

The right to equal treatment

The immense importance of the principle of equality in this country is reflected in the very first section of the Constitution in which it is stated that the achievement of equality is one of the founding values of the Republic. Local authorities in particular, have been subjected to many court cases in which their acts or legislative provisions, whether they concerned property or electricity rates, zoning conditions or even dog licenses, have been alleged to be in conflict with the equality clause (s 9 of the Constitution). This article seeks to outline, in general, the way in which the courts deal with constitutional challenges on the basis of the principle of equality and, more specifically aspects that are of particular relevance to local authorities. The introduction is followed by three examples.

Section 9 of the Constitution provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories or persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more of those grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In the case of *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC), the Constitutional Court laid down the test for determining whether or not a certain act or legislative provision is unconstitutional for want of compliance with the equality clause. When a court is confronted with an act or legislative provi-

sion which is alleged to be unconstitutional because it is in conflict with the principle of equality, it will seek to answer the following three questions:

- (1) does the measure amount to differentiation?
- (2) does the differentiation constitute 'unfair discrimination'?
- (3) is this unfair discrimination justified under the limitations clause?

Differentiation with a rational connection to its aim

The first question is whether or not the act or legislative provision in question differentiates or distinguishes between people or categories of people. In other words, does the measure make a difference in its application between people or groups of people? If it does, there must be a rational connection between the differentiation and a legitimate government purpose. This means that the differentiation 'must make sense' when viewed against what is aimed to be achieved with the measure in question. In the absence of a rational connection, the differentiation falls foul of section 9(1) of the Constitution and the measure is unconstitutional. For example, if a local authority increases the sewage levies in one of its areas because it wants to create room in its budget for the organisation of the annual municipal fair, there is no rational connection between the measure and its aim. If a rational connection between the differentiation and its purpose is established, the enquiry proceeds to the next question.

Unfair discrimination

The determination whether or not a legislative provision or act amounts to 'unfair discrimination' can be divided in two questions.

(a) Firstly, one has to determine whether the differentiation amounts to discrimination. If the differentiation is based on one of the grounds listed in section 9(3), such as race, gender, sex, pregnancy etc., discrimination has been established. If the differentiation is based on a ground not listed in section 9(3), the court will examine whether or not the ground for differentiation has to do with attributes and characteristics which, when manipulated, have the potential to degrade or dehumanise people. These grounds are often based on biological attributes or characteristics which are outside of a person's control, or with

ways in which people associate, express or practice religion or culture.

It is important that section 9(3) prohibits the state from discriminating directly or indirectly. Indirect discrimination occurs when a differentiation is being made on the basis of a ground that is neutral at first sight. The result of the use of that particular ground however is that persons belonging to a particular group are affected disproportionately. It is of particular importance for local authorities that differentiation on the basis of geographical area, an apparently 'neutral' ground, has often been held to amount to indirect discrimination on the basis of race or colour. Given the history of racial segregation in this country, a differentiation between residents of different areas can, under certain circumstances, amount to indirect discrimination on the basis of race or colour.

(b) The second question asks whether or not the discrimination is unfair. If the discrimination, directly or indirectly, is based on one of the listed grounds, the court will presume that it is unfair. It is then up to the party defending the provision, which would be the local authority, to prove that it was in fact not 'unfair'. In the determination whether or not the discrimination is 'unfair', the main focus is on the impact of the discrimination on the complainant and others in his or her situation. Three factors are important, namely:

- (1) What is the position of the persons affected? Do they belong to a 'vulnerable' group, which, for example, has suffered from unfair discrimination in the past?
- (2) What is the nature of the measure in question and what is sought to be achieved by it? In other words, is there a good reason for the discrimination?
- (3) To what extent does the measure affect the rights or interests of the complainants? Does it affect their human dignity?

If the measure is an *executive* act, the enquiry ends here. An *executive* act that amounts to unfair discrimination is unconstitutional. However, if the measure is a *legislative* act, a third question needs to be addressed.

Is the unfair discrimination justified?

