SACHS J ABRIDGED JUDGMENT (CONCURRING)

Minister of Finance and Other v Van Heerden

[135] Paradoxical as it may appear, I concur in the judgment of Moseneke J on the one hand, and the respective judgments of Ngcobo J and Mokgoro J, on the other, even though they disagree on one major issue and arrive at the same outcome by apparently different constitutional routes. As I read them the judgments appear eloquently to mirror each other. In relation to philosophy, approach, evaluation of relevant material and ultimate outcome, they are virtually identical. In relation to starting point and formal road travelled, they are opposite. The majority judgment comes to the firm conclusion that the composition of the new Parliament overwhelmingly pointed to members having been disadvantaged by race discrimination and political affiliation, and therefore started and finished its enquiry within the framework of the affirmative action provisions of section 9(2). The two minority judgments baulked at the idea of categorising the new parliamentarians as disadvantaged by discrimination, and started and completed their analysis within the non-discrimination provisions of section 9(3). In my view it is no accident that even though they started at different points and invoked different provisions they arrived at the same result. Though the formal articulation was different the basic constitutional rationale was the same. I agree with this basic rationale. I would go further and say that the core constitutional vision that underlies their separate judgments suggests that the technical frontier that divides them should be removed, allowing their overlap and commonalities to be revealed rather than to be obscured. If this is done, as I believe the Constitution requires us to do, then the apparent paradox of endorsing seemingly contradictory judgments is dissolved. Thus, I endorse the essential rationale of all the judgments, and explain why I believe that the Constitution obliges us to join together what the judgments put asunder.

[136] The main difficulty concerning equality in this case is not how to choose between the need to take affirmative action to remedy the massive inequalities that disfigure our society, on the one hand, and the duty on the state not to discriminate unfairly against anyone on the grounds of race, on the other. It is how, in our specific historical and constitutional context, to harmonise the fairness inherent in remedial measures with the fairness expressly required of the state when it adopts measures that discriminate between different sections of the population. I agree with Mokgoro J that the main focus of section 9(2) of the Constitution is on the group advanced and the mechanism used to advance it, while the primary focus under section 9(3) is on the group of persons discriminated against. I do not however regard sections 9(2) and 9(3) as being competitive, or even as representing alternative approaches to achieving equality. Rather, I see them as cumulative, interrelated and indivisible. The necessary reconciliation between the different interests of those positively and negatively affected by affirmative action should, I believe, be done in a manner that takes simultaneous and due account both of the severe degree of structured inequality with which we still live, and of the constitutional goal of achieving an egalitarian society based on non-racism and non-sexism.

[137] In this context, redress is not simply an option, it is an imperative. Without major transformation we cannot 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[89] At the same time it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bathwater of remedial action. Thus while I concur fully with Moseneke J that it would be illogical to permit a presumption of unfairness derived from section 9(3) (read with section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by section 9(2), by the same token I believe it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2).

[138] The illogic can best be cured if the frontier between sections 9(2) and 9(3) is dismantled rather than fortified. If the emphasis is on establishing an egalitarian continuum rather than defining cut-off points it becomes possible to avoid categorical or definitional skirmishing over precisely what is meant by persons or categories of persons disadvantaged by discrimination. Once this is done one can see that though on

the surface the majority and minority judgments appear to represent quite distinct ways of reasoning, they are in fact united by the same underlying constitutional logic. In my view, it is not by happenstance that they achieve the same outcome. They use the same historical and philosophical premises, give weight to virtually identical material factors and make their evaluations on the same principled bases. It is not the body of the argument which is different, but the manner in which it is clothed; should it wear the apparel of section 9(2), or should it present itself in the dress of section 9(3)?

[139] If sections 9(2) and (3) are read in conjunction and in a comprehensive and contextual way in the light of the egalitarian constitutional values and goals as set out above, section 9(3) ceases to be viewed as a stand-alone provision and falls to be interpreted in the light of the constitutional vision established by section 9(2). Section 9(2), for its part, ceases to function in a categorical or definitional way with dramatic consequences for the evaluation to be made. Section 9(2) should be seen as an integral and overarching constitutional principle established by section 9, rather than as a discreet element within it that serves as an autonomous and sealed off launching-pad for state action. It would, in my view, do a disservice to section 9(2) to treat it as a fantastical constitutional device for leaping over the gritty hurdles of hard social reality and escaping from basic equality analysis. It is not a magic analytical slipper which, if no toes protrude, converts the wearer into a sovereign princess unrestrained by any notions of fairness and beyond the bounds of ordinary constitutional scrutiny.

