SACHS J ABRIDGED JUDGMENT (DISSENTING IN PART)

SACHS J:

[100] Langa DP has analysed the difficult issues in this case, if I might say so, with composure and sensitivity and I wish to express my concurrence in the order that he proposes and also to endorse the greater part of his reasoning. The only section of his judgment with which I find myself unable to agree relates to his finding that selective enforcement of debt recovery by the City Council of Pretoria (the council), involving concessionary treatment to service-users in black residential areas, amounted to unfair discrimination against a householder in a white suburb, Mr Walker (the respondent in the appeal, to whom I shall refer as the "complainant"). Given the public importance of the matter and the novelty of our jurisprudence in this area, I will set out the grounds for my disagreement in some detail.

[101] There are no easy solutions to the problems raised by this matter. As was pointed out in *Prinsloo v Van Der Linde and Another*, "[w]hile our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality." Just as the transformation of our harsh social reality is by its very nature difficult to accomplish, so is it hard to develop a corresponding and appropriate jurisprudence of transition.

[102] I will summarise my basic argument in the paragraphs that follow and then set out my reasoning more fully later. The findings made by Langa DP indicate that the council attempted to upgrade the deplorable quality of services in neighbourhoods that

were poor and grossly under-serviced as a result of generations of avowedly racist and discriminatory state policies. Such policies were expressed in laws implemented by previous local authorities leading to the untold hardships of which the Constitution speaks. In what appears to have been an effort to rise above the politics of race and articulate the spirit of civic responsibility and compassion that animates the Constitution, the council, in which voters of the affluent parts of Pretoria were well represented, embarked on a negotiated, step-by-step process to fulfill its obligations to those whom previous local governments had at best ignored and at worst oppressed. Such a process, however ineptly carried out at times, was aimed at overcoming the practical difficulties and psychological factors that kept the urban community divided and entrenched disadvantage.

[103] I find it jurisprudentially incongruous to regard the complainant as a victim of unfair discrimination as a result of such a process. He was disturbed in no way in his enjoyment of residence in a neighbourhood which had been made affluent by state-enforced advantage in the past. The group with which he identified himself continued to get the benefit of regular municipal services at all material times. He was not called upon to do any more than to pay what he owed for services he had always received. He was not being singled out or targeted in any way, neither because of his race nor even because he lived in a comfortable neighbourhood. In my view, although treated differently, he was not discriminated against in any manner whatsoever; alternatively, if the council's conduct can correctly be classed as discriminatory against him, it was by no means unfair.

[104] To say this is not to contend that the council may act in any way it pleases provided that its motive is to redress inequalities. Section 8 itself provides at least two major principles which must guide programmes aimed at achieving substantive equality through the application of differential treatment to those who start off in unequal situations. The first is that, once duly adopted, laws must be administered in an impartial and even-handed way. As section 8(1) says: "Every person shall have the right to equality before the law and to equal protection of the law." The second broad guiding principle is that such programmes must be ". . . designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms".

Discrimination

[105] I am far from persuaded that the issue was one of discrimination at all, direct or indirect. I tend to agree with the magistrate that the policy of selective enforcement was based on the identification of objectively determinable characteristics of different geographical areas, and not on race.[6] There was no direct discrimination on the grounds of race. Nor, in my view, was there indirect discrimination on the grounds of race simply because whites lived in one area and blacks in another. In *Harksen v Lane NO and Others* it was accepted that, even though the great majority of solvent spouses targeted by the insolvency law might well have been women, this did not raise

questions of indirect discrimination against women. In the present case, there is overwhelming evidence to show that the complainant has in fact benefited from accumulated discrimination and that he continues to enjoy structured advantage of a massive kind. I find nothing in the papers, on the other hand, to prove that he has been prejudiced by discrimination, whether direct or indirect, or whether in the past or at present. The mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not, in my view, enough to constitute indirect discrimination on the grounds of race.