When it is concluded that a legislative provision amounts to unfair discrimina-

by a municipality

tion, it can still be 'saved' by section 36 of the Constitution. Section 36 allows limitation of the constitutional rights under certain conditions. In other words, even though the legislative provision violates the right to equality, it is still constitutional if it passes the test laid down in section 36. In this final leg of the equality test, the burden of proof shifts to the local authority. The local authority must prove that the legislative provision, which discriminates unfairly, is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Section 36 then lists the factors that need

to be taken into account. These include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and any less restrictive means to achieve the purpose. Many of these considerations overlap with the considerations as to whether or not there is unfair discrimination. The purpose and effect of the provision in question will be weighed. However, section 36 explicitly requires proportionality. The law should impair the right to equality no more than is necessary to accomplish the desired objective.

If there were other, less restrictive, measures possible to achieve the same objective, section 36 does not 'save' the violation of the equality clause. The question whether or not an infringement of a right is a legitimate limitation of that right involves a far more factual enquiry than the abstract interpretation of the right itself. The determination whether the violation is justified requires factual evidence. Unless the local authority convinces the court that the discriminatory legislation was justifiable in terms of section 36, the court will conclude that it is unconstitutional and therefore invalid.

Equality and differentiated electricity rates and selective debt collection

City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)

The facts

Among several separate local councils, amalgamated in terms of the LGTA into the Pretoria City Council were two formerly black areas, Mamelodi and Atteridgeville and formerly white suburbs, referred to as old Pretoria. Residents of Mamelodi and Atteridgeville paid for their electricity on the basis of a 'flat rate', which is a fixed amount, based on the average usage of electricity in their area. Residents of old Pretoria paid for their electricity on a 'metered rate', an individual amount based on the actual usage of electricity by the consumer. The metered rate was higher than the flat rate. The council had started to install meters in Mamelodi and Atteridgeville but continued to use the flat rate in those areas until all the meters were installed. In terms of the recovery of arrears, legal action was instituted against residents of old Pretoria only, whereas the municipality endorsed a 'benevolent' approach towards the residents of Mamelodi and Atteridgeville, which resulted in them not being sued to enforce payment of arrears in those areas. Walker, a resident of old Pretoria was sued for arrears in respect of charges for electricity provided by the municipality. He challenged the constitutionality of the municipality's actions in respect to its policy on the delivery of

electricity services. He was of the opinion that the council had infringed his right to equality and that he was being discriminated against.

In the application of the equality test, the Constitutional Court distinguished between the differentiation in rates and the selective enforcement of payment of arrears.

Rational connection

For both the differentiation in rates and the differentiation in enforcement, the Court accepted that it was rationally connected to a legitimate government purpose. The purpose of the measures was to continue rendering those particular services, while trying to phase in a situation where equal services would be provided for at equal prices, throughout the entire area. The Court accepted that as a legitimate purpose and accepted that the differentiation in rates and in enforcement 'made sense' when viewed against that purpose.

Unfair discrimination

(a) Was there discrimination?

Both the differentiation in rates and the selective enforcement were based on apparently 'neutral' grounds, namely geographical area. But the Court was of the opinion that both measures amount-

ed to indirect discrimination on the grounds of race.

"It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory."

(b) Was the discrimination unfair?

Since the discrimination was based on one of the specified grounds, the council had to rebut the presumption that the discrimination was 'unfair'. As indicated above, the Court had to consider three factors: the position of claimants in society, the nature and purpose of the measure and the impact of the measure on others.

The differentiated rates

As to the different rates in the different areas, the Court held as follows:

Position of complainants in society

The Court held that the persons affected by the measure belonged to a group, ie the white community of old Pretoria that has not been disadvantaged by past dis-

crimination but rather benefited from it. They could be viewed as a racial minority, and therefore vulnerable, but the Court observed that it must be careful "to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other". Thus, in this case, the factor of the position in society weighed against Walker.

Nature and purpose of the power

The Court considered that the council had a responsibility to eliminate the disparities that resulted from past policies. This meant that the council's efforts not only had to be directed towards the elimination of the flat rates and the institution of metered rates, but also towards the upgrading and development of the previously disadvantaged areas. It was also taken into account that there was no other reasonable choice for the council but to allow the differentiation to continue to exist. There were no meters in the townships and a flat rate throughout would have been unscientific as well as more harmful than the present situation. The decision not to activate the existing meters in Mamelodi and Atteridgeville was not intended to prejudice residents of old Pretoria, but was taken on the basis of strategic and practical considerations. The fact that the residents of old Pretoria were in actual fact 'subsidising' Mamelodi and Atteridgeville did not render the measure unfair. The Court asserted that cross-subsidisation is integral to the pricing of electricity and that it is unavoidable between different categories of consumers.

