THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 8/97

THE CITY COUNCIL OF PRETORIA **Applicant/ Appellant**

versus

J WALKER **Respondent**

Heard on: 19 August 1997

Decided on: 17 February 1998

JUDGMENT

LANGA DP:

Factual background

[1] The applicant is the City Council of Pretoria (the council). It sued the respondent, Mr Walker, in the Pretoria Magistrate's Court for payment of an amount of R4753,84[1] being arrear charges for services rendered by the council during the period July 1995 to 23 April 1996. The respondent did not deny that he owed the amount claimed. He contended instead that he was

[1] The amount of R5 041, 70, which was originally claimed, was amended to an agreed amount of R4 753, 84.

entitled to withhold payment by reason of the fact that the council's conduct, which I shall elaborate upon in due course,[2] constituted a violation of his constitutional right to equality as enshrined in section 8 of the interim Constitution.[3] He also contended that the council was in breach of section 178(2) of the interim Constitution. The grounds relied upon by the respondent therefore raised issues of constitutionality.

[2] The respondent's defence was not upheld by the magistrate and he was ordered to pay the amount claimed as well as costs. On appeal, the Transvaal High Court[4] (the High Court) set aside the magistrate's order and substituted for it an order of absolution from the instance with costs.[5] The council applied for leave to appeal to this Court against the High Court's judgment

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2 See para 6.

3 See section 8 of the Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution).

4 Formerly the Transvaal Provincial Division of the Supreme Court.

5 The judgment is reported as *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); 1997 (3) BCLR 416 (T).

and order.

[3] Pursuant to directions issued by the President in terms of the Rules of the Constitutional Court, the application for leave to appeal as well as the merits of the appeal were argued together. We have accordingly had the benefit of full argument on both the merits and ancillary issues which were raised, from the parties as well as counsel who appeared for the National Electricity Regulator (NER), which was admitted as amicus curiae.

[4] The council was established by the consolidation, on 8 December 1994, of a number of municipalities into one. These included, among others, the two black townships of Atteridgeville and Mamelodi and the formerly white municipality which was known as the Pretoria City Council. It will be convenient to refer to this last area as "old Pretoria." The respondent is a resident of Constantia Park, a suburb in old Pretoria. It is common knowledge that the population of Mamelodi and Atteridgeville is black and that of old Pretoria overwhelmingly white and the case was argued on that basis.

[5] The facts which provide the background for the issues raised in this matter may be summarised as follows: electricity and water charges in the council's area were levied on a differential basis. The residents of old Pretoria, including the respondent, were levied on a tariff based on actual consumption measured by means of meters installed on each property. This had been the position long before the amalgamation. Residents of Mamelodi and Atteridgeville, in the absence of meters, were levied on the basis of a uniform rate for every household. This system, generally referred to as a flat rate, also predated the amalgamation.

[6] The respondent's objections to the council's conduct were based on the following grounds: (a) the flat rate in Mamelodi and Atteridgeville was lower than the metered rate and this therefore meant that the residents of old Pretoria subsidised those of the two townships; (b) the differentiation in the tariffs continued even after meters had been installed on some properties in Mamelodi and Atteridgeville; (c) only residents of old Pretoria were singled out by the council for legal action to recover arrears whilst a policy of non-enforcement was being followed in respect of Mamelodi and Atteridgeville; and (d) the imposition of differential rates was a contravention of section 178(2) of the interim Constitution. The respondent also complained that the council did not take the residents of old Pretoria into its confidence when the target dates for the implementation of a consumption-based tariff were not met. Instead, misleading information was given to old Pretoria residents, leaving them under the impression that the metered rate was being uniformly applied at a time when it was not. With regard to the objections in (a), (b) and (c), the respondent's complaint was that the council's conduct amounted to unfair discrimination and was therefore a breach of section 8 of the interim Constitution. In its judgment on appeal, the High Court held that the actions of the council summarised in (a) to (c) above amounted to discrimination based on race; that the council had not, under section 8(4)of the interim Constitution, established that such discrimination was not unfair; and that accordingly such actions were unconstitutional as being inconsistent with section 8(2) of the interim Constitution. The High Court also held that the council's conduct described above constituted a breach of section 178(2) of the interim Constitution.

Preliminary matters

(a) The Rule 18 Certificate

[7] Appeals to this Court are governed by rules 18 and 19 of the Rules of the Constitutional Court.[6] In response to the council's application for a certificate in terms of rule 18, the High Court refused to furnish a positive certificate save to confirm that the evidence which had been led was sufficient to enable this Court to deal with the issue without referring it back to the High Court. For the rest, it was held that there were no issues of substance which were of a constitutional nature and which merited the attention of this Court and that there was no reasonable prospect that the Court would grant leave to the council to appeal, or that it would reverse the judgment or the order given in the High Court.

[8] It had been argued on behalf of the council that the exercise of a value judgment by the High Court in deciding the question whether or not the discrimination was unfair was a constitutional issue which required the attention of the Constitutional Court. Le Roux J, who delivered the High Court's judgment on the application, rejected the council's argument. He

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[6] Rule 18(a) requires an appellant to apply to the judges who gave the judgment sought to be appealed against to "certify that the only issue (or issues) remaining in the case is (or are) of a constitutional nature and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such issue given by the provincial or local division concerned." Rule 18 (e) reads as follows:

> "(e) If it appears to the judge or judges of the division of the Supreme Court concerned, hearing the application made in terms of (a), that-
> (I) the constitutional issue is one of substance on which a ruling by the Court is desirable; and
> (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the division concerned for further evidence; and
> (iii) there is a reasonable prospect that the Court will reverse or materially alter the decision given by the division concerned if permission to bring the appeal is given, such judge or judges of the division concerned shall certify on the application that in his or her or their opinion, the requirements of sub-paragraphs (I), (ii) and (iii) have been satisfied, or, failing which, the judge or judges shall certify which of such requirements have been satisfied, and which have not been satisfied."

stated:[7]

> "Wat die onbillikheid van die diskriminasie aanbetref, is dit 'n blote toepassing van die feitelike agtergrond wat gemeensaak tussen die partye is. Dit is 'n situasie wat elke dag in hierdie howe voorkom. Dit is niks buitengewoons nie. . . . Dit is na my mening voor die hand liggend dat die toepassing van feite op 'n besondere saak voor die hof, ook 'n feitelike aangeleentheid is en nie 'n saak is wat gereserveer behoort te word vir die Konstitusionele Hof nie. "

With regard to the submission that the issue of whether the order of absolution from the instance in this matter was a constitutional issue, he had this to say:

[7] *Stadsraad van Pretoria v Walker* TPA A1516/96, 29 April 1997 at 6. Van Dijkhorst and De Villiers JJ concurred in the judgment.

"Wat betref die kwessie van die regsmiddel wat hierdie hof toegepas het nadat hy geoordeel het dat daar onbillike diskriminasie was teenoor die respondente, is ek ook van mening dat dit nie 'n buitengewone remedi (sic) is nie. Dit kom by baie sulke gevalle voor. 'n Mens kan maar net dink aan die geval van twee persone wat oor 'n saak wat teen die openbare belang is, in 'n hof litigeer en 'n eis instel, wat 'n hof weier om enigsins te oorweeg, die sogenaamde par delictum - geval. Daar is ook talle ander voorbeelde waar die een party, hoewel hy op die oog af 'n goeie eis het nie met skoon hande hof toe kom nie. Dan sal 'n hof hom nie tegemoet kom nie. Hierdie is na my mening slegs 'n spesie van daardie genus van gevalle waar die feite sodanig is dat 'n hof nie die eiser, hoewel hy op die oog af 'n goeie eis het, tegemoet sal kom totdat hy nie sy huis in orde gebring het nie. Die bevel van absolusie van die instansie beteken nie dat die eiser nou van enige regsmiddel ontneem word nie. Dit is nie 'n permanente ontneming nie, dit is slegs tydelik totdat hy sy huis in orde gebring het. Gevolglik gaan hierdie saak oor koste en oor prestige. Op hierdie grondslag kan ek nie insien dat dit 'n saak van groot belang is vir die toekoms nie. Dit is slegs tydelik van aard. Dit is ook nie 'n buitengewone regsmiddel nie. Dit stel die party in staat om weer sy regte af te dwing indien sy posisie in die reine gebring is en hy nie langer die Grondwet verbreek nie, en aangesien dit slegs 'n kwessie van koste is, is ek van mening dat dit nie 'n saak is wat van belang is om gereserveer te word vir die Konstitusionele Hof nie."[8]

[9] The High Court had been required to determine whether the conduct of the council amounted to unfair discrimination and if it did, the appropriate relief or remedy had to be decided. The exercise involves the elaboration of concepts such as "equality" and "unfair discrimination." The High Court's assessment of what constitutes a breach of section 8 is a matter which is constitutional in nature. Section 98(2) of the interim Constitution states -

"The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the

[8] Id at 6.

provisions of this Constitution, including -

(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3".

[10] In interpreting and enforcing the Constitution in this case, the Court has to decide whether there has been unfair discrimination. If that is established, the next step is to determine what the appropriate order is in the circumstances of the case.[9] Unfair discrimination, and the issue of an appropriate order when section 8 of the interim Constitution has been breached, are constitutional issues in respect of which this Court has final jurisdiction. However, the existence of a constitutional issue is not the sole determinant of which matters should be considered by this Court. Rule 18 requires in addition that the issue must be one of substance.

[9] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 18.

[11] Whether or not a constitutional issue is one of substance will depend on the facts of the particular case. The present matter is based on factual issues but it also involves the application of law to facts. The respondent has invoked a constitutional provision, the right not to be the victim of unfair discrimination. The full implications of this right, which is an aspect of the right to equality contained in section 8 of the interim Constitution, are complex. The section 8 right has been discussed in four recent judgments of this Court, namely, *Prinsloo v Van der Linde and Another,*[10] *President of the Republic of South Africa and Another v Hugo,*[11] *Harksen v Lane NO and Others*[12] and *Larbi-Odam and Others v Members of the Executive Council for Education and Another (North-West Province)*[13]. It is a subject which is still in need of further elaboration. The central issues here are whether the use by the council of differential tariffs in the recovery of service charges and the selective enforcement of debt recovery, in the circumstances of this case, amount to a breach of the equality provisions in the interim Constitution. These questions and the question whether the order made by the High Court constitutes appropriate relief within the meaning of section 7(4) of the interim Constitution, are matters of much interest and importance not only to the litigants in this case but also to the public and to our equality jurisprudence which is still in its early stages of development. I have no doubt that the issues

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10 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

11 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

12 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

13 1997 (12) BCLR 1655 (CC).

raised in this matter are of sufficient substance to merit the attention of this Court and that leave to appeal should accordingly be granted.

