ACKERMANN , O'REGAN AND SACHS JJJ: ABRIDGED JUDGMENT

Prinsloo v Van der Linde and Another

[1] Much of South Africa is tinder dry. Veld, forest and mountain fires sweep across the land, causing immense damage to property and destroying valuable forest, flora and fauna. The Forest Act 122 of 1984 (the "Act") has as one of its principal objects the prevention and control of such fires. A major method of achieving this is to create various fire control areas where schemes of compulsory fire control are established, with special emphasis on the clearing and maintenance of fire belts between neighbouring properties. Landowners in areas outside of such fire control areas are, on the other hand, encouraged but not required to embark on similar fire control measures. A number of provisions prescribe criminal penalties for landowners in fire control areas who fail to fulfil their statutory obligations. In addition, an offence is created in respect of persons who are wilfully or negligently responsible for fires "in the open air", while it is an offence for any landowner in any area to fail to take such steps as are under the circumstances reasonably necessary to prevent the spread of fires.

[2] One provision in the Act dealing expressly with responsibility for a fire on land outside of a fire control area is section 84. It reads as follows:

> "**84. Presumption of negligence.** - When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved."

It is the constitutionality of this provision which is under consideration in the present matter.

THE EQUALITY ISSUES: SECTION 8

[15] While the attack based on section 8 was not strongly pressed by counsel for the applicant, it must nevertheless be given due consideration. For present purposes the relevant provisions of Section 8 of the interim Constitution read as follows:

"**Equality.**

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(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.

(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 freedoms.

(*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."

[16] In his written argument, counsel pointed to the differentiation between defendants in veld fire cases and those in other delictual matters. According to him, this differentiation had no rational basis, because the apparent object that the legislature sought to achieve by reversing the general rule regarding the incidence of onus that whoever avers must prove, could have been, and, indeed, already was, accomplished

by means of common law aids to proof. He referred in particular to the concept of res ipsa loquitur and the practice of triers of fact to require less evidence to establish a prima facie case if the facts in issue are peculiarly within the knowledge of the opposing party. A second differentiation which was raised by first respondent, relates to the fact that the presumption of negligence applies only in respect of fires in non-controlled areas, and not to those spreading in controlled areas, which at first blush appears to be incongruous. The challenge to constitutionality in both cases would be based either on a breach of the right to equality as guaranteed in section 8(1) or on a violation of the prohibition of discrimination contained in section 8(2). To determine whether either challenge in terms of section 8 is correct, it is necessary to consider first the proper approach to be taken to sections 8(1) and (2).

[17] If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. As Hogg puts it:

> "What is meant by a guarantee of equality? It cannot mean that the law must treat everyone equally. The Criminal Code imposes punishments on persons convicted of criminal offences; no similar burdens are imposed on the innocent. Education Acts require children to attend school; no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than the manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distribution of the property of a person who dies leaving a will from that of a person who dies leaving no will. The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with low incomes. Indeed, every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone."

The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits, or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that

separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory "in the constitutional sense".

[18] Even a cursory summary of international experience indicates that there are no universally accepted bright lines for determining whether or not an equality or non-discrimination right has been breached. The varying emphases given in different countries depend on a combination of the texts to be interpreted, modes of doctrinal articulation, historical backgrounds and evolving standards. Questions of institutional function and competence might play a role when reviewing, for example, legislation of a social and economic character.

[19] In relation to the text and context of the interim Constitution, it would therefore seem that a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny, might create more problems than it solved. At the same time, we must be mindful of section 35(1) which states:

"**Interpretation.**

> **35.** (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality . . ."

[20] Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage. While our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality. At the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity. All this reinforces the idea that this Court should be astute not to lay down sweeping

interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.

[21] In *Brink v Kitshoff NO*, a general review was conducted of the approaches adopted in Canada, the United States of America, India and in international conventions and covenants. That review concluded:

> ". . . that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality."

The Court emphasised that section 8 is the product of our own particular history, that perhaps more so than in the case of other provisions in Chapter 3 the interpretation of section 8 must be based on its own language and that our history was particularly relevant to the concept of equality.

[22] When section 8 is read as a whole it appears that the concept of equality is referred to in different ways. In section 8(1) it is described positively as a "right to equality before the law" and as a "right . . . to equal protection of the law". In section 8(2) it is formulated negatively: "No person shall be unfairly discriminated against, directly or indirectly. . .". It may be neither desirable nor feasible to divide the various subsections or descriptions into watertight compartments. Nonetheless, it would appear 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 makes clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered. This right, or this aspect of the right guaranteed, does not apply to the present case.