The impact on complainants

The differentiation in rates did not have an adverse impact on Walker to the extent that he could feel his dignity violated. The high standard of service delivery in old Pretoria had not deteriorated, while delivery in the townships was still unsatisfactory. The continued use of the flat rate on properties where meters had been installed and the delay in the installation of meters did not change this.

Thus, the Court concluded

Rates may vary from user to user, depending on the quality of services and the types or circumstances of the user.

that the differentiation in rates did not amount to unfair discrimination.

Selective debt collection

As to the selective enforcement of arrears, the Court concluded otherwise.

Position in society of persons affected

The argument that the complainants do not belong to a particularly 'vulnerable' group remained the same in this context.

Nature and purpose

of the measure

The Court acknowledged that the council faced the problem of trying to prevent a culture of non-payment taking root in old Pretoria, while at the same time trying to convert such an existing attitude, which was rooted in the history of resistance against apartheid structures in the townships. It was even of the opinion that a carefully formulated and implemented policy of selective enforcement, openly adopted by the council, might have been consistent with the goal of furthering equality for all. But the municipality's selective enforcement fell flat because it was not based on a rational and coherent policy adopted openly by the council. On the contrary, it was a confusing and incoherent myriad of decisions taken by officials without council approval, and in conflict with the council's public resolutions. The lack of council authority, the confusion and incoherence made the presumption of unfairness more difficult to rebut.

Impact on the complainants

The actions of the municipal officials did not conform to official council policy, but the council failed to deal with them, leaving it to its officials to weather the storm. The complainants were misinformed and misled by the council. The informality of the policy deprived the residents of old Pretoria and the Court of an opportunity to scrutinise it. This behaviour by the municipality's officials grieved the residents of old Pretoria and made them feel that they were not deserving of equal concern, respect and consideration, thereby seriously affecting them.

This led the Court to the conclusion that the selective enforcement amounted to

a policy of selective enforcement of service fee arrears, whereby disadvantaged areas are treated 'with a softer hand' is not always unconstitutional

unfair discrimination of the residents of old Pretoria.

Justification

The violation of the right to equality could not be salvaged by the limitations clause, because the challenge was directed at conduct of the council, not at a legislative provision, which rendered the limitations clause inapplicable.

Assessment and comments

In assessing the way the Constitutional Court deals with equality at a local level, an important factor is the existence of enormous disparities in the overall quality of facilities and services provided by local authorities. These disparities must be taken into account. It is the duty of local government to eliminate these disparities that are the consequence of the politics of the past. Uniformity in rates and other levies should not be interpreted to mean identical rates for everyone. Rates may vary from user to user, depending on the quality of services and the types or circumstances of the user. In *Walker*, the Court was not of the opinion that the right to equality bars local authorities from having service fee policies that amount to cross-subsidisation. The aim is substantive equality, not formal equality. A strict policy of equal pay services, disregarding historical inequalities and discrepancies in the quality of services, can thus be inconsistent with the constitutional right to equality. Equality can actually be promoted by cross-subsidisation instead of it being a threat to equality.

When the council's officials embarked on a policy of non-enforcement in the townships the right to equality was violated. This was a policy that was not recorded, not officially authorised by the council and based on *ad hoc* decisions by council officials. This seemed to be the biggest problem in the eyes of the Court:

"Whilst there can be no objection to a council taking into account the financial position of debtors in deciding whether to allow them extended credit, or whether to sue them or not, such differentiation must be based on a policy that is rational and coherent."

This implies that a policy of selective enforcement of service fee arrears, whereby disadvantaged areas are treated 'with a softer hand' is not always unconstitutional. But for such a policy to be constitutional, it would have to carefully formulated, announced and debated in public and implemented in a way which does not seriously impair the rights and interests of other residents of the municipality.