(b) Which Constitution applies

[12] It was common cause that the matters in dispute fell to be resolved in terms of the interim Constitution and not the final Constitution.[14] When the High Court heard the appeal on 3 March 1997, which was after the final Constitution had come into force, it invoked the provisions of item 17 of Schedule 6 to that Constitution[15] and dealt with the matter as if the final Constitution had not been enacted. In my view this was the correct approach. All the issues giving rise to the dispute occurred during the operation of the interim Constitution and the relevant provisions in the two Constitutions are not materially different. I am satisfied that this is

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[14] The Constitution of the Republic of South Africa, Act 108 of 1996.

[15] Item 17 of Schedule 6 reads as follows:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

not a matter in respect of which the interests of justice require that the final Constitution should be applied.

(c) The jurisdiction of the magistrate

~~[13]~~ The High Court considered whether, in the light of the defence raised by the respondent, the magistrate had jurisdiction to deal with the matter. It held that the claim was within the jurisdiction of the magistrate but that the defence based on the provisions of the interim Constitution was beyond the magistrate's direct or incidental jurisdiction. It held further that since the claim was within his jurisdiction the magistrate was entitled to deal with the matter and to pronounce upon the validity of the claim and of any defence within his jurisdiction. If, apart from the constitutional issue, the claim was established, judgment could be given in favour of the plaintiff and the defendant could raise the constitutional issue on appeal:

> "Die benadering lei nie tot onreg teenoor 'n verweerder wat deur 'n eiser gedwing word om te litigeer in 'n hof waar sy verweer nie beregbaar is nie. Die antwoord is eenvoudig. Hy pleit sy verweer. Beide partye lei hul getuienis op die verweer. (Die getuienis is toelaatbaar omdat dit relevant is tot die pleit.) Die landdros maak sy geloofwaardigheidsbevindings ten aansien van die getuies. Nadat vonnis gegee is ten gunste van die eiser (by verstek aan 'n beregbare verweer) word die saak op appèl beslis op al die geskilpunte insluitend die konstitusionele geskilpunt waaroor die landdros hom nie uitgelaat het nie. Die vraag op appèl is immers of die vonnis van die landdroshof in die lig van alle verwere in die hof van appèl beregbaar, staande kan bly. Hierdie hof het wel jurisdiksie om grondwetlike vrae van hierdie aard te bereg (artikel 101(3) (*b*)) en nie bloot as hof van eerste instansie nie. (Artikel 101(4) gelees met artikel 98(7).)
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> Hierdie benadering ten aansien van die afneem van getuienis deur die laerhof strook met

die gees van die Grondwet. Kyk artikel 102(1) en (3)."[16]

~~[14]~~ Neither party sought leave to appeal against the decision of the High Court on the question of the magistrate's jurisdiction, or on the practice to be followed in the Magistrate's Court if a plea raises a constitutional issue beyond the jurisdiction of the court. No argument was addressed to us on those questions; nor was any argument addressed to us on the question whether this Court has jurisdiction to interfere with findings made by a High Court in regard to such matters, which would depend on whether they are matters relating to the "interpretation, protection and enforcement" of the provisions of the Constitution within the meaning of section 98(2) of the interim Constitution.

[16] N 5 at 203 (SA); 425H-426A (BCLR).

~~[15]~~ The interim Constitution contemplates that there will be occasions on which constitutional issues beyond the jurisdiction of a court may arise in proceedings before such court. Where it deals with such matters specifically it requires the court concerned to receive evidence on all issues raised in the matter, including constitutional issues beyond its jurisdiction.[17] Where it addresses the procedure to be followed in the Magistrate's Court , it deals only with matters where the validity of a law is placed in issue.

[16] It may well be that in the light of the amendment of section 103(1) of the interim Constitution by Act 13 of 1994, the magistrate had incidental jurisdiction to adjudicate upon the defence. However, in the absence of an appeal against the findings made by the High Court in regard to jurisdiction, I do not consider it appropriate to express any opinion thereon. It is sufficient to say that if the magistrate had no jurisdiction to deal with the constitutional issues raised by the plea, there is nothing in the practice laid down by the High Court that is inconsistent with the interim Constitution.

Background to the dispute

[17] The dispute should be seen in the light of changes which have come about as a result of the adoption of a new constitutional order. It would be surprising if the process of bringing together, in a constitutional sense, people and communities who were kept apart for many years did not occasion its own difficulties and tensions. The difficulties are compounded by the

[17] See sections 102(1), 102(3), 102(15) and 103(4)(a).

disparities and imbalances inherent in our society which are the result of policies of the past.

[18] Atteridgeville was established in 1939 and Mamelodi in 1953, both as black townships. The two townships were administered under a different legislative and regulatory regime to that which applied in old Pretoria which was part of "white South Africa". The amalgamation of Atteridgeville and Mamelodi with old Pretoria was regulated by the Local Government Transition Act 209 of 1993, which became operational on 2 February 1994. That Act provides for the restructuring of local government through the establishment of elected transitional councils. After the three separate local councils were amalgamated with effect from 8 December 1994, the council of old Pretoria effectively exercised control over the relevant area until a democratically elected council was established consequent on the elections held in November 1995 in accordance with the Local Government Transition Act.

[19] Atteridgeville and Mamelodi are no different from other poverty-stricken black townships in South Africa; there are glaring disparities between the two townships on the one hand, and old Pretoria on the other, in property values, delivery of services and infrastructure. At the time of the amalgamation electrical installations in the townships were generally broken or damaged and there was no regulation which obliged the residents of Atteridgeville and Mamelodi to pay for services. The inferiority of the infrastructure in the black townships included there being no meters for water and electricity. The residents were levied a flat rate for such services as they received. The amalgamation was no magic wand; the disparities did not suddenly disappear on 8 December 1994 but continued into the new era of local government.

[20] This then was the situation with which the council had to contend after 8 December 1994. It had to exercise control over Atteridgeville and Mamelodi in addition to old Pretoria and other areas. The challenge facing the council from the beginning was to provide services and to treat all the residents within its jurisdiction equally. Those pre-existing disparities and the limited resources which the council had at its disposal meant that the task would be fraught with difficulties.

[21] On 9 December 1994 the council decided, as a temporary measure, not to apply the consumption-based tariff in Mamelodi and Atteridgeville but to operate on the basis of a flat rate. The consumption-based tariff was in operation elsewhere in the council area, including Constantia Park. The decision of the council in relation to Mamelodi and Atteridgeville was actually forced on it because there were no meters to record the individual consumption of water and electricity in these areas. Rather optimistically as it turned out, the council set itself a programme to install the 38 000 meters needed by June 1995. The idea was that once the meters had been installed, the residents in the two townships would also be subject to the same metered rates as was the case in old Pretoria. The actual installation of meters however only commenced in June 1995 and was completed in April 1996. On 1 July 1995 the council announced a consumption-based tariff for its whole area. At that time, meters had already been installed on some of the properties in the townships. The consumption-based tariff was not, however, applied to those properties; they continued instead to be charged according to the flat rate. Mr. Eicker, a senior official of the council who was responsible for credit control, said in evidence that this was the result of a decision taken by council officials to continue charging the flat rate to domestic premises in Atteridgeville and Mamelodi until all the meters that were required in the

two townships had been installed. According to Mr. Eicker to do otherwise might have been counter-productive and might have resulted in violent resistance and vandalism. The delay in imposing a consumption-based tariff throughout the council area and the manner in which the council dealt with the transition to a unitary council attracted criticism from some residents of old Pretoria.

[22] Respondent belonged to a group which called itself "Besorgde Belastingbetalersgroep" (the BBG). Before the commencement of litigation in this matter, the BBG complained to the council about the matters referred to in paragraph 6 as well as other issues and held meetings with council officials to voice their complaints. In June 1995 it submitted a memorandum to the council in which it demanded, among other things, that Atteridgeville and Mamelodi be separated from old Pretoria and that money paid by the council to subsidise "other communities" be recovered. It also demanded that the residents of old Pretoria be charged for water and electricity at the same flat rate as the residents of Atteridgeville and Mamelodi and that no steps be taken against residents who objected to paying the metered rates until the dispute over the matters that had been raised had been resolved. The BBG threatened to take legal action against the council. Its members, including the respondent, however, took no legal steps to challenge the council to end the alleged unfair discrimination and the contravention of section 178(2) of the interim Constitution. They refused to pay the full amount, paying instead a lower amount which was equivalent to the flat rate which was in operation in Mamelodi and Atteridgeville. The amount claimed by the council from the respondent represented the difference between what the respondent would have paid on the metered rate and what he actually paid on the basis of the flat rate.

[23] It is clear that the council treated the respondent together with the other residents of old Pretoria in a manner which was different to the treatment accorded to the residents of Mamelodi and Atteridgeville by (a) operating a flat rate in Mamelodi and Atteridgeville while a consumption-based tariff, which was higher, was used in old Pretoria; (b) differentiating between old Pretoria and those parts of Atteridgeville and Mamelodi where meters had already been installed; and (c) taking legal steps to recover arrears from residents of old Pretoria only and failing to take similar action against defaulters in Mamelodi and Atteridgeville.

[24] The differentiation in this case was, at least partly, an inherited one. The amalgamation that occurred resulted in a new relationship between areas which had been administered differently. It was however a meeting of contrasts. The present case concerns two areas which were black and one that was white. The former were poorly developed in terms of infrastructure for municipal services; they had no meters to record consumption of electricity and water. The white area had adequate facilities and the necessary infrastructure; it was equipped with meters which were relied on for the calculation of service charges for water and electricity. The flat rate in the two townships was a convenient practical expedient because of the poor infrastructure. This differentiation was not initiated by the new council; it became the council's responsibility, however, to end it. While it lasted, it applied geographically and its effect was that the higher consumption-based tariffs operated in old Pretoria and not in the two townships. The enforcement of payment for services in old Pretoria was, as it had been through the years, by way of court action, while a more benevolent approach was followed in the other two areas. I turn now to deal firstly with the alleged breaches of section 8 and thereafter with the alleged breach

of section 178(2) of the interim Constitution.

Differentiation and discrimination

[25] Section 8, in so far as it is relevant, provides as follows -

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
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> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
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> (3) (a) This section shall not preclude 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 freedom.
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> (b) . . . .
>
> (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

[26] The question whether there has been a breach of section 8 of the interim Constitution has to be assessed against the background set out in the preceding paragraphs. That assessment cannot be undertaken in a vacuum but should be based both on the wording of the section and in the constitutional and historical context of the developments in South Africa. What is clear is

that not all differentiation amounts to discrimination as envisaged in section 8.[18] It remains to be determined whether the differentiation in this case constitutes a violation of the right protected by section 8.