[106] The core of my argument at this stage is that the complainant has not made out a case of having suffered prima facie discrimination at all. In order to invoke the presumption of unfairness contained in section 8(4), some element of actual or potential prejudice must be immanent in the differentiation, otherwise there is no "discrimination" to be evaluated, and the need to establish fairness or unfairness has no subject matter.

[107] In the light of our history of institutionalised racism and sexism, there might be sound reasons for treating direct differentiation on the grounds specified in section 8(2) as prima facie proof of discrimination on such grounds without further evidence of prejudice being required, thereby triggering the presumption of unfairness contained in section 8(4). In other words, any form of express classification on the grounds of race, sex, etc. could immediately per se raise questions of potential prejudice. That is the most I understand this Court to have done in the four equality

cases cited in Langa DP's judgment. However that might be, in the case of differential impact of an indirect nature I feel that there is no scope for any such per se assumption of discrimination, and that some element of prejudice, whether of a material kind or to self-esteem, has to be established. Only then can it be said that "prima facie proof of discrimination" on one of the specified grounds exists, as required by section 8(4). Absent discrimination, then, the question of fairness or otherwise is not reached, because it is not the presumption that gives rise to the discrimination, but proof of the discrimination that invokes the presumption.

[108] The concept of indirect discrimination cannot be an open-ended one to be applied in a decontextualised and formulaic manner so as automatically to trigger the presumption of unfairness in section 8(4) independently of real impact. Rather, it must be given sensible and practical limits consistent with the objectives and overall scheme of section 8. A focused approach to indirect discrimination is demanded by the text of section 8 read as a whole and construed in the light of the preamble and postscript to the Constitution.

[109] Looked at in its historical setting, the text makes it clear that equality is not to be regarded as being based on a neutral and given state of affairs from which all departures must be justified. Rather, equality is envisaged as something to be achieved through the dismantling of structures and practices which unfairly obstruct or unduly attenuate its enjoyment. In this framework, the presumption of unfairness as provided for by section 8(4) makes perfectly good sense when there is either overt or direct

differentiation on one of the specified grounds such as race or sex, or where patterns of disadvantage based on such grounds are being reinforced without express reference but as a matter of reality. On the other hand, the presumption makes no sense at all when invoked to shield continuing advantage gained as a result of past discrimination from the side-winds of remedial social programmes designed to reduce the effect of such structured advantage.

[110] A presumption of unfairness becomes particularly incongruous when applied to a situation such as the present. Firstly, the complainant identifies himself not on the grounds of residence in a neglected neighbourhood, but on the basis of belonging to a racial group which, as is commonly known, benefited directly in the past from programmes that were systematically law-enforced and overtly racist. Indeed, he continues to enjoy manifest de facto advantage as a result of such programmes. Secondly, the complainant is being deprived of nothing by the measure which he attacks. His objection is simply that he is being left out of a programme which relieves from certain obligations other persons whose objective circumstances are markedly different from and inferior to his. The question at this juncture is not one of unfairness, but of whether or not there is prima facie proof of discrimination against him in the first place.

[111] One may test the matter by looking at the case of a school deciding to waive fees of certain classes of children. If the measure identifies these children directly on the ground of race, then, bearing in mind the ugly history of race classification in this

country, it is appropriate that the school board should be required to establish fairness in terms of section 8(4) (or alternatively, to show that it had adopted a measure to achieve the advancement of disadvantaged persons in terms of section 8(3)(a)). If, on the other hand, the criterion used is poverty and not race, and it so happens that the great majority if not all the beneficiaries happen to be black, then it would be counter to the whole tenor of section 8 to say that this was a case of indirect discrimination against white children who would be left out of the programme, and therefore presumptively unfair to the latter. Indeed, for some time to come, all poverty relief programmes, public housing programmes or programmes to extend primary health care or access to basic education will inevitably benefit black people more than white. It would be a strange, indeed a perverse, reading of sections 8(2) and (4) which resulted in such programmes being treated as prima facie violatory of the equality principle and presumptively unfair unless the contrary could be established. Conversely, if school fees were waived only for children of parents who had previously been to the school, this apparently neutral device could well operate in a way which reinforced patterns of racial disadvantage or exclusion, thereby constituting indirect discrimination.