[23] The idea of differentiation (to employ a neutral descriptive term) seems to lie at the heart of equality jurisprudence in general and of the section 8 right or rights in particular. Taking as comprehensive a view as possible of the way equality is treated in section 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination. This needs some elaboration. We deal with the former first.

[24] It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later.

[25] It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". 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 aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority . . . to a culture of justification".

[26] Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8. But

while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe section 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present.

[27] It is to section 8(2) that one must look in order to determine what this further element is. For reasons which will subsequently emerge it is unnecessary to consider the precise ambit or limits of this subsection. It is, however, clearly a section which deals not with all differentiation or even all discrimination but only with unfair discrimination. It does so by distinguishing between two forms of unfair discrimination and dealing with them differently.

[28] The first form relates to certain specifically enumerated grounds ("specified grounds") on the basis whereof no person may unfairly be discriminated against. The specified grounds are race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. When there is prima facie proof of discrimination on these grounds it is presumed, in terms of subsection (4), that unfair discrimination has been sufficiently proved, until the contrary is established. These are not the only grounds which would constitute unfair discrimination. The words "without derogating from the generality of this provision", which introduce the specified grounds, make it clear that the specified grounds are not exhaustive. The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.

[29] The question arises as to what grounds of discrimination this second form includes. A purely literal reading and application of the phrase "without derogating from the generality of this provision" would lead to the conclusion that discrimination on any ground whatsoever is proscribed, provided it is unfair. Such a reading would provide no guidance as to what unfair meant in regard to this second form of discrimination. It would provide very little, if any, guidance in deciding when a differentiation which passed the rational relationship threshold constituted unfair discrimination. It also seems unlikely that the content of the concept unfair discrimination would be left to unguided judicial judgment. We are of the view,

however, that when read in its full historical and evolutionary context and in the light of the purpose of section 8 as a whole, and section 8(2) in particular, the second form of unfair discrimination cannot be given such an extremely wide and unstructured meaning.

[30] Proper weight must be given to the use of the word “discrimination” in subsection (2). The drafters of section 8 did not, for example, follow the model of the Fourteenth Amendment to the Constitution of the United States which, in paragraph 1 thereof, refers only to the denial of “the equal protection of the laws.” Section 8(1) certainly positively enacts the encompassing and important right to “equality before the law and to equal protection of the law”, but section 8 does not stop there. It goes further and in section 8(2) proscribes “unfair discrimination” in the two forms we have mentioned.

[31] The proscribed activity is not stated to be “unfair differentiation” but is stated to be “unfair discrimination”. Given the history of this country we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

[32] In Dworkin’s words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment. We find support for the approach we advocate in the following passage from the judgment of this Court in *The President of the Republic of South Africa and Another v Hugo*:

> "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."

and in which the following passage from *Egan v Canada* was quoted with approval:

> "This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society . . . More than any other right in the *Charter*, s.15 gives effect to this notion . . . Equality, as that concept is enshrined as a fundamental human right within s.15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."

[33] Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well. It is not necessary to say more than this in the present case, for reasons which emerge later in this judgment.

[34] Since the adoption of the interim Constitution, the provisions of section 8 have been referred to in a number of reported Supreme Court judgments. In some the reference has been somewhat in passing; in other provisions have been held to be merely regulatory while in certain instances they have been held to constitute a clear breach of the section 8(2) prohibition against unfair discrimination. The question whether,

and to what extent, the protection of section 8 may be invoked by juristic persons has also been considered. None of these cases has been concerned with the constitutionality of a statutory onus provision in civil cases. Nor has an attempt been made in any of them to conduct a comprehensive analysis of the proper interpretation of section 8 and in particular the relationship between section 8(1) and 8(2). It therefore does not seem necessary for us to consider or comment on any of them individually.

[35] Turning now to the case before us, it is necessary in the first place to enquire whether the necessary rational relationship exists between the purpose sought to be achieved by section 84 of the Act and the means sought to achieve it. The objectives of the Act as set out in the long title, are "[t]o provide for . . . the prevention and combating of veld, forest and mountain fires; . . . and matters connected therewith." In essence, applicant contended that section 84 lacked rationality because it did not use the least onerous means of achieving its objectives. This approach, however, is based on two misconceptions. First, the applicant is prematurely importing a criterion for justification into a test to be applied at the infringement enquiry (definitional or threshold) stage. The question of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry. Second, underlying the argument is an assumption that somehow there should be a "presumption of innocence" in civil matters as weighty and untouchable as that in criminal cases, so that a reverse onus in a civil matter should be as vulnerable to impeachment as one in a criminal trial.