[18] See *Prinsloo* n 10 at para 17.

[27] In written argument on behalf of the respondent, it was argued that there was no rational connection between the discriminatory measures taken by the council and a legitimate governmental purpose ". . . which is proffered to validate it".[19] In particular, respondent contended that the conduct of the council could not be said to have been authorised by section 8(3)(a) of the interim Constitution inasmuch as the discriminatory measures had not been "designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination . . .". The council's attitude on the other hand was that the differentiation was rationally connected to the legitimate objective of dealing with the period of transition by phasing in the required changes in order to achieve equality between the residents of the different areas. The issue of a rational connection is of course relevant to the question whether the actions of the council breached respondent's section 8(1) right. In *Prinsloo*[20] the following was stated:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this

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[19] Id at para 26.

[20] At para 25.

aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner."

The two limbs of section 8(1), the "right to equality before the law" and the right "to equal protection of the law", were referred to in *Prinsloo*[21] where it was stated, as had been said by Didcott J speaking for the Court in *S v Ntuli*,[22] that "the right to 'equality before the law' is concerned more particularly with entitling 'everybody, at the very least, to equal treatment by our courts of law.' " It was said further that ". . .no-one is above or beneath the law and that all persons are subject to law impartially applied and administered." The rationality criterion adopted in *Prinsloo* should, in my view, be equally applicable whether we are dealing with "equality before the law" or "equal protection of the law". I am satisfied that the differentiation in the present case was rationally connected to legitimate governmental objectives. Not only were the measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources, during a difficult period of transition. This is however not the end of the enquiry as differentiation "that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purposes of section 8(2)."[23] When the matter was argued before us, counsel for the respondent concentrated his attack on what was alleged to be unfair discrimination in terms of section 8(2). This raises the question whether the

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[21] At para 22.

[22] 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 18.

[23] *Harksen* n 12 at para 44 (SA); para 43 (BCLR).

differentiation complained of constitutes discrimination and if it does, whether that discrimination is unfair.

[28] The four judgments of this Court to which I have referred [24] were all delivered after the judgment of the High Court in this case. They deal extensively with the equality provision in the interim Constitution and analyse the concept of discrimination.

[29] In *Harksen* we held that the enquiry as to whether differentiation amounts to unfair discrimination is a two-stage one.

> "Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[24] See para 11 above.

> (b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation."[25]

[30] Section 8(2) prohibits unfair discrimination which takes place "directly or indirectly". This is the first occasion on which this Court has had to consider the difference between direct and indirect discrimination and whether such difference has any bearing on the section 8 analysis as developed in the four judgments to which I have referred.

[31] The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).

[32] The emphasis which this Court has placed on the impact of discrimination in deciding whether or not section 8(2) has been infringed is consistent with this concern. It is not necessary in the present case to formulate a precise definition of indirect discrimination. The conduct of which the respondent complains is summarised in paragraph 6 of this judgment. It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the

[25] At para 54 (SA); para 53 (BCLR).

treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, 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. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this.

[33] I have had the opportunity of reading the judgment of Sachs J in which the view is expressed that the differentiation in the present case was based on "objectively determinable characteristics of different geographical areas, and not on race".[26] I cannot subscribe to this view or to the proposition that this is a case in which, because of our history, a non-discriminatory policy has impacted fortuitously on one section of our community rather than another. There may be such cases, but in my view this is not one of them. The impact of the policy that was adopted by the council officials was to require the (white) residents of old Pretoria to comply

[26] See para 105 below.

with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them, whilst the (black) residents of Atteridgeville and Mamelodi were not held to the tariff, were called upon to pay only a flat rate which was lower than the tariff, and were not subjected to having their services suspended or legal action taken against them. To ignore the racial impact of the differentiation is to place form above substance.

[34] It is clear from Mr Eicker's evidence that the council officials knew that the effect of the policy would be discriminatory and that the residents of old Pretoria would be likely to object to it. The council did not rely on section 8(3) of the interim Constitution at the trial and did not then suggest that its officials had adopted the policy to which objection was taken in order to address the unfair discrimination of the past. It sought to justify the policy on the grounds that it was reasonable and the only practical way of dealing with the situation in the circumstances which existed. That is relevant to the enquiry whether the discrimination was "unfair". It is not, however, relevant to the enquiry whether there was differentiation on the grounds of race.

[35] This Court has consistently held that differentiation on one of the specified grounds referred to in section 8(2) gives rise to a presumption of unfair discrimination. The presumption which flows from section 8(4) applies to all differentiation on such grounds. There may possibly be cases where the differentiation cannot conceivably result in discrimination and for that reason does not cross the threshold of section 8(2). According to Sachs J, however, section 8(2) is triggered only by differentiation which imposes "identifiable disabilities" or threatens "to touch on or reinforce patterns of disadvantage" or "in some proximate and concrete manner

threaten(s) the dignity or equal concern or worth of the persons affected" and in the absence of such consequences, the presumption under section 8(4) does not arise.[27] This in my view, is contrary to the decisions of this Court in the four cases to which I have referred, in which it was held that differentiation on one of the specified grounds set out in section 8(2) gives rise to a presumption of "unfair discrimination". I can see no reason for distinguishing in this regard between discrimination which is direct and that which is indirect. Both are covered by section 8(4) and both are subject to the same presumption. Whilst the matters mentioned by Sachs J are no doubt relevant to the question of unfairness and to cases on which reliance is placed on section 8(3) of the interim Constitution or section 9(3) of the final Constitution, they do not, in my view, enter into the first stage of the enquiry which is to determine whether there has been differentiation, direct or indirect, on the grounds of race. The principle established by section 8(3) is an important part of the equality guarantee of our Constitution. It clearly applies to all cases of discrimination, whether direct or indirect. The point here is that there was no basis on the evidence given in the trial court on which a case based on section 8(3) could reasonably have been advanced.

[36] It was argued on behalf of the council that if on an evaluation of the facts of the present case discrimination was established, such discrimination was not "unfair". As already indicated, I am satisfied that the conduct of the council does amount to discrimination. Since, as I have already found, the differentiation was on one of the grounds specified in section 8(2), the council bears the burden of rebutting the presumption of "unfair discrimination".

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[27] See para 113 below.

Has the presumption of unfair discrimination been rebutted?

[37] The enquiry into whether the presumption of unfair discrimination has been rebutted involves an examination of the impact of the discrimination on the respondent. The concept of unfairness was considered in the majority judgment in *Hugo*[28] where the following was stated:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked .
>
> . . . .
>
> To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."

[38] In *Harksen,*[29] Goldstone J in discussing factors relevant to the determination of

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28 N 11 at paras 41 and 43.

29 At para 51 (SA); para 50 (BCLR). Although the Court was not unanimous in the application of the equality principles to the facts of *Harsken*, there was unanimity as regards the formulation of those principles.

unfairness stated:

> "The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner . . . In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination."

He went on to list some of the factors which have to be considered in order to determine whether the discriminatory provisions have impacted unfairly on the complainant as follows:[30]

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question
>
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving "precision and elaboration" to

[30] Id at para 52 (SA); para 51 (BCLR).

> the constitutional test of unfairness. They do not constitute a closed list.
>
> In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair."

[39] With regard to the question whether intention has any relevance in the determination of unfairness, it is to be noted that in none of the four judgments was it suggested that intention to discriminate is an essential element of unfair discrimination. The question of intention, particularly in cases of indirect discrimination has, however, been considered by courts in other jurisdictions.

[40] The United States Supreme Court has held that in cases under the equal protection clause where indirect discrimination is in issue it is necessary to prove that the conduct complained of "had a discriminatory effect and that it was motivated by a discriminatory purpose".[31] In Title VII cases,[32] however, which deal with discriminatory practices in employment, the Supreme Court has taken a different approach dictated by the purpose of the legislation.

> ". . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest

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[31] *United States v Armstrong* (1996) 134 L Ed 2d 687 at 699 where the relevant authorities are reviewed.

[32] Title VII of the Civil Rights Act of 1964, which provides for class actions to enforce provisions of the Civil Rights Act.

relationship to the employment in question."[33]

[33] *Griggs v Duke Power Co.* (1971) 401 US 424 at 432.

The difference between the approach to Title VII claims and equal protection claims was discussed by the Supreme Court in *Washington v Davis*[34] where a divided court held that proof of intention to discriminate was a requirement of claims for indirect discrimination based on the equal protection clause. The Chapter on Fundamental Rights in the interim Constitution is different to the Bill of Rights of the United States in that it contains not only an equal protection clause in the form of section 8(1) but also an anti-discrimination clause, section 8(2).

[41] In *Re Ontario Human Rights Commission et al and Simpson-Sears Ltd*[35] the Supreme Court of Canada held that proof of intention to discriminate was not necessary in order to establish a breach of the Ontario Human Rights Code which contained a provision that:

> "No person shall . . . discriminate against any employee with regard to any term or condition of employment."

In giving judgment for the Court, McIntyre J said:

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[34] (1976) 426 US 229.

[35] (1986) 23 DLR (4th) 321 (SCC).

> "Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory."[36]

The same principle has been applied to the prohibition against discrimination which forms part of the equality rights entrenched in section 15 of the Charter.[37]

[42] Article 119 of the European Economic Community Treaty contains provisions which require equal pay for equal work without discrimination on the grounds of sex. An EEC directive[38] binding on member states and which was applicable to this requirement provided that:

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[36] Id at page 329.

[37] *Law Society of British Columbia v Andrews* et al (1989) 56 DLR 1 (SCC) at 16-9; Hogg, Constitutional Law of Canada, 3ed para 52.7 (h).

[38] Council Directive (EEC) 76/207.

> ". . . the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status".

The European Court has held[39] that where an exclusion from a benefit affects "a far greater number of women than men" that is evidence of indirect discrimination and it is for the undertaking that has made the exclusion to show that "it is based on objectively justified factors unrelated to any discrimination on the grounds of sex."

[39] *Bilka-Kaufhaus GmbH v Weber von Hartz* (1986) ECR 1607, para.31. For an example of the application of this principle to part time employees see: *EOC v Secretary for State for Employment* 1994 (1) All ER 910 (HL).