[112] Furthermore, although section 8(3) was not directly invoked to justify the council's actions, its provisions cannot be ignored when an attempt is made to give meaning to section 8 as a whole. In particular, sections 8(2) and (4) must be read in the light of the clear support that section 8(3) gives to the principle of substantive equality which this Court has repeatedly supported in other matters. Section 8(3),

loosely and not always helpfully referred to as the affirmative action section, indicates that, if anything, a presumption of fairness rather than unfairness should attach to measures ". . . designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms." The value system clearly enunciated by section 8 read as a whole would be inverted if the spectre of indirect discrimination was automatically raised each and every time a measure had some differential impact, even if only tangential and psychological, on the advantaged groups in society. Moreover, it would be distinctly odd if the Constitution were to be interpreted in such a way as expressly to authorise intentional and direct discrimination to overcome disadvantage as described in section 8(3), only to treat similar differentiation as prima facie unfair if it was unintentional and indirect under section 8(2). Finally, given that virtually all legislation and state action will in practice affect whites and blacks differently, the distinction drawn by section 8(2) between specified and unspecified grounds would effectively disappear and the very purpose of section 8 (4) would be undermined.

[113] For a question of indirect unfair discrimination under section 8(2) to be raised, something more must be shown than differential impact on persons belonging to groups specified in section 8(2). I am certainly not arguing that proof of intention to discriminate is required. Nor am I suggesting that there must be a direct and relevant connection — even if unintended — between the measure and the disadvantage

suffered. Yet, to establish that the impact of the indirect differentiation is prima facie discriminatory on grounds specified in section 8(2), the measure must at least impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected. In the present case, I fail to see how the decision not to issue summonses against persons in Atteridgeville and Mamelodi in any way threatened to or was capable of imposing burdens or reinforcing disadvantage for the complainant, withholding benefits from him or undermining his dignity or sense of self-worth. It did not discriminate against him; it did not even reach him.

[114] I find that Cameron J followed the correct approach (in a case with a different legal context but which posed basically similar dilemmas) when he cited with approval an unreported judgment by Wunsh J in *Greater Johannesburg City Council v Europa Hotel* (Case No.22394/95, 17 November 1995):

> "Even if one were to accept that some ratepayers and consumers have been released from their obligations, what does this establish? On the one hand, the Respondent argues that the Applicant is acting irregularly in foregoing these amounts. On the other hand, the Respondent says that some users have been released and that it has been discriminated against by reason of the fact that it has not had the same treatment. If an organisation, a concern, a local authority or a business releases a person from liability for amounts owing for reasons which it considers sound, and does not release others where the same reasons do not prevail, you are not dealing with discrimination." [My emphasis]

[115] The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them. I am unaware of the concept being expanded so as to favour the beneficiaries of overt and systematic advantage.

[116] In our still fragmented and divided country, with its legacy of racial discrimination and its deeply entrenched culture of patriarchy, and with it practices and institutions based on homophobia or on a lack of attention to the most elementary rights of disabled people, almost every piece of legislation, and virtually every kind of governmental action, will impact differentially on the groups specified in section 8(2) of the Constitution. There are strong policy and practical reasons for holding that something more than differential impact is required before indirect discrimination under section 8 can be inferred.