[140] As Moseneke J trenchantly makes clear section 9(2) is not agnostic on the question of fairness. It confronts the issue of discrimination in an unambiguous, head-on manner which provides express direction. It gives properly devised affirmative action programmes a clear constitutional nod. They do not constitute unfair discrimination. They do not fall foul of the prohibition against such discrimination, not because they are exempt, but because they are not unfair. So understood, the section leaves no doubt that the more snugly a race-based measure fits into section 9(2), the more difficult it will be to challenge its constitutionality. Conversely, the less comfortable the fit, the less impervious the measure will be to attack. It is not a question of all-or-nothing, but one of purpose, context and degree. To my mind, where different constitutionally protected interests are involved, it is prudent to avoid categorical and

definitional reasoning and instead opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.

[141] The overall effect of section 9(2), then, is to anchor the equality provision as a whole around the need to dismantle the structures of disadvantage left behind by centuries of legalised racial domination, and millennia of legally and socially structured patriarchal subordination. In this respect it gives clear constitutional authorisation for pro-active measures to be taken to protect or advance persons disadvantaged because of ethnicity, social origin, sexual orientation, age, disability, religion, culture and other factors which have operated and continue to operate to disadvantage persons or categories of persons.

[142] The section functions in a manner that gives a clear constitutional pronouncement on issues which have divided legal thinking throughout the world in relation to problems concerning equal protection under the law. The whole thrust of section 9(2) is to ensure that equality be looked at from a contextual and substantive point of view, and not a purely formal one. As this Court has frequently stated, our Constitution rejects the notion of purely formal equality, which would require the same treatment for all who find themselves in similar situations. Formal equality is based on a status-quo-oriented conservative approach which is particularly suited to countries where a great degree of actual equality or substantive equality has already been achieved. It looks at social situations in a neutral, colour-blind and gender-blind way and requires compelling justification for any legal classification that takes account of race or gender. The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a

society based on equality, non-racialism and non-sexism, become the important signifiers.

[143] It also means that where disadvantage was imposed because of race, then race may appropriately be taken into account in dealing with such disadvantage (the same would apply to gender, disability, language and so on). It accordingly makes it clear that properly designed race-conscious and gender-conscious measures are not automatically suspect, and certainly not presumptively unfair, as the High Court held.

[144] Remedial action by its nature has to take specific account of race, gender and the other factors which have been used to inhibit people from enjoying their rights. In pursuance of a powerful governmental purpose it inevitably disturbs, rather than freezes, the status quo. It destabilises the existing state of affairs, often to the disadvantage of those who belong to the classes of society that have benefited from past discrimination.

[145] Yet, burdensome though the process is for some, it needs to be remembered that the system of state-sponsored racial domination not only imposed injustice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole. For as long as the huge disparities created by past discrimination exist, the constitutional vision of a non-racial and a non-sexist society which reflects and celebrates our diversity in all ways, can never be achieved. Thus, though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings.

[146] It follows from the above analysis that I do not believe it is necessary or appropriate to engage in agonising analysis over whether strictly speaking the new parliamentarians constituted a category of persons disadvantaged by unfair discrimination. A substantive approach to equality eschews preoccupation with formal technical

exactitude. It is algebraic rather than geometric, relational rather than linear. Its rigour lies in determining in a rational, objective way the impact the measures will have on the position in society and sense of self-worth of those affected by it. The critical factor is not sameness or symmetry, but human dignity, a quality which by its very nature prospers least when caged. In a matter like the present it should accordingly not make any significant difference whether one starts one's analysis from the vantage point of those former disadvantaged, or of those who have been advantaged. Nor should there be a Chinese wall between the two. It follows that reading sections 9(2) and 9(3) together, the outcome should be the same, whatever the technical point of departure.

[147] Even if section 9(2) had not existed, I believe that section 9 should have been interpreted so as to promote substantive equality and race-conscious remedial action. Other legal opinions might have been different. Section 9(2) was clearly inserted to put the matter beyond doubt. The need for such an express and firm constitutional pronouncement becomes understandable in the light of the enormous public controversies and divisions of judicial opinion on the subject in other countries. Such divisions had become particularly pronounced in the United States. The intensity of the debate in the Supreme Court was eloquently captured by Marshall J in *The City of Richmond v Croson Co.* The majority in that matter held that the USA was a colour-blind and race-neutral country, so that affirmative action programmes based on race should be subject to the same strict scrutiny applied to overtly discriminatory and racist practices. Challenging this view and underlining the distinction between measures taken to enforce racism and those taken to overcome it, he wrote:

"Racial classifications 'drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism' warrant the strictest judicial scrutiny because of the very irrelevance of these rationales.(reference omitted). By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove*: 'Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for

remedial purposes can be crafted to avoid stigmatization ...such programs should not be subjected to conventional "strict scrutiny"- scrutiny that is strict in theory, but fatal in fact.' (reference omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity."