[43] In interpreting section 8 of the interim Constitution it seems to me to be of importance to have regard to the fact that it contains both an equal protection clause and an anti-discrimination clause. The purpose of the anti-discrimination clause, section 8(2), is to protect persons against treatment which amounts to unfair discrimination; it is not to punish those responsible for such treatment.[40] In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken. There is nothing in the language of section 8(2) which necessarily calls for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination. Consistent with the purposive approach that this Court has adopted to the interpretation of provisions of the Bill of Rights, I would hold that proof of such intention is not required in order to establish that the conduct complained of infringes section 8(2). Both elements, discrimination and unfairness, must be determined objectively in the light of the facts of each particular case. This seems to me to be consistent not only with the language of the section, but also with the equality jurisprudence as it has been developed by this Court.[41] It is also consistent with the presumption in section 8(4) which would be deprived of much of its force if proof of intention was required as a threshold

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[40] See also n 36 above.

[41] In *Harksen* an objective test was set out for determining whether or not the differentiation amounted to discrimination, see para 29 above. Although the decision was given in relation to direct discrimination there seems to be no reason why an objective test should not also be applied when indirect discrimination is in issue.

requirement for the proof of discrimination.[42]

[44] This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits "*unfair*" discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness. This is made clear in the passage cited above[43] from the judgment of Goldstone J in *Harksen*'s case. It is also made clear in that case that an objective test has to be applied in deciding whether or not discrimination has been unfair.

The position of the respondent in society

[42] See Chaskalson et al *Constitutional Law of South Africa*, para 14.5(b).

[43] See 29 above.

[45] What is of importance at this stage of the enquiry is the interplay between the discriminatory measure and the person or group affected by it. As pointed out by O'Regan J in *Hugo*:[44]

> "The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."

[46] The postscript to the interim Constitution refers to our "past of a deeply divided society".[45] Differentiation made on the basis of race was a central feature of those divisions and this was a source of grave assaults on the dignity of black people in particular. It was however not human dignity alone that suffered. White areas in general were affluent and black ones were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas. Section 8 is premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with. In *Hugo* it

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[44] At para 112.

[45] See the section under "National Unity and Reconciliation."

was said:

> "We need, therefore, 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."[46]

[47] The respondent belongs to a group that has not been disadvantaged by the racial policies and practices of the past. In an economic sense, his group is neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past. In this case for instance, the respondent did not plead poverty as his reason for not paying the amount owing by him calculated on a consumption-based rate; indeed there is evidence that those ratepayers who found themselves in financial difficulties could approach the council for extensions and more lenient treatment. What the respondent has done, together with other residents who share his view on this, was to signify in a dramatic way their objection to the fact that the residents of Mamelodi and Atteridgeville were given the benefit of paying for services at different and lower rates. I am acutely aware that generalisations are invidious and that there are undoubtedly some members of the white community who are poor and some from the black

[46] At para 41.

community who are wealthy. The fact of the matter is that the discriminatory practices of the past were designed to and did benefit the white community whilst inflicting disadvantage on the black community.

[48] The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection. When that happens a Court has a clear duty to come to the assistance of the person affected. Courts should however always be astute 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.

The nature and purpose of the power

[49] It is the council's responsibility to deliver services to all residents in its area. This task has to be performed in a manner which does not unfairly discriminate against any one of the residents. The other side of the coin is the council's entitlement to be paid for the delivery of services. To that end, the council is required to put in place effective measures for the collection of municipal charges. In a time of transition though, the council's responsibility to the residents has an added and equally important dimension. Since the consolidation of various areas may involve a complex mixture of advantage and disadvantage, the measures that the council resorts to must be directed at eliminating the disparities and disadvantages that are a consequence of the policies of the past, to engender equality in as short a time as the council's resources permit. It

follows therefore that while the council's efforts had to be directed at the elimination of the flat rate in the townships and the institution of a consumption-based tariff for all, the rapid upgrading of services and the development of a proper infrastructure in the previously disadvantaged areas also had to be high on its list of priorities.

The flat rate

[50] The council maintained bulk meters to determine the quantity of electricity and water supplied to Atteridgeville and Mamelodi. According to Mr Eicker the flat rate was calculated by measuring the bulk supplies to Atteridgeville and Mamelodi, deducting the business use (which was metered) and dividing the balance between the number of houses in the two townships. For the purposes of this calculation the bulk supplies were averaged over a period of time. In the result, the total charges levied through the flat rate and the metering of business premises were apparently intended to be more or less equivalent to the tariff rate for the electricity and water consumed in the townships.

[51] This was a crude method of recovering charges. It meant that those residents who consumed less water and electricity than the "average" resident of Atteridgeville and Mamelodi paid the same as those whose consumption was above the average. It also meant that if consumption in the two townships increased, the flat rate would be inadequate to recover the tariff charges for the actual consumption.

[52] There was however, no reasonable alternative to a flat charge. Meters had not been

installed in residential premises in Atteridgeville and Mamelodi and without them there was no way of measuring the consumption of individual users. In the circumstances that existed the charging of a flat rate calculated in the manner described by Mr Eicker was the council's solution to the problem. The respondent did not suggest that there was a better method of levying the charges nor did he challenge the validity or the amount of the flat rate in the tariff. His attitude was that the flat rate was less than the metered rate and if a flat rate was charged in Atteridgeville and Mamelodi, it should be charged throughout the whole municipality of Pretoria. It was on that basis that he made payment of his monthly accounts.

[53] The council's decision to confine the flat rate to Atteridgeville and Mamelodi and to continue charging the metered rate in old Pretoria and in businesses in Atteridgeville and Mamelodi that were equipped with meters was dictated by the circumstances with which it was confronted. It was in effect a continuation of the practice which had been followed prior to the consolidation of the various areas which now make up the council area. There are four times as many stands in "old Pretoria" as in Mamelodi and Atteridgeville put together.[47] Since it is a wealthier and more developed area than Atteridgeville and Mamelodi, it is a fair assumption that old Pretoria would have accounted for a major proportion of the total consumption of water and electricity in the municipality. To have applied a flat rate throughout the entire municipality would have been unscientific, and would have resulted in far greater prejudice to individual users than the application of the flat rate in Atteridgeville and Mamelodi alone. In the circumstances the adoption of a flat rate as an interim arrangement while meters were being installed in the

[47] There are 203 578 stands in "old Pretoria", 25 307 in Mamelodi and 13 442 in Atteridgeville.

residential areas of the two townships was the only practical solution to the problem.

[54] The respondent was critical of the delay in installing the meters in Atteridgeville and Mamelodi. The council originally contemplated that the work would be completed by June 1995. In June the council officials asked for an extension of the deadline until October. In September they sought a further extension until 1 November, and on 30 April 1996 they asked for a condonation of the delay and an extension until the end of May. At the time of the trial in May all the meters had apparently been installed. Mr Eicker said that the original target date proved to be unrealistic because of the number of contractors involved, the difficulty the consulting engineer had in exercising control over them, and difficulties flowing from administrative "red tape". Why the time estimates were so faulty was not clear. The delays not only prolonged the period during which the flat rate was in force, but it also prevented readings being taken from those meters which had been installed. According to Mr Eicker, there had to be some form of co-ordination between the meters and the council's accounting records before individual consumption could be assessed and accounts sent out on that basis. It was only in about March or April 1996 that this difficulty was resolved.

[55] It was not suggested that the delay in installing the meters was due to bad faith on the part of the council or its officials or that there was any ulterior purpose in the conduct which led to the delay. Even if there was negligence on the part of council officials in failing to ensure that the work was completed at an earlier date (an issue which was not fully investigated at the trial), that in itself would not necessarily lead to a finding that the discrimination that resulted from the delay was "unfair". It would be no more than a factor to be taken into account in the assessment

of the impact of the discrimination in order to determine whether or not it was "unfair".[48]

[56] The council was criticised by the High Court for not informing the rate-paying public in old Pretoria about its difficulties regarding implementation of the consumption-based tariff in the townships even though this had been promised. This failure occurred notwithstanding the fact that the council could have disseminated the information through its newsletter, the *Muniforum*. It was compounded by the fact that misleading information was given, leading the readers of the publication to believe that a consumption-based tariff was being implemented. There was no satisfactory explanation for this. The failure to deal openly with residents in old Pretoria is not in keeping with the new values of public accountability, openness and democracy. It is conduct that deserves censure; it is however not the central issue in the dispute. The question is whether the conduct of the council in operating a flat rate in the two townships and in selectively taking legal action to enforce payment of arrears against the residents of old Pretoria and not also against defaulting residents of the two townships amounts to unfair discrimination.

Cross-subsidisation

[57] The respondent linked the flat rate to the issue of cross-subsidisation. It was the respondent's case that because the flat rate was lower than a consumption-based rate, the ratepayers of old Pretoria were subsidising those of Mamelodi and Atteridgeville. This, it was contended, was unfair.

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[48] See para 37 above.

[58] The evidence on cross-subsidisation given at the trial was not clear. Mr Eicker explained that the flat rate had been calculated after taking into account the total consumption of water and electricity in Atteridgeville and Mamelodi. His evidence-in-chief on this issue was as follows:

> "Goed, dan sê die verweerder dat die inwoners van Pretoria is derhalwe verplig om pro rata meer vir die gebruik van elektrisiteit en water te betaal as die inwoners van Atteridgeville en Mamelodi. Is dit 'n korrekte stelling?-- My vertolking daarvan is nee, want ons het tog bepaal watter verbruik is die ongemeterde verbruik in die twee dorpsgebiede. Met ander woorde ...(tussenby).
>
> Hoe het u dit bepaal? - - Dit is na aanleiding van 'n studie wat verlede Meimaand gedoen is en waarvolgens die persone wat die tariewe bepaal vir my sê dat hulle het na die "bulk" meters, "bulk" metering gaan kyk en hulle het die besigheidsektor se verbruike afgetrek en bepaal wat is die gemiddelde verbruik per huishouding in die twee dorpsgebiede.
>
> Is dit so maklik soos om die eenhede wat na Mamelodi toe gestuur is te meet en dit te deel deur die hoeveelheid huishoudings daarso? - - Weens weereens die verlede, en dit was ook my opdrag aan my mense dat daardie meter, daardie "bulk" voorsieningsmeter moet op 'n voortgesette basis gelees word, al lewer ons nie meer die rekening aan die Stadsraad van Mamelodi en aan die Stadsraad van Atteridgeville nie, moet ons voortgaan om daardie verbruike te bepaal elke maand.
>
> Nou, dan sê die verweerder die eiser is nie instaat om te bepaal hoeveel die inwoners van Pretoria pro rata meer betaal vir munisipale dienste as inwoners van Atteridgeville en Mamelodi nie. Is dit 'n korrekte stelling? - - Ek verstaan die vraag nie heeltemal nie, maar ek sou sê - hoeveel hulle pro rata meer betaal? Ek glo nie hulle betaal pro rata meer nie, want hulle betaal mos volgens dieselfde tariefstruktuur.
>
> En in die dae toe hulle nog die vaste tarief betaal het weet u of dit toe pro rata meer of minder was? - - Omdat die vaste tarief nie volgens 'n begroting daargestel is nie - 'n

begroting bepaal tog wat die tariewe moet wees - is dit moeilik om te sê dat - want ons het nog, ons het nie volle beheer gehad oor die begroting wat oorgeneem is nie."