[117] An undue enlargement of the concept of indirect discrimination would mean that every tax burden, every licensing or town planning regulation, every statutory qualification for the exercise of a profession, would be challengeable simply because it impacted disproportionately on blacks or whites or men or women or gays or straights or able-bodied or disabled people. If the state in each such case were to be put to the burden of showing that differentiation was not unfair, the courts would be tied up interminably with issues that had nothing to do with the real achievement of

equality and protection of fundamental rights as contemplated by section 8. Judicial review would lose its sharp cutting edge and become a blunt instrument invocable by all and sundry in a manner that would frustrate rather than promote the achievement of real equality.

[118] It would, accordingly, be spreading section 8 far too thin to achieve its purpose if each and every measure of such kind were to be regarded as effecting indirect discrimination which was presumptively suspect. In particular I am far from convinced that differential treatment that happens to coincide with race in the way that poverty and civic marginalisation coincide with race, should be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation. A well-focused construction of section 8(2) which is directed at laws and practices that perpetuate historically-created forms of disadvantage, or which is focused on preventing new forms of subordination or marginalisation would be far more consonant with the Constitution than a crude reduction of every measure designed to deal with intrinsically difficult social issues to the dimensions of race.

Unfair

[119] Even if I am wrong in my view that the policy pursued by the council did not result in discrimination against persons identified by their pigmentation, I am satisfied that any discrimination that may have been practised would not have amounted to *unfair* discrimination as contemplated by section 8(2) of the Constitution. Langa DP has distilled the essential facts of the case and I merely repeat certain findings taken

from his judgment. Over the period concerned, the standard of the supply of water for Atteridgeville and Mamelodi was drastically improved. Meters were installed in 38,000 homes for the monitoring of electricity and water usage. Existing municipal services generally were upgraded or replaced. The council officials opted for a "soft" approach based on negotiations rather than a "hard" one based on straightforward application of the law, and the level of payments showed a marked improvement so that by the end of the period in question well over half the people billed were paying, and the first summonses for arrears were being issued. There was no question of deliberately targeting the inhabitants of old Pretoria, but there was a policy of conscious benevolence to residents in Atteridgeville and Mamelodi, which took the form of delayed enforcement of debt recovery rather than cancellation of debt. On the negative side, there were many temporary set-backs and delays in the programme: what appear to have been ad hoc decisions were taken by Council officials; the material on negotiations is sparse, and there was a clear failure to provide the broad public of Pretoria with honest and accurate

information as the process unfolded.

[120] I will apply the approach and criteria on unfairness as developed in *Harksen* to these basic facts.

Applying Harksen

The position of the complainant in society; whether he belongs to a socially vulnerable group that has been the victim of disadvantage in the past

[121] The context in which the issue of unfairness must be determined was brought out in *Prinsloo* where the majority of the Court stated:

> "Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order."

[122] The residents of old Pretoria have historically been advantaged both by the standard of municipal services provided to them as well as by their involvement as recognised participants in the system of local government. Previous laws and policies operated systematically and intentionally to enhance their advantages.

[123] The doors of the courts must, of course, be equally open to all South Africans, independently of whether historically they have been privileged or oppressed. Indeed, minorities of any kind are always potentially vulnerable. Processes of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage. Thus persons who have benefited from systematic advantage in the past and who continue to enjoy such benefits today, are by no means excluded from the

protection offered by section 8. Yet as O'Regan J put it in *Hugo*: "The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair." Conversely, the less vulnerable the group, the less the likelihood of unfairness. It follows that the place of a complainant in the structures of advantage and disadvantage will always be one of the central elements in the determination of how fair or unfair the challenged discrimination is. In the present case there is nothing to indicate that the action of the council tracked any existing, or precipitated any new, pattern of disadvantage related to membership of a group specified in or contemplated by section 8(2). Nor does the evidence suggest that the group that did not get the benefit of differential enforcement was, as a group, under-represented on the council, and hence possibly vulnerable to marginalisation and disadvantage.

[124] We should remember, too, that it is not the Court's function to decide whether the council's conduct was prudent or whether all its choices were appropriate. The Court's task, as I understand it, is limited to deciding whether the impugned conduct was fair, given the value of promoting equality that underlies section 8. The coherence and openness of its conduct would then merely be factors to be taken into account when deciding on the question of fairness and not per se definitively constitutive of unfairness in themselves.