Equality and the uniform increase in property rates

*Lotus River, Ottery, Grassy Park Residents Association
v South Peninsula Municipality 1999 (4) BCLR 440 (C)*

Facts

A conflict arose out of the adoption of the budget for the 1998/1999 financial year by the South Peninsula Municipality, one of six metropolitan local councils in the Cape Metropolitan area. The draft budget showed a deficit of R56,04 million. In terms of section 10G(3)(b) of the LGTA, municipalities are not allowed to budget for a year-end deficit on their operating accounts. The South Peninsula Municipality used property rates as a mechanism for financing the deficit between the municipality's other sources of income and its budgeted expenditure. A general increase in property rates of 19 % was included in order to balance the budget. The valuation on which property rates are assessed is normally required to be based on current open market values. But in the Cape Metropolitan Area, many areas had valuation rolls that reflected unrealistic values because they were outdated. Some of the valuation rolls were based on valuations conducted in 1974. The result of the outdated valuation rolls is that increases in value of property since the last valuation had not been taken into account when the rates were determined. This had led to a skewed structure of rates, because the value of the property in white areas had boomed since the last valuation, while property in the disadvantaged areas had not increased much in value. The applicant, representing residents of three previously disadvantaged areas in the South Peninsula, alleged that the uniform increase of property rates amounted to a breach of the right to equal treatment (s 9 of the Constitution).

The arguments of the applicant

1. The rates increase in the budget amounted to unfair administrative action, because the objections of the residents were not properly considered. This argument was withdrawn after the Constitutional Court decided in *Fedsure Life Assurance Ltd v The Greater Metropolitan Johannesburg Transition Metropolitan Council* 1998 (12) BCLR 1458 (CC) (see *LGL Bulletin* 1999 (1)

6) that rate decisions do not constitute administrative action.

2. The rates increase was a breach of the right to equal treatment of the residents of the disadvantaged areas. The apparent unfairness of the skewed property rates structure was compounded when the rates were increased by the same percentage all over the South Peninsula. It effectively resulted in the homeowners in white Constantia paying a lower rate than homeowners in disadvantaged Grassy Park. The increase, while apparently neutral, impacted disproportionately on black homeowners in previously disadvantaged areas, and therefore constituted indirect discrimination on the basis of colour.

Differentiation and a rational connection

On the first question, the Cape High Court accepted that the South Peninsula Municipality was compelled by the LGTA to present a balanced budget and, at the same time, faced difficult and complex fiscal problems. For those reasons, the Cape High Court agreed that the increase was rationally connected to the purpose of balancing the budget.

Unfair discrimination

(a) The Cape High Court held that there was indeed indirect discrimination on the basis of colour. An overwhelming majority of the owners of property in previously disadvantaged areas, which suffered the disproportionate impact of the rates increase, were black.

(b) Discrimination on the basis of colour is presumed to be unfair, unless this presumption is rebutted. It was therefore up to the South Peninsula Municipality to convince the Court that the rates increase did not unfairly discriminate against people of colour in the affected disadvantaged areas. But far from rebutting the presumption, the respondents appeared to confirm it. They acknowledged that the rates increase exacerbated

an already unequal position, but emphasised that it was an interim measure, pending the completion of a General Valuation of the entire area. The Court mentioned the three factors relevant in the test as to whether discrimination is unfair or not. It did not elaborate on their application. However, as to the position of the complainants in society, the fact that the complainants belonged to a group that was previously disadvantaged undoubtedly played a role. It was concluded that the discrimination was unfair and violated the equality right of section 9 of the Constitution.

Justification

Since it was decided in *Fedsure* (see above) that rates decisions are legislative acts and not administrative acts, the third question as to whether or not the unfair discrimination could be justified under section 36 needed to be addressed. The key issue was the notion of less restrictive means; the law should impair the right no more than is necessary to accomplish the

desired objective. The applicants were of the opinion that, besides a general increase, there were other options open to the municipality, such as -

- trimming the budget;
- reducing the level of service delivery in areas, favoured by discrimination;
- cutting back on capital projects;
- making an *ad hoc* valuation;
- imposing differential rates so as to cross-subsidise residents in disadvantaged areas; and
- seeking cross-subsidisation from the Metropolitan Council.

The South Peninsula Municipality argued that it had considered many possible alternatives to the uniform rates increase:

- the budget had been trimmed;
- an *ad hoc* valuation had been considered, but the result of that, according to the outcome of modelling exercis-

The different impact of the uniform increase on different geographical areas constituted indirect discrimination on the basis of colour.