[59] The last answer given by Mr Eicker seems to have been a reference to the time prior to the incorporation of Atteridgeville, Mamelodi and old Pretoria to fall under one municipality. In cross-examination however, Mr Eicker acknowledged that the subsidisation of water and electricity supplies which had obtained before the council assumed responsibility for Atteridgeville and Mamelodi continued after the consolidation involving the three municipalities. His evidence was as follows:

"En is dit reg mnr Eiker, dat die 'flat rate' wat u aangetref het minder was as die gemeterde verbruik? - - Waarskynlik, ja.

Met ander woorde selfs op die veronderstelling dat op 1 Desember 1994 elke inwoner van Mamelodi sy 'flat rate' betaal het sou die totale bedrag ten aansien van elektrisiteits-voorsiening steeds minder gewees het as wat inderdaad voorsien is. Korrek? - - Weereens waarskynlik. Ek weet nie.

Maar u is die persoon wat die ...(onhoorbaar) Nou weet ons egter ook dat op 1 Desember 1994 die gemiddelde verhaling van dienste in Mamelodi - en as ek Mamelodi sê tel ek elke keer Atteridgeville by - ver onder 'n honderd persent was, nie waar nie? - - Ja, ek het nie daardie syfers nie maar ons kan dit aanvaar, ja.

Dit is 'n algemeen bekende feit? - - Ja.

En dit vir u as die hoof van die afdeling wat agterstallige rekeninge moet hanteer 'n onmiddellike en kardinale probleem gewees het want u het geweet hier kom verdere moeilikheid vir my? - - Dit was inderdaad so.
Dan wil ek dit aan u stel mnr Eicker, dat u op 1 Januarie 1995 toe die 'flat rate' toe bepaal is 'n 'flat rate' bepaal het wat steeds laer was as die werklike verbruik van elektrisiteit. Is dit korrek? - - Die mense wat met die begroting werk sal dit nader kan toelig maar my

mening is ja, dit is korrek.

Dit is korrek. Met ander woorde met die intrapslag toe ons nou groter Pretoria word het die stadsraad uit sy eie 'n tarief vir Atteridgeville en Mamelodi bepaal wat met die intrapslag minder was as wat die raad geweet het hy sou verskaf. Korrek? - - Ja.

En met die intrapslag het die raad verder geweet op 1 Januarie 1995 dat hy nie net verskaf teen 'n prys minder as wat verbruik word nie maar dat die mense aan wie hy verskaf alles behalwe voorbeeldige betalers is. Korrek? - - Ja.

. . . .

Met ander woorde met die intrapslag op 1 Januarie 1995 het die Stadsraad van Pretoria geweet dat ten aansien van elektrisiteitsvoorsiening en van watervoorsiening aan Mamelodi en Atteridgeville maand vir maand in die rooi gaan wees. Korrek? - - Ja. Sê maar so, ja.

Nee, maar dit kan mos nie anders nie? - - Ek het dit nie geweet nie. Ek kon dit dink maar ek het dit nie geweet nie.

U het dit aan die einde van Januarie geweet want toe het u met die rekeninge begin werk. Korrek? - - Ja.

En daarna het u geweet einde Februarie gaan dit erger lyk en einde Maart 1995 gaan dit nog erger lyk? - - Dit is reg.

En inderdaad het einde Februarie u stoutste of ergste verwagtinge oortref; dit was erger as wat u selfs verwag het, was dit nie so nie? - - Ek kan nie dit sê nie.

Maar dit was erg? - - Dit was erg.

. . . .

Die elektrisiteit wat die raad verskaf aan die ou Pretoria word volgens bestaande, daar is

deurentyd volgens bestaande tariewe verskaf. Korrek? - - Ja.

Daardie bestaande tariewe was hoër as die prys waarteen Pretoria Stadsraad die elektrisiteit by die groot maat verskaf het, by Evkom aangekoop het. Is dit reg? - - Uiteraard, ja.

En hy was hoër ten aansien van water as wat die groot-maat verkoop, die Randse Waterraad, die water aan Pretoria verskaf. Korrek? - - Dit is reg.

Nou, as 'n mens daardie feite in aanmerking neem mnr Eicker, dan is dit korrek is dit nie, dat die verbruiker, die belastingbetalers van die ou Pretoria vanaf 1 Januarie 1995 water- en elektrisiteits verbruik van die inwoners van Atterdgeville en Mamelodi subsidieer? Is dit reg? - - Waarskynlik, ja."

[60] It was not put to Mr Eicker that his evidence-in-chief as to the method according to which the flat rate had been calculated was incorrect; the fact that such a calculation had been made was not disputed. The water and electricity tariffs make provision for "lower consumption groups" by setting "minimum" charges which are less per unit for consumption below a particular level, than charges for consumption above that level. The flat rate was calculated according to this tariff on the assumption that the average consumption per household would be 250kWh per month. Mr Eicker advised both the respondent and the attorneys for the BBG of this in letters written to them respectively on 19 and 26 October 1995. Why it resulted in the total of the flat rate charges being less than the total charge for actual consumption calculated according to the tariff is not clear and was not investigated at the trial. But the fact that the council considered it necessary to phase in the metered charge over a period of seven months and made provision for this in its tariff and that the officials were reluctant to charge metered rates until all the meters had been installed, shows that the council and its officials contemplated that the metered charges would be higher

than the flat rate. This was borne out by the fact that when accounts charging at the metered rate were sent out to certain residents of Atteridgeville and Mamelodi, the council immediately offered to refund or credit the amounts charged that were in excess of the flat rate. The magistrate held that the flat rate was less than the metered rate would have been, and the High Court agreed with this conclusion. That finding has not been shown to be incorrect, and is a factor to be taken into account in dealing with the alleged breach of section 8(2). In my view however, it is not decisive of the issue.

[61] The amicus curiae, the National Electricity Regulator (NER), provided the Court with a detailed and helpful analysis of cross-subsidisation in the pricing of electricity. What emerged from the NER's contribution was that cross-subsidisation is integral to the pricing of electricity and that: (a) there are numerous factors that influence the pricing of electricity and as a result it would be difficult to determine the true cost of supply to every consumer; (b) cross-subsidisation will occur even where uniform tariffs exist; (c) the tariffs levied against domestic users are often lower than the actual cost of supplying electricity to them; and (d) cross-subsidisation between different categories of consumers and within the same category is unavoidable.

[62] Cross-subsidisation does not only find expression in the distribution of electricity but in other situations as well, for example, in income tax, in public administration, in the use of a variety of public amenities, and so on. In its judgment on the merits of the dispute the High Court seems to have taken the view that cross-subsidisation is discriminatory and that the levying of

different rates for the same services is always unfair.[49] I am unable to agree with this view which looks to formal rather than substantive equality. There may well be cases where it is not unfair to charge according to different rates for the same services; it seems to me to be inconsistent with the equality jurisprudence developed by this Court to hold that all cross-subsidisation is precluded by section 8(2).

[63] In an area where a flat rate is in operation, for instance, cross-subsidisation within that area is inevitable. If rich and poor in that area pay for services on the basis of a flat rate, it may well be that the poor and lowest consumers of electricity subsidise the rich and largest consumers; the poorest might be paying more than they would be in the absence of a flat rate, and the rich might be paying less. The respondent himself could very well be a beneficiary of cross-subsidisation if businesses in old Pretoria, as in other places, pay for the same services on a higher rate than residents. I am satisfied that in the instant case, cross-subsidisation, which in any event cannot be regarded as having been the creation of the council, is an accepted, inevitable and unobjectionable aspect of modern life. I deal later with the cross-subsidisation

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[49] N 5 above at 207 (SA); 430 (BCLR): "Op sigself is die blote instelling van 'n vaste heffing ("flat rate") vir alle dienste gesamentlik enersyds, teenoor die vereiste van 'n gemeterde tarief heffing andersyds nie onbillik nie. Dit word egter anders wanneer die vaste heffing nie die billike waarde van dienste weerspieël nie maar wesenlik laer is. Wanneer die dienste gelykwaardig is soos in hierdie geval met water en elektrisiteit maar die vergoeding nie, is die onderskeid onbillik."

which was a result of the delay in installing the meters and of the failure to apply the tariff to users of metered premises in Atteridgeville and Mamelodi.

Assessment of the impact of the flat rate and the cross-subsidisation

[64] The operation of the flat rate in Mamelodi and Atteridgeville was a temporary measure. The council initially intended the flat rate to be phased out by June 1995, but it continued until April 1996. In June 1995 the consumption-based tariff was increased by 17 percent. It had been calculated on the basis that charges in Mamelodi and Atteridgeville would be made in terms of the new tariff and would be enforced in accordance with the council's credit control policy. The subsequent delays in installing the meters and the failure to enforce the tariff took place after the tariff had been increased. There is nothing to show that the increase in the tariff would not have occurred or that the increase would have been less, if provision had not been made for a flat rate. According to Mr Eicker, the new tariff resulted in a reduction of charges to residential properties in old Pretoria because the capital levy which had previously been included in the charges was withdrawn. The flat rate was also substantially increased, by more than 50 percent with effect from 1 January 1995. In so far as the tariff made provision for subsidised rates this seems to me to be consistent with the way in which electricity is supplied throughout South Africa and in my view it does not constitute unfair discrimination.

[65] There was no evidence that the respondent has been adversely affected in any material way by provision for a flat rate in the tariff or by the policy adopted by the council officials. There was no evidence of any deterioration in the high standard of delivery of services in old Pretoria since the amalgamation; on the other hand, although there was some improvement in the

two black townships, the evidence showed that service delivery was still not satisfactory. In the circumstances of this case, in my view, cross-subsidisation resulting from the application of the tariff is not material in the assessment of unfairness.

[66] It was not suggested that the council deliberately delayed the installation of the meters or that it did not intend to install them as soon as possible after 9 December 1994. According to the evidence, it failed to do so within the time specified because of administrative red tape and ineffectiveness. I am of the view, however, that given the difficulties involved in this period of transition, the fact that elections only took place in November 1995 and the new council would have had to confront many problems when it came into office, and that the council itself had to rely on outside contractors to do the installations, the time taken overall cannot be said to have been so unreasonable as to preclude the council from relying on it.