The nature, purpose and duration of the power being exercised

[125] The summonsing of the complainant for non-payment in respect of services rendered represented the continuation of the normal practice of debt recovery. The complainant was not being singled out for disadvantage but called upon to meet his ordinary obligations. The fact that inhabitants of Atteridgeville and Mamelodi were treated with special benevolence in respect of law enforcement in no way added to his burdens. He was being required to pay money because he had enjoyed the services, not because of any benevolence which the council had shown to others. In *Hugo,* prisoners who were fathers of young children, were not afforded early release, unlike mothers of young children, who were. Nevertheless, this Court found that although constituting a disadvantage, the presidential pardon did not restrict or limit their rights or obligations as fathers in any permanent way. Goldstone J stated:

> "It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act. That Act merely deprived them of an early release to which they had no legal entitlement."

The societal objective being pursued by means of the issuing of the summonses was the totally unproblematic one of recovering a debt, thereby enabling the council to meet its obligations towards the inhabitants within its area.

[126] If the "soft" approach applied to debt recovery in Atteridgeville and Mamelodi can be seen as in any way impinging adversely on the complainant (which I do not think it did, except possibly in a symbolical sense as will be discussed below), then the evidence suggests and the results confirm that it was adopted as a "best efforts"

attempt of relatively short duration to incorporate progressively the inhabitants of two marginalised, under-serviced and largely impoverished communities into a unified structure of local government. The objective was to transform a culture of non-payment deeply rooted in a history of painful struggle for political rights and equal treatment,[89] into one of payment in the new circumstances of democratic entitlement and responsibility. In short, it was to overcome rather than to perpetuate inequality.[90] As pointed out by Dworkin:

> "There is nothing paradoxical . . . in the idea that an individual's right to equal protection may sometimes conflict with an otherwise desirable social policy, including the policy of making the community more equal overall." (My emphasis)

The extent to which the discrimination affected the rights of the complainant and impaired his dignity

[127] I simply cannot see how the complainant's rights were affected or his fundamental human dignity impaired by his receiving a summons to pay for something that was due. Nor do I discern any other injury of comparable gravity that he may have suffered.

[128] Paraphrasing Dworkin, whose thinking on the subject was incorporated into the majority judgment in *Prinsloo* and bears repeating here because of its centrality to the issues, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.[92] The matter was trenchantly put by Goldstone J in *Hugo* when he said:

> “We need . . . to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”

The same point is made by O’Regan J when she says that “. . . although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality.”

[129] It might well be that even in the absence of concrete disadvantage, the symbolic effect of a measure (or the absence of a measure that should have been taken) could impair dignity in a way which constitutes unfair discrimination. This could arise if the selective enforcement involved deliberate targeting whether direct or disguised, or was so related in impact to patterns of disadvantage as to leave the persons concerned with the understandable feeling that once more they were being given the short end of the stick. An understandable sense of unfairness however, cannot be separated from the purpose for which the measure was taken and the means used for its achievement; the more manifestly justifiable the public purpose in the light of the objectives of the Constitution, the less scope for a legitimate feeling of having been badly done by.

[129] What is fair or unfair cannot be looked at exclusively through the eyes either of the inhabitants of old Pretoria or of those of Atteridgeville and Mamelodi, but must be viewed simultaneously from the diverse points of view of all the inhabitants of the whole of Pretoria, bearing in mind the values enshrined in the Constitution. All were entitled to equal respect, and all had the right to have their concerns and sensitivities taken account of in an equal manner. This did not require the same treatment for all. Any blanket application of identical measures in all of Pretoria irrespective of particular circumstances and the vast structural inequalities that existed, would not have represented equal concern but rather, have manifested equal unconcern.