- es, would have been even more harsh on the poorer households;
- the banding of properties, as suggested by the applicants, is unlawful; and
- it was further said by the municipality that no less than 66 % of its capital budget for 1997/1998 had been employed in disadvantaged communities.

This convinced the Court that the municipality had a limited range of viable options and chose to increase the rates only after careful consideration. It did consider alternatives to the increase in order to adopt the least restrictive means to achieve its purpose. The Court took into consideration the financial consequences of the restructuring of local government, the fact that external subsidies were no longer available and that General Valuation was well underway. The violation of the right to equality was justified under these circumstances and the rates increase was held not to be unconstitutional.

Assessment and comments

With reference to other equality cases,

such as the *Walker* and *Fedsure* cases, the Court gave some remarks on the implementation of the principle of equality by local authorities. The enormous disparities in the quality of services as well as the duty of local government to address those, were emphasised. The Court did not have any difficulty in finding that the discrimination was based on colour even though, on the face of it, the differentiation concerned geographical differences. In other words, the differing impact of the uniform increase on different geographical areas constituted indirect discrimination on the basis of colour.

The outcome of this case was, to a very large extent, based on the municipality's argument that the measure was of an interim nature in anticipation of the completion of a General Valuation of properties in the entire area. The Court accepted that the South Peninsula Municipality was facing difficult financial circumstances and that all other options had been carefully considered and rejected on valid grounds. It did, however, stress that if the municipality were to breach its undertaking to com-

plete the new valuation roll in time for the 1999/2000 budget, it would be far more difficult to evade a similar constitutional challenge.

Most probably, this final warning has been one of the reasons for the South Peninsula Municipality not to embark on a similar exercise for the 1999/2000 budget, which was announced three months after the judgement. In this budget, differentiated increases in property rates were announced. The increase was determined for each individual area, combining the rates and services in those areas. A general percentage would be determined by whatever increase was required to balance the budget. Subsequently, a percentage would be added or deducted from that general increase, depending on the area. For example, homeowners in Constantia faced a general increase plus 13,52 % while homeowners in Grassy Park got 3,24 % deducted from the general increase. In this way, the discrepancies in the basis on which rates have been levied were addressed.

Equality and differentiated zoning regulations

Municipality City of Port Elizabeth v Rudman 1998 (4) BCLR 451 (SE)

The facts

The Municipality of the City of Port Elizabeth instituted proceedings against Mr and Mrs Rudman, seeking an interdict to restrain them from using their property for any purpose other than as stipulated in the applicable zoning regulations. The zoning regulations of Port Elizabeth differed per area. In the former white areas, the regulations were based on the Land Use Planning Ordinance 15 of 1985 (Cape), and in the former black areas they were based on the (repealed) Black Communities Development Act 4 of 1984. The regulations in the former black areas were less restrictive than those in the formerly white areas. Mr and Mrs Rudman, residents of a former white area, argued that the difference between the regulations unfairly discriminated against them.

Rational connection

The Court first looked at the rational connection between the difference and

the purpose to be achieved by it and concluded that the difference arose out of the different needs of the people in the different areas. In the former black areas there was a need for freer and easier use of land. The differentiation between the two sets of regulations had not arisen out of a perverse desire to discriminate against the residents of the former white areas.

Unfair discrimination

The Court then discussed whether or not the differentiation amounted to unfair discrimination. Did it prejudice the residents of formerly white areas in a serious manner? In the view of the Court, it did not. In actual fact, not all residents of the former black area benefited from the flexible approach as some of them would prefer stricter regulations. And in the same vein, inhabitants of the former white areas might very well appreciate the stricter regulations in their area, because of their concern to pre-

serve the character of their neighbourhood.

Selective enforcement

The Rudmans also argued that the municipality enforced its zoning regulations selectively, as it only acted on complaints even though it was aware of numerous instances of illegal use. The Court observed that most of the complaints came from the former white areas, and this had resulted in more enforcement in those areas than in the former black areas. All complaints were investigated and there was not enough manpower to achieve more than that. In the light of these facts, the Court concluded that there was uniform enforcement.

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