[67] The decision not to activate the meters on a piecemeal basis was clearly taken as a matter of judgment, strategy and practical considerations, and not with the intention of prejudicing the residents of old Pretoria or benefiting the residents of Atteridgeville and Mamelodi. The reasons given by Mr Eicker for the decision were that: (a) the council wanted to effect upgrading in an orderly manner and it was not practicable to activate meters on a one by one basis; (b) because of the general poor level of services, there was resistance to paying metered rates; (c) inequality would have resulted from using different tariffs in the same locality; and (d) it was not possible to read the meters which had been installed until March or April 1996.

[68] I am satisfied that the operation of the flat rate and its continued application on

properties where meters had been installed in Mamelodi and Atteridgeville, as well as the cross-subsidisation which may have resulted from any delay in implementing a metered tariff, did not impact adversely on the respondent in any material way. There was no invasion of the respondent's dignity nor was he affected in a manner comparably serious to an invasion of his dignity.

Selective enforcement

[69] At the time of the trial in the Magistrate's Court in May 1996 approximately 3000 summonses had been served on defaulting residents in old Pretoria. Although figures do not always tell the whole story, statistics referred to in the evidence reveal that in old Pretoria about 25% of the rate-paying residents were in default and the arrears in that part amounted to R229 million. In old Pretoria steps were taken to enforce payment by suspending services and by the issuing of summons. For reasons of hygiene though, there was no interruption of water supplies. In Atteridgeville, less than one third of the 13 442 ratepayers were in default and in Mamelodi the figure was just under 50 percent of the 25 307 ratepayers. Atteridgeville and Mamelodi owed R12 million and R57,5 million respectively. Electricity services to individual stands could not be suspended in these townships because there were no means for doing so. Despite the number of residents in arrears no legal action was instituted against them, though summonses were issued against defaulting businesses in those townships.

[70] Of particular importance to an understanding of the differential treatment in the present

case are historical factors such as the existence of a culture of non-payment in Atteridgeville and Mamelodi. Its origins are part of the history of resistance to apartheid structures in the past, fortified as it was by protests against poor or non-existent service delivery by local authorities. On the other hand, in old Pretoria where services had been of a high standard and there had been no protest against government policy, there had been a culture of payment. Those who did not pay were dealt with by conventional credit control measures, including suspension of services and taking of legal action where necessary.

[71] The large sum owing in respect of arrear charges in old Pretoria appears to have been the result, in part, of concerted action by the group of ratepayers who objected to the fact that they were being charged a metered rate whilst residents of Atteridgeville and Mamelodi were being charged a flat rate. The problem confronting the council at this time was how to prevent a culture of non-payment for services taking root in old Pretoria, and how to convert the culture of non-payment for services which had existed in Atteridgeville and Mamelodi into one of payment for services.

[72] According to Mr Eicker the policy that was adopted by council officials to address this problem was to enforce payment of arrear charges in old Pretoria, if necessary by means of suspension of services or legal action, and to encourage payment of arrears by residents in Atteridgeville and Mamelodi, but not to take legal action against them while the installation of meters was still in progress. Questions about this appear to have been raised by the attorneys for the BBG and are dealt with in a letter written to them by Mr Eicker on 26 October 1995. He asked them to be patient, saying that the action against residents who failed to pay their accounts

was in a strategic phase of implementation and that to disclose the strategy would undermine what was being planned. This may be the reason why the matter was not raised formally at council meetings. There is nothing on the record to show that the policy of not suing was raised with the council prior to 7 May 1996 when Mr Eicker reported somewhat equivocally to the executive Committee that no credit control measures (in Atteridgeville and Mamelodi) were possible for different reasons, of which the upgrading of services and administration were the most important. That was only a few days before the hearing in the Magistrate's Court commenced. There can be no doubt, however, that the Council must have been aware of the delays and the policy adopted by its officials. There were articles in the press and there were public meetings at which these matters were raised and the build-up of arrear charges in old Pretoria and the townships could not have gone unnoticed.

[73] Section 8 of the Constitution is a guarantee that at least at the level of law-making and executive action, hurtful discrimination such as that which forms part of our painful history, will no longer be a feature of South African life. Equality is one of the core values of the Constitution. Whilst the section clearly calls for more than "formal equality" and recognises the need to address past disadvantages, the guarantee that it gives extends to all sections of the community, not only those who have been disadvantaged in the past. 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. It goes without saying that a local authority is not obliged to sue every debtor. The Constitution requires only that its debt-collection policy be rational and not constitute unfair discrimination.

[74] Section 8(3) permits the adoption of special measures which may be required to address past discrimination. In the present case, however, although there was mention of it in argument, it was not part of the council's case that the policy of selective enforcement of arrear charges was a measure adopted for the purpose of addressing the disadvantage experienced in the past by the residents of Atteridgeville and Mamelodi. The reasons given for the policy were pragmatic. Apparently the town engineer had indicated that he was anxious to avoid anything that might provoke a hostile reaction from the residents of Mamelodi and Atteridgeville at a time when the contractors were engaged in the installation of meters in the two townships. It was to accommodate this concern that the council officials adopted a policy of enforcing claims against (white) residents of old Pretoria and of not enforcing claims against (black) residents of Atteridgeville and Mamelodi. This was in fact contrary to a council decision that arrear charges should be collected and if necessary enforced by way of legal action against all consumers.

[75] The case advanced by the council was that in the circumstances that existed at that time the selective enforcement, though discriminatory, was not unfair. It was argued on behalf of the council that the policy had the legitimate purpose of facilitating the transition from a system under which municipal services were provided on a separate and unequal basis to one in which equal services would be provided on an equal basis. Counsel stressed that the arrear charges were not written off, and that the policy was for the short term only, and was to come to an end when all the meters had been installed.

[76] This argument, however, failed to take into account that the policy of selective

enforcement of debts owed to the council was not one which was initiated by the council itself. It was one adopted and implemented by its officials apparently without its authority and in conflict with its own express resolution which required action to be taken against all defaulters. Furthermore, as already mentioned, the policy was implemented not only without public notice but in secrecy and after untrue and misleading public statements had been made by such officials with regard to that policy. The mere fact that council officials acted without authority and in contravention of council policy does not have as a necessary consequence that the policy implemented by them constituted unfair discrimination. That question must be answered objectively with regard only to what they did or omitted to do. In other words, if the policy would not have been unfair if implemented in terms of council policy, the fact that it was implemented without the council's authority would not make it unfair. At the same time where a policy is deemed by section 8(4) to constitute unfair discrimination on a ground specified under section 8(2), the fact that the policy is contrary to a fair and rational council resolution and is implemented in secrecy and in contradiction of public statements issued by the council officials, makes the burden of proving the policy not to be unfair more difficult to discharge than it might otherwise have been.

[77] The respondent and other residents of old Pretoria were not victims of past discrimination. A properly formulated policy to promote a culture of payment in areas in which there had been a culture of boycott would not have been aimed at impairing the respondent's interests in any way. If carefully formulated and implemented it could have been directed to the achievement of the "important societal goal" of transforming both the living conditions and culture of non-payment in Atteridgeville and Mamelodi, and that might well have been

consistent with the goal of furthering equality for all. If such a policy had been formulated a court would have been in a position to evaluate it, to determine whether it met the requirements of fairness, and also to monitor its implementation. The ratepayers of Pretoria would also have been aware of and able to monitor the implementation of the policy.

[78] But that was not the evidence before the Court. Mr Eicker says that the policy of encouragement with no legal action was adopted by the officials, and that they would have implemented enforcement mechanisms as soon as the meters had been installed. The failure to enforce payment of arrears had nothing to do with the ability of residents to pay, or the introduction of metered charges. The residents who were in arrears had been charged at the flat rate, and the decision not to sue was a general decision applicable to all residents of Atteridgeville and Mamelodi, irrespective of their financial circumstances or their ability to pay for the services. This policy was not recorded in any document. The council which must have known about the problems that were being experienced failed to deal with them at its meetings, leaving it to its officials to weather the storm as best they could.

[79] The picture that emerges from Mr Eicker's evidence is not of a rational and coherent plan adopted openly by the council or its officials to recover arrear and current charges from ratepayers in Atteridgeville and Mamelodi. It is instead a picture of confusion and uncertainty with officials being pulled in different directions by different pressure groups; of the truth being concealed and false information being disseminated; and of decisions being taken by officials without council approval to charge on a basis inconsistent with the tariff and not to enforce council resolutions dealing with the recovery of arrear charges.

[80] The burden of rebutting the presumption of unfairness was on the council. The effect of what was done was to take action against defaulters in old Pretoria but not in Mamelodi and Atteridgeville; to single out white defaulters for legal action while at the same time consciously adopting a benevolent approach which exempted black defaulters from being sued.

[81] No members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups. That is the grievance that the respondent has and it is a grievance that the council officials foresaw when they adopted their policy. The conduct of the council officials seen as a whole over the period from June 1995 to the time of the trial in May 1996 was on the face of it discriminatory. The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity. This was exacerbated by the fact that they had been misled and misinformed by the council. In the circumstances it must be held that the presumption has not been rebutted and that the course of conduct of which the respondent complains in this respect, amounted to unfair discrimination within the meaning of section 8(2) of the interim Constitution.

Limitation of right

[82] The rights guaranteed in Chapter 3 of the interim Constitution may be limited in terms of section 33(1) of the interim Constitution. A requirement of section 33(1) is that a right may only be limited by a law of general application. Since the respondent's challenge is directed at the conduct of the council, which was clearly not authorised, either expressly or by necessary implication by a law of general application, section 33(1) is not applicable to the present case.

Section 178(2) of the interim Constitution

[83] The respondent submitted in argument that the council has failed to comply with section 178(2) of the interim Constitution. This provision deals with the competence of a local authority "to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions." The proviso to the section requires that

> "within each local government such . . . . tariffs shall be based on a uniform structure for its area of jurisdiction."

The provision is contained in Chapter 10 of the interim Constitution and its operation would have commenced immediately after the date of the elections for local government on 1 November 1995.[50]

[50] *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W) at 474J - 476J.