<u>Conclusion on unfair discrimination</u>

[131] It is clear from the papers that the strategic objective of the council, however clumsily realised at times, was in fact to integrate Atteridgeville and Mamelodi rather than to isolate old Pretoria. Its evident purpose, substantially successful in respect of debt recovery, was to achieve equal, across-the-board enjoyment of rights and assumption of responsibilities. It sought to establish the practices and habits of municipal citizenship rather than to entrench the former patterns of division and alienation, and to eliminate double standards, not to perpetuate them.

[132] The less directly invasive the discrimination, the more substantial its legitimate social function, and the less it reinforces or creates patterns of systematic disadvantage, the less likely is it to be unfair. The differential debt recovery measures

were not taken because the inhabitants of old Pretoria were white. Nor did they in fact impose new burdens or disadvantages on the white inhabitants of Pretoria, who, as it happened in the circumstances were not a politically vulnerable minority, if that were relevant. Furthermore, looked at objectively, these measures could not be said to have impacted unfairly on them by reinforcing negative stereotypes or patterns of disadvantage associated with their skin colour, nor did they affect their dignity or sense of self-worth. The fact that a complainant chooses to wear the cap of a victim of race discrimination, does not mean that the cap fits.

[133] At the end of the day, the case was not really about money but about the rights and responsibilities of citizenship. The people of Atteridgeville and Mamelodi had in an earlier period[96] used non-payment for services as a weapon to secure full citizenship rights for themselves both at the national and local level. The coming into force of the Constitution after the elections of 27 April 1994 might have ushered in for them a period of palpable enjoyment of citizenship rights at the national level. Yet, at the local level where their day-to-day lives had to be lived, such a sense of inclusion had still to be constructed. The meaningful reconstruction of Pretoria could not be done without the effective deconstruction of at least the most flagrant elements of difference that kept the city fragmented. This could not be achieved without acknowledging the reality of the lives that the people of Atteridgeville and Mamelodi led, the grossly inferior services they received, the lack of decent infrastructure and the sense of historically-grounded distance from and hostility towards City Hall.

[134] A pristine council, functioning in a fresh way with daunting new responsibilities, limited resources, and an old bureaucracy, was faced with the need to re-establish the rule of law at the municipal level or, one should say, to establish the rule of law in a meaningful sense for the first time for all the inhabitants of Pretoria. In seeking to achieve acceptance by all inhabitants of the city of the entitlements and responsibilities that went with municipal citizenship, the council could have opted either for sending in the bailiffs accompanied by an appropriate number of police, or for negotiations. The first solution was not proceeded with, but instead the path of negotiations, so much part of our contemporary culture, was followed. The detailed decisions on law enforcement were all consequential upon that decision. To my mind, in considering the fairness of the process as a whole, it is formalistic and unreal to examine in detached isolation every single step that was taken along the way. The path of achieving a negotiated integration of the community into a new, united Pretoria was inevitably tortuous, and to scrutinise each de-contextualised action with hindsight from an armchair point of view would be to set an unrealistically high standard. There is not an institution in the country, I venture to say, that has not encountered organisational problems in the period of transition.

[135] The council was faced with the heavy responsibility of converting an area that had long existed outside of the sphere of effective municipal government into one functioning as an integral part of our new constitutional state at the local level. I find it quite forced to say that the inherently difficult process of equalising the basic conditions and setting in which municipal services were rendered and charged for, in

any way impacted adversely on the white inhabitants of the city. On the contrary, it was manifestly in the interests of all the residents of Pretoria, black and white, to see a single civic community being established, and the council was entitled to take reasonable steps to achieve this result.

[136] Accordingly, and only to the extent that the judgment of Langa DP finds that selective enforcement by the council of payment for services constituted unfair discrimination against the complainant, I respectfully record my dissent.