[36] In regard to the first misconception, a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way. In any civil case, one of the parties will have to bear the onus on each of the factual matter's material to the adjudication of the dispute. So, in the case of an aquilian claim for damages arising from a veld fire, one of the parties will bear the onus concerning negligence. As long as the imposition of the onus is not

arbitrary, there will be no breach of section 8(1). In rare circumstances, it may be that the allocation of onus will impair other constitutional rights and a challenge will then arise. That is not the case here.

[37] In regard to the second misconception, an onus in a civil case cannot be equated with the overall onus of proof in criminal cases. In *Mabaso v Felix* the Appellate Division described the fundamental difference between the incidence of the onus of proof in civil and criminal cases in the context of assault as follows:

> "In its anxiety that no accused should be punished for a crime without proof of his guilt our common law deliberately places the burden of proving every disputed issue, save insanity, on the prosecution. But in civil law . . . considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct."

[38] There is indeed nothing rigid or unchanging in relation to the question of the incidence of the onus of proof in civil matters, no established "golden thread" like the presumption of innocence that runs through criminal trials. As Davis AJA, quoting Wigmore, put it:

> ". . . all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness.'"

As long as the rules relating to the onus are rationally based, therefore, no constitutional challenge in terms of section 8 will arise.

[39] The purpose of the Act is to prevent veld fires. There can be no doubt that the State has a legitimate and strong interest in preventing veld, forest, and mountain fires. It has chosen to fulfil its responsibility by means of the scheme set out in the opening paragraph of this judgment. In fire control areas there is compulsory participation in schemes to prevent fires spreading, involving shared information, planning and execution. Specific statutory duties are imposed with prescribed penalties for disobedience.

[40] In non-controlled areas, on the other hand, there are opportunities for joint management on a voluntary basis only, with no obligation, and no necessity for shared management and pooled knowledge. Persons are left in the dark as to what steps their neighbours have taken to avert fires. The causes of the fire and its spread will often be peculiarly within the knowledge of the neighbour. The specific duties imposed on landowners in fire control areas are accordingly counterbalanced by the general inducement contained in section 84 for those responsible for land in non-controlled areas to be especially vigilant lest they find themselves saddled with responsibility for damage caused by fire spreading from their land. The purpose of section 23 of Act 72 of 1968, the predecessor of the present section 84, was identified by Fannin J as follows:

> "It was argued on behalf of the plaintiff that the presumption was created in recognition of the peculiar difficulties faced by a person who suffers damage as a result of a fire whose origin he may be wholly unable to establish, and of the fact that, in most cases, if not all, a person from whose land a fire spreads will be in a much better position to show how and where the fire originated, whether it was lit by himself or by anyone for whose acts he is in law responsible and the manner in which the fire was dealt with, if at all, by him or by his servants or agents. This, I think, is undoubtedly correct. Furthermore, a person who has suffered as a result of a fire which has come from another's land will often not be in a position to embark upon any investigation as to the origin or cause of the fire and will certainly have no right to enter upon that land to conduct any such investigation. That such difficulties in relation to fires have long been recognised appears from a perusal of *Voet*, 9.2.20, which however relates to fires in buildings."

In our view, there can be no doubt that a rational relationship is demonstrated between the purpose sought to be achieved by section 84 and the means chosen.

[41] This does not end the matter, because despite the existence of the aforementioned rational relationship between means and purpose, the particular differentiation might still constitute unfair discrimination under the second form of unfair discrimination mentioned in section 8(2). The regulation effected by section 84 in the present case differentiates between owners and occupiers of land in fire control areas and those

who own or occupy land outside such areas. Such differentiation cannot, by any stretch of the imagination, be seen as impairing the dignity of the owner or occupier of land outside the fire control area. There is likewise no basis for concluding that the differentiation in some other invidious way adversely affects such owner or occupier in a comparably serious manner. It is clearly a regulatory matter to be adjudged according to whether or not there is a rational relationship between the differentiation enacted by section 84 and the purpose sought to be achieved by the Act. We have decided that such a relationship exists. Accordingly, no breach of section 8(1) or (2) has been established.

CONCLUSION

[42] In the result the applicant has not established that section 84 of the Act is in any way inconsistent with the provisions of section 8(1) or (2) or section 25(3)(c) of the interim Constitution. The case should accordingly be referred back to the Transvaal Provincial Division of the High Court. No order for costs was asked for, indeed counsel specifically agreed that none should be made, and there is no reason to make one.