invalidity can be cured through interpretation.

[156] And, indeed, this is the problem which lies at the heart of this application. One cannot but have immense sympathy for Mr Jacobs' plight and it might be that the Constitution requires that the relevant common law principles should be applicable in a situation such as the present. However, the proper place for that argument is a frontal challenge of the constitutional validity of the section. In the absence of a frontal challenge, we are constrained by what the language of section 23 reasonably permits. And here, the language of section 23 is clear and unrelenting. To put the point differently, in the context of a frontal challenge, I have little doubt that we would conclude that section 23 limits section 34 of the Constitution. That being so, the unavoidable conclusion is that section 23 does not permit of the interpretation proffered by the first and second judgments.

[157] It is, moreover, not mere pedantry to insist that a statute is challenged by frontal attack, rather than through the back door of section 39(2). In the first place, the powers of a court in terms of section 39(2) are carefully circumscribed. While we are enjoined to interpret legislation in order to promote the spirit, purport and object of the Bill of Rights, it is not permissible to ignore the clear language of a statute. To do so is to legislate rather than interpret, and encroaches on a competence solely vested in Parliament. As Kentridge AJ warned, "[i]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination".[175] Secondly, to permit an attack on the validity of legislation under the guise of section 39(2) deprives Parliament of an opportunity to demonstrate that the facial shortcoming of a statute can, in fact, be justified in terms of section 36 of the Constitution. As this Court explained in *My Vote Counts I*,[176] albeit in a different context:

[175] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.

[176] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts I*).

> "On the procedure resorted to by the applicant and the approach adopted by the minority judgment, the usual procedural hoops in a frontal challenge that invokes inconsistency with a right in the Bill of Rights are bypassed. It may well be that Parliament might have been able to demonstrate that what shortcomings there may be are justified in terms of section 36(1) of the Constitution. How do we then reach a conclusion that Parliament has failed to comply with a constitutional obligation? Or, do we simply say, quite plainly, Parliament could never have been able to show justification? How can we say that when – as we seek to demonstrate below – that was not a case that Parliament had to meet and, therefore, not an issue before us? That cannot be so."[177]

[158] These are precisely the difficulties we face in this matter. In the absence of a frontal challenge, we do not know whether Parliament might be able to justify what appears to be a rights limitation occasioned by section 23(1). We cannot simply say, without more, that Parliament would never have been able to offer such a justification.

[159] For these reasons, I would dismiss the appeal.

[177] Id at para 175.

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