A possible remedy under section 8(1)

[137] My rejection of complainant's argument that he was a victim of unfair discrimination in terms of section 8(2) does not, however, mean that I conclude that he could not have found any remedy at all under other provisions of section 8. Differential substantive treatment by the council of people living in such disparate circumstances might be eminently fair, whereas at the same time differential enforcement of laws once so adopted might be constitutionally offensive. This could be because even without becoming entangled in the patterns of advantage and disadvantage that lie at the heart of unfair discrimination as prohibited by section 8(2), such differential enforcement could violate the element of impartiality that underlies the rule of law as protected by section 8(1). In this connection I would like fully to endorse the sentiments implicit in the judgement of Langa DP on the centrality of respect for the rule of law to the whole constitutional endeavour.

[138] Had the complainant's objective been to seek the aid of the court in achieving equal and impartial enforcement of the law, and not, as it was in this case, to get its approval for equal and impartial non-enforcement of the law, different considerations could well have come into play. Put another way, if the complainant had sought to secure enforcement of the responsibilities of others rather than to achieve absolution from his own, the trial court would not have been obliged to focus on the artificial question of whether or not the complainant had ended up suffering unfair disadvantage because of his being white. Rather, it would have examined whether or not as a resident of Pretoria he was entitled to call upon the council to enforce its laws in an equal and impartial manner against all residents whatever their living circumstances or colour. Stated more technically, had his contention been that selective enforcement of debt recovery was based on non-acceptable criteria of an arbitrary character which infringed his rights to equal protection and equality before the law, he could have sought a remedy based on a violation of section 8(1) of the Constitution. This subsection reads: "Every person shall have the right to equality before the law and to equal protection of the law". In *Prinsloo* the majority judgment held that it appeared that "the right to 'equality before the law' [was] concerned more particularly with entitling 'everybody, at the very least, to equal treatment by our courts of law.' " It stated that section 8(1) made it "clear that no one [was] above or beneath the law and that all persons [were] subject to law impartially applied and administered." The question then would have been the correct one of whether the law was being impartially applied and administered, not the inappropriate one of whether the complainant's dignity had been attacked.

[139] It could well be that such a court, after having considered fuller and more appropriately focused evidence on the subject, might have come to the conclusion that the measures of differential enforcement were indeed consistent with the objectives of section 8(1), or alternatively, that they were expressly authorised by section 8(3), or alternatively, that they represented a breach of section 8(1) that could only be permitted if sanctioned in terms of section 33(1) of the Constitution by a law of general application that passed the tests of reasonableness and justifiability. If it should have ended up adopting conclusions adverse to the council, the Court could have been given a chance to fashion appropriate remedies to ensure that any strategy pursued by the council would comply with its order in relation to method and timing. Thus, while not relieving the complainant of the need to meet his own obligations, such remedies could have ensured court supervision of the process compelling all other inhabitants to fulfill theirs.

[140] The result of my analysis is that if, in order to overcome patterns of disadvantage and create a united city, a council feels it necessary to apply the law differentially to residents in its area, it may do so, and may even be required to do so. Yet, in such a situation, it might well be obliged to develop a coherent and serious strategy which, looked at rationally and objectively, would be capable of advancing substantive equality and truly promoting the idea of a city of civic equals. Furthermore, it might be required to function in a manner that is open and above board in relation to all the persons likely to be affected, whether directly or indirectly,

by any such a programme. Law enforcement always permits a degree of discretion which operates on a case by case basis. Yet, any form of systematic deviation from the principle of equal and impartial application of the law (as was the practice in the present case for a certain period), might well have to be expressed in a law of general application which would be justiciable according to the criteria of reasonableness and justifiability as set out in section 33. Since these are enquiries that belong to the case that should have been brought, and not to the one actually before us, I do not think it appropriate to pursue them to any definitive conclusion.

[141] Accordingly, although in one important respect I follow a different route to his, I arrive at the same conclusions as Langa DP in terms of the behaviour required by the Constitution of a local authority in a period of transition.