[84] Respondent argued that in charging a flat rate to residents of Mamelodi and Atteridgeville and a consumption-based tariff to residents of old Pretoria after that date, the council was not levying charges in terms of a uniform structure as required by section 178(2). The section has been considered in several cases before the High Court. In *Greater Johannesburg City Council v Europa Hotel,*[51] Wunsh J did not find it necessary to analyse the meaning of a "uniform structure"; he found on the facts that there was no evidence that the requirement of a uniform structure had not been complied with. In *Beukes v Krugersdorp Transitional Local Council and Another* [52] the issue was decided on the basis that the requirement of a uniform structure was not applicable to that case since the complaint concerned the pre-election position of the local authority. Chapter 10 of the interim Constitution could only be applicable after the local government elections. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* ,[53] Goldstein J held that the " requirement of a uniform structure cannot be interpreted to require uniformity or equality of treatment at every level and in every respect." In *Frans v Munisipaliteit van Groot Brakrivier en Andere,*[54] Van Zyl J, noting that there was nothing in the interim Constitution and in legislation

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[51] See *Greater Johannesburg City Council v The Europa Hotel* Case No. 22394/95, 17 November 1995, unreported.

[52] N 50 above.

[53] 1997 (5) BCLR 657 (W).

[54] 1997 (3) BCLR 346 (C).

which specified the period within which a local authority had to implement a uniform structure suggested that a reasonable time had to pass before a local authority could be said to be in breach of the proviso to the section.

[85] The constitutional requirement that the rates and tariffs charged by a local government shall be based on a "uniform structure" needs to be interpreted within the context of local government as it exists. There are enormous disparities in the quality of facilities and services provided by local government authorities to users within their municipal areas. Particularly important is the fact that there are for historical reasons enormous differences in the overall quality of services provided to what were formerly white suburbs and black townships. In addition, it should be borne in mind that local governments provide services to widely different categories of users, such as industrial, commercial and agricultural users as well as to domestic consumers in formal and informal settlements. Section 178(2) does not stipulate that a uniform tariff be established but that it be based on a "uniform structure". It should not be interpreted therefore to mean that the tariff must provide for identical rates to be charged to all consumers regardless of the quality of service or the type or circumstances of the user. That could produce a highly inequitable result. The section requires instead that local governments establish a "uniform structure" for tariffs. In my view, this requirement compels local governments to have a clear set of tariffs applicable to users within their areas. The tariffs themselves may vary from user to user, depending on the type of user and the quality of service provided. As long as there is a clear structure established, and differentiation within that structure is rationally related to the quality of service and type or circumstances of the user, the obligation imposed by section 178(2) will have been met. If the differentiation is alleged to be discriminatory the remedy of aggrieved

persons is to challenge the validity of the tariff under section 8(2) of the interim Constitution. As the High Court held in its judgment, there was no challenge to the tariff in the present case and its validity must be assumed.[55]

[86] The problem in the present case arose from the fact that the tariff made no provision for a flat rate after September 1995 yet by that date there were still premises without meters. The council officials had to deal with this problem and it is contended that the way in which they did so infringed section 178(2). What is clear is that the obligations imposed on councils by section 178(2) could not be expected to be achieved overnight. In this respect, Van Dijkhorst J observed:

[55] N 5 above at 211 (SA); 433 (BCLR).

> "Die eenvormigheidsvereiste van artikel 178(2) gelees met die gelykheidsbeginsels van artikel 8(2) moet egter realisties toegepas word. *Lex non cogit ad impossibilium.* Die Grondwet vereis nie die onmoontlike nie. Die doel daarvan is juis om die verhouding tussen owerheid en onderdaan vlot, soepel en billik te reël tot voordeel van beide. Gesonde beginsels van publieke administrasie, goeie regering en openbare verantwoordbaarheid met die oog op doeltreffende dienste en effektiewe sakebestuur is die oogmerk van artikel 178."[56]

Since I have come to the conclusion that the conduct of the council officials in dealing with the situation in Atteridgeville and Mamelodi constituted an infringement of section 8(2) of the interim Constitution, nothing turns on the question whether it also constituted an infringement of section 178. It is therefore not necessary to decide whether section 178(2) applies only to the basis on which tariffs have to be drawn up, or whether it applies also to the manner in which the tariff is enforced; and if it does, whether the failure of the council to amend the tariff and to make provision for the recovery of charges from unmetered premises after September 1995, or the conduct of the officials in failing to adhere to the tariff, constituted a breach of section 178.

Summary of findings

[87] To summarise I find that -

(a) the conduct of the council officials during the period July 1995 to April 1996 in

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[56] Id at 208 (SA); 430 (BCLR).

relation to the selective recovery of charges for water and electricity consumed in Atteridgeville and Mamelodi amounted to unfair discrimination in breach of section 8 of the interim Constitution.

(b) The tariff promulgated in the Provincial Gazette of 23 August 1995 must be assumed to be valid.

(c) It is not necessary to decide whether the provisions of section 178 of the interim Constitution were infringed by the manner in which the tariff was applied and enforced.

Appropriate relief

[88] I turn now to consider appropriate relief. The High Court upheld the respondent's defence, as it were, and set aside the magistrate's order, substituting it with an order for absolution from the instance with costs. Argument was addressed to us about the appropriateness or otherwise of the High Court's order.

[89] The respondent invoked the provisions of section 8 of the interim Constitution as a defence to the council's claim based on respondent's failure to fulfill a contractual obligation. Simply put, the respondent's attitude is that he is entitled to withhold payment for services rendered for as long as the council continues with a policy of selective enforcement of payment for services.

[90] Section 7(4)(a) of the interim Constitution provides :

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (*b*) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

The question is what is the appropriate relief in this case. More specifically, is an order of absolution from the instance in this case appropriate relief, where the council sues for recovery of a debt that is due?

[91] The circumstances of the case are relevant to the determination of what is an appropriate order. I have found that the conduct of the council in selectively enforcing the collection of the arrears amounts to unfair discrimination. The discrimination was indirect and did not involve an intention to harm the respondent and the other ratepayers of old Pretoria. There is no evidence of a vindictive targeting of any section of the community. The officials of the council took the decision and, in a rather haphazard way, started to implement it. It should be mentioned that Mr Eicker was formerly an employee of the old Pretoria Council, and for him it was simply a continuation of procedures previously followed to institute legal action against defaulters in old Pretoria. There was no such tradition in Mamelodi and Atteridgeville and the officials had to decide how to cope with the situation. There is nothing to suggest that the decisions that they took were not taken in good faith or that they did not consider it to be the most effective way of dealing with the situation. To some extent the "soft" policy that they adopted bore fruit as payment for services in the two townships increased steadily over the period in issue rising from 47% in July 1995 to 80% in March 1996 in Atteridgeville and from 54% to 72% in Mamelodi.

[92] Le Roux J points out in his judgment on the application for a certificate in terms of rule 18 that the order for absolution from the instance does not bar the council from the relief it seeks against the respondent.[57] It can sue him as soon as it has purged its default under the Constitution. That is true, but it is also relevant to consider the impact of the order made by the High Court in the period of transition. Much has been said about a culture of non-payment by residents of townships. It is a feature of the past, linked as it was to political protest against discriminatory policies under apartheid and an expression of dissatisfaction regarding the low standard of services which were provided. It has no place in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights.

[93] Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it however cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable. It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate

[57] N 7 at 7.

relief should be and to combine with others or take it upon himself or herself to punish the government structure by withholding payment which is due.

[94] The debt that is owed by respondent remains and the only question is whether its payment should be enforced. He does not contend that he is paying more than he should be paying, rather that *others* are paying less than they should. The finding that the conduct of the council officials amounted to unfair discrimination is an intimation that the council has acted incorrectly and that it should put its house in order. It is not a vindication of respondent's refusal to pay for services rendered.

[95] A person who suffers the infringement of a right entrenched in Chapter 3 of the interim Constitution is entitled under section 7(4)(a) to "appropriate relief". For the reasons mentioned above, I do not consider an order for absolution from the instance to be appropriate relief for the purposes of section 7(4)(a) in the instant case, where the council's claim against the respondent is in all other respects unassailable. The conduct of the council officials cannot be equated with the type described in the cases referred to in the judgment of the High Court where courts have refused to come to the relief of litigants because "their hands are not clean". I am of the view that appropriate relief should be relief which is tailored to the needs of the particular case. In *Fose*, Ackermann J speaking for the Court stated:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the

protection and enforcement of these all important rights."[58]

[96] I have found that the selective institution of legal proceedings by the council amounts to a breach of respondent's constitutional right not to be unfairly discriminated against. It has not been shown that respondent could not have availed himself of other, more practical remedies which would have been effective in getting the council to cease its objectionable conduct, thus eradicating the reason for the complaint. Instead of withholding amounts lawfully owing by him to the council, the respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his section 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the court in question. The court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order. It cannot simply be assumed, particularly in our new constitutional dispensation, that the council would not have taken all diligent steps to ensure scrupulous compliance with any such order. The court would in any event be in a position to deal appropriately with any deliberate failure or refusal to comply.

[97] In the result I find that the course followed by the respondent in this case was inappropriate, to the extent that his reliance on the breach of the section 8 right is not a defence to the council's claim. I accordingly find that the order of the High Court of absolution from the

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[58] At para 19.

instance with costs is not appropriate relief in this matter. The council must therefore succeed in the appeal to the extent that the order of absolution from the instance cannot stand.

Costs

[98] I now proceed to consider the question of costs. The High Court's order for costs against the council followed the usual practice in that Court of ordinarily awarding costs to the successful party. The council has been successful in this appeal, but there are other factors which must be taken into account. In *Motsepe v Commissioner of Inland Revenue*, Ackermann J, speaking for the Court, stated:

> ". . . one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be . . ."[59]

In the present case, the respondent invoked a constitutional provision as his defence to the council's claim. Although I have found that the course he followed was not appropriate, it was not frivolous. The issues involved were not only of substance but also of considerable interest to the litigant as well as to the public in general. Resort to this Court

[59] 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 30.

was accordingly justified. I have found, in the present case, that the council infringed the respondent's section 8 right by subjecting him to unfair discrimination. The council is a local authority and not a private individual. Although I find that the order for absolution from the instance was not appropriate relief in the circumstances, I am of the view that this is not a case in which an order for costs should be made against the respondent.

The Order

[99] The following order is made:

(a) the application for leave to appeal to this Court is granted;

(b) the appeal is upheld; the order of the Transvaal High Court is set aside and for it the following is substituted:

(i) the appeal is dismissed;

(ii) no order is made as to costs.

(c) no order as to costs in respect of the application for leave to appeal or the appeal in this Court is made.

Chaskalson P, Ackermann, Goldstone, Kriegler, Madala, Mokgoro and O'Regan JJ concur in the judgment of Langa DP.

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."[1] 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.

[1] 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20.

[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.[2] Such policies were expressed in laws implemented by previous local authorities leading to the untold hardships of which the Constitution[3] speaks.[4] 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,[5] 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.[6]

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2 See, generally, Friedman "One Step Forward, Two Steps Back" in *Councils and Controversy: South Africa's New Regional Services Councils* (South African Institute of Race Relations, Johannesburg 1987) at 1; Heymans and Totemeyer (eds) *Government by the People* (Juta & Co, Ltd, Cape Town 1988); Bennett et al (eds) *Servicing the Nation: Local and Regional Government Reform* (University of Natal, Durban 1986).

3 References to the "Constitution" are to the interim Constitution of the Republic of South Africa Act 200 of 1993.

4 The Postscript of the Constitution opens with the following words:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

5 There were 203,578 households in old Pretoria and 25,307 and 13,442 in Atteridgeville and Mamelodi respectively. See the judgment of Langa DP at paras 17-18 for a description of old Pretoria and the two areas loosely referred to as "the townships".

6 As Kentridge "Equality" in Chaskalson et al *Constitutional Law of South Africa* (Juta & Co, Ltd, Kenwyn 1996) at 14.24 asserts (correctly I believe): "For as surely as the Constitution is a bridge from a culture of authority to a culture of justification, it is a bridge from a society of oppression

[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.

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and subjugation to a community of equals."

[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".[7]

Discrimination

[7] Section 8(3)(a) of the Constitution.

[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.[8] 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.[9] 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[10] associated with race, is not, in

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[8] Thus, for example, black civil servants and others who took up residence in old Pretoria were treated as residents and subjected to the same patterns of enforcement as their neighbours.

[9] 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at n 46.

[10] Indeed, the very word "impact" which is usually contrasted with "intention", presupposes an element of forceful contact or collision that in some way disturbs the existing equilibrium of the contacted object. Implicit in it is the notion of adverse effect equivalent in outcome to that of an

my view, enough to constitute indirect discrimination on the grounds of race.

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intended blow. Thus absent some additional contextual element, a one-off caress to A is not a blow to B, especially when A is in need of tender care and B is in good health. There is simply no impact on B. The action does not reach B. If, on the other hand, there has been a history of systematic favouritism to A and neglect of B, then, of course, there would be symbolical impact of a prejudicial kind, since even a slight gesture would track and reinforce structured disadvantage and maintain internal disequilibrium.

[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),[11] 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.

[11] Section 8(4) reads:

> "***Prima facie*** proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established." [My emphasis.]

[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.[12] 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

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[12] *Prinsloo* above n 1 (differentiation not amounting to discrimination); *The President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (express differentiation on grounds of gender amounting to direct discrimination on a specified ground, onus on state to establish fairness); *Harksen* above n 9 (differentiation on the basis of belonging to a group covered by but not specified in section 8(2), onus of proving unfairness on applicant, indirect discrimination on grounds of gender not pursued); *Larbi Odam and Others v The Member of the Executive Council for Education (North-West Province*) 1997 (12) BCLR 1655 (CC) (direct differentiation on grounds of citizenship, not specified in section 8(2), onus of proving unfairness on applicant).

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.[13] 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.

[13] See for example para 126 below.

[113] For a question of indirect[14] 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.[15] 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

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[14] The finding of discrimination in *Hugo* above n 12 can be distinguished on the grounds that the differentiation in that matter between fatherhood and motherhood directly engaged sex and gender, thereby triggering the presumption in section 8(4).

[15] See *Egan v Canada* (1995) 29 CRR (2d) 79 for sharp differences among Canadian judges on the question of whether there must be a direct connection between the measure and the prejudice suffered, or whether indirect impact which reinforced patterns of disadvantage would be sufficient to constitute discrimination.

threaten the dignity or equal concern or worth of the persons affected.[16] 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

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[16] I am reinforced in my view by the finding by McIntyre J (dissenting) in *Andrews v Law Society of British Columbia* (1989) 36 CRR 193 at 228 who said that a distinction whether intentional or not amounts to discrimination against an individual or group if it has ". . . the effect of imposing burdens, obligations, or disadvantages on such an individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society." See also McIntyre J's comment at 232 that " 'The inquiry, [as to whether or not there is discrimination] in effect, concentrates on the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus. . .' (Quoting Hugessen J.A. in *Smith, Kline and French Laboratories v Canada (A.G.)* (1986) 27 CRR 286 at 293-4) ". . . The words 'without discrimination'. . . limit [the] distinctions which are forbidden by the section to those which involve prejudice or disadvantage. . . [A] complainant . . . must show not only that . . . the law has a differential impact on him or her . . . but . . . must show that the legislative impact is discriminatory."(at 234 -5) See also Hogg *Constitutional Law of Canada* 3ed (Carswell,

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)*:*

Scarborough 1992) at 1171.

"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."[17] [My emphasis]

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[17] *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 481 B-D. Cameron J goes on to say that on the facts of the case before him, there were unchallenged sound and businesslike reasons for differential collection and that:

> "If, of course, a local authority were to follow a sustained

[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

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> locality-directed policy of non-collection or waiver which has a direct or indirect racially discriminatory impact, that would no doubt be unfair, and would thus be open to challenge under s 8(2)."(at 481 H-I)

I agree that a sustained locality-directed policy could in an appropriate case show such intense and wounding disregard for the legitimate civic sentiments of residents in other areas as to raise questions of unfair discrimination on the ground of race. In my view, the agreed facts of the present case come nowhere close to showing such a sustained practice. They testify to a policy that was ad hoc, context-specific and of relatively short duration. Unlike Langa DP, I do not feel that any inference of discrimination by the council against the complainant, direct or indirect, can be drawn.

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.[18] 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.[19] 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

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[18] Above at paras 17-24 and 64-72.

[19] It is a reasonable inference from the rather unsatisfactory factual material supplied in the magistrate's court that it was only with the installation of meters that proper contracts between the council and the residents were entered into, thereby creating for the first time a clear legal foundation for enforcement of payment for consumption. It is not evident on what grounds the inhabitants could previously have been sued. The universal installation of meters accordingly provided the universal basis for law enforcement.

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.[20] 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*[21] 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

[20] These were to businesses in arrears with payments.

[21] Above n 9 at para 52 (SA); para 51 (BCLR).

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."[22]

[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.

[22] Above n 1 at para 20.

[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.[23] 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."[24] 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.[25] 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

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[23] *Hugo* above n 12 at para 41.

[24] Above n 12 at para 112.

[25] The other major element, as O'Regan J pointed out in *Hugo* id, is that ". . . the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair." In the present case I fail to see any material invasion of the complainant's interests.

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.[26] 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

[26] See Kentridge above n 6 at 14.25-6, for a discussion of the relationship between fairness and prudence. Referring to the impact of section 8(3) on the section as a whole, she insists that achieving the objects of the equality clause ". . . is justified in relation to the purposes underlying the value of equality itself — it is not considered to be a diminution of equality which must be justified with reference to competing considerations." I might add that even if section 8(3) is not specifically pleaded or relied upon by counsel, it cannot be ignored as a strong interpretive pointer when attempting to divine the import of section 8 as a whole.

[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.[27] 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.[28] 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."[29]

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27 Above n 12.

28 Id at para 47. See also the concurring judgement of O'Regan J at para 114.

29 Id at para 47. See also *A K Entertainment CC v Minister of Safety and Security and Others* 1995 (1) SA 783 (ECD) at 789; *Cherry v Minister of Safety and Security and Others* 1995 (3) SA 323 (SECLD) at 331-2; *Batista v Commanding Officer, SANAB, SA Police, Port Elizabeth, and Others* 1995 (4) SA 717 (SECLD) at 725; *Beukes v Krugersdorp Transitional Local Council* above n 17.

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,[30] into one of payment in the new circumstances of democratic

[30] Above n 2.

entitlement and responsibility. In short, it was to overcome rather than to perpetuate inequality.[31]

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[31] As Kentridge above n 6 at 14.4 comments:

> "The existence of . . . deep-rooted, pervasive and self-perpetuating patterns of inequality, in other words structural inequality, means that actual social equality cannot be achieved by the application of apparently neutral standards to all.
> A formal approach to equality assumes that inequality is aberrant and

As pointed out by Dworkin:

> that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way now is not going to change the patterns of the past, for that inequality needs to be redressed and not simply removed. This means that those who were deprived of resources in the past are entitled to an 'unequal' share of resources at present.
>
> . . . [t]hose who are not alike should be differently treated in proportion to their difference. The value of a contextual approach to equality is that it helps us to identify those differences which require differential treatment in order to achieve actual, substantive equality." (footnote omitted)

> "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."[32] (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.[33] The matter was trenchantly put by Goldstone J in *Hugo* when he said:

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[32] *Taking Rights Seriously* (Harvard University Press, Cambridge 1977) at 226. His comments were made in the far more difficult context of an individual actually being denied a benefit - namely access to a university - and not as here, where the complainant is denied nothing; Dworkin argues that even denial of a benefit can be consistent with equal protection.

[33] Above n 32 at 227.

> "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."[34]

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."[35]

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[34] Above n 12 at para 41 (footnote omitted).

[35] Id at para 112.

[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.[36] 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.

[130] 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,

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[36] In *Egan v Canada* above n 15 at 106-7, L'Heureux-Dubé J spoke of a need for a subjective/objective test for impairment of dignity, which, she said, was a "notoriously elusive concept" requiring "precision and elaboration". See also Langa DP at para 29 above and Goldstone J in *Harksen* above n 9 at para 51 (SA); para 50 (BCLR). I would paraphrase her approach as referring to a well-founded or grounded sense of having been unfairly treated. The question I would put is: Do the interests protected and the values promoted by the Constitution objectively dictate judicial empathy for the subjective experience of unfairness complained of? The answer can never be easy in a society as divided, pluralist, systematically inequitable and notoriously thin skinned as ours. See *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) para 162.

would not have represented equal concern but rather, have manifested equal unconcern.

Conclusion on unfair discrimination

[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[37] 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

[37] Above n 2. See the comments of Langa DP at paras 70 and 91 above.

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.' "[38] 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."[39] 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),[40] 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

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38 Above n 1 at para 22 quoting Didcott J in *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at 18.

39 Above n1 at para 22.

40 The terms of section 8(3)(a) of the Constitution played surprisingly little role in the argument in the present matter. A strong case can be made for saying that these provisions underline the need and also ease the way for applying the substantive equality approach presented above, that they serve as an interpretative guide to the values underlying sections 8(1) and 8(2) and that they should not be regarded as constituting an exception to or qualification of the principle of equality and non-discrimination . See Kentridge above n 6 at 14.3.

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.

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For the respondent: E Bertelsmann SC and J S Stone instucted by Marius Coertze Prokureurs.

For the amicus curiae: G J Marcus SC and A E Bham instructed by Edward Nathan and Friedland Incorporated.