[148] Our Constitution pre-empted any judicial uncertainty on the matter by unambiguously directing courts to follow the line of reasoning that Marshall J relied on, and that the majority of the US Supreme Court rejected. In South Africa we are far from having eradicated the vestiges of racial discrimination. In the present matter, for the reasons given in all the judgments, the High Court was clearly wrong in utilising an approach steeped in the notions of formal equality. It was this inappropriate vision that led it to presume unfairness and strike down the pension scheme at issue. I have no doubt that our Constitution requires that a matter such as the present be based on principles of substantive not formal equality, and that the critiques in the majority and minority judgments of the High Court's approach are well founded. Where I differ from my colleagues is in preferring to treat sections 9(2) and 9(3) as overlapping and indivisible rather than discreet.

[149] Applying section 9 in an holistic manner to the present matter, and in particular integrating sections 9(2) and 9(3), leads me to the conclusion that in most if not all cases like the present, the very factors that would answer the question whether a measure was designed to promote equality under section 9(2), would serve to indicate whether it was unfair under section 9(3). Thus, a measure taken for improper or corrupt motives would not pass muster under either section, even if done under the guise of advancing the disadvantaged. Similarly, a scheme that was so lacking in thought and organisation as seriously to threaten the very functioning and survival of the enterprise involved, would lack rationality, and could not be said to advance or be

fair to anybody, let alone the disadvantaged. A more difficult problem could arise where a measure advances the interests of one disadvantaged group as against another; the present case does not require an attempt to deal with the historical, social and legal issues involved. More relevant to the present matter is where the measure advances the disadvantaged but in so doing disadvantages the advantaged. As the majority of this Court pointed out in *Walker,* members of the advantaged group are not excluded from equality protection:

"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. . . .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."

. . .

"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."

[150] At the same time the judgment pointed out:

'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.'

[151] Although the majority judgment in *Walker* expressly did not examine the implications of the affirmative action provision in the interim Constitution, the above words are articulated in open-ended language and underline the Court's commitment to the values of non-racialism. Clearly they do not allow section 9(2) to be interpreted in a way which says: provided the measure affecting the advantaged persons (whites, men, heterosexuals, English-speakers) is designed to advance the disadvantaged, the former can be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged.

[152] Serious measures taken to destroy the caste-like character of our society and to enable people historically held back by patterns of subordination to break through into hitherto excluded terrain, clearly promote equality (section 9(2)), and are not unfair (section 9(3)). Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way. At the same time, if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere. Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged. That is what promoting equality (section 9(2)) and fairness (section 9(3)) require. Yet some degree of proportionality, based on the particular context and circumstances of each case, can never be ruled out. That, too, is what promoting equality (section 9(2)) and fairness (section 9(3)) require.

[153] Applying the above approach to the present matter, I have no doubt that the scheme under attack comfortably clears the promoting equality/fairness bar. There is nothing to suggest that it was adopted with improper motives, or that it was unduly punitive or manifestly and grossly disproportionate in its impact. The fact that the same remedial purpose could have been achieved in other and possibly better ways would not be enough to invalidate it.

[154] The survivors of the old Parliament had benefited from an extremely generous, one-off scheme which had been negotiated on their behalf at Kempton Park. It remained intact as a guarantee that their agreement to accept the new democratic constitutional dispensation would not have the result of leaving them economically high and dry. The majority of the new generation of members of Parliament had been excluded by law from standing for office under the old dispensation. Others of this generation had refused to be part of a racist and oppressive regime, indeed had resisted it, often at great personal cost. I see nothing discriminatory, unfair or antithetical to the achievement of equality, in their taking special steps in these particular circumstances to ensure for themselves a reasonable measure of financial security. Indeed, the

measure emphasises the needs of those who at a relatively advanced age were entering Parliament for the first time. In a period of dramatic historical transition from one parliamentary dispensation to a completely different one, these were special measures adopted to deal with real economic problems facing the overwhelming majority of the new members. At the same time the old parliamentarians lost nothing. Neither their purse nor their dignity was assailed. They were not being punished for having been part of the old apartheid set-up. They were simply being excluded from some special benefits that were given on objectively justifiable grounds to the new parliamentarians. I accordingly agree with the neat manner in which Ngcobo J evaluates the position in this regard.

[155] I would just wish to add that for the new scheme to have distinguished on grounds of race or previous political affiliation between individual persons in this large and diverse new generation of members of Parliament, would have been divisive and invidious. The one-off boost to their pension entitlements was, in my view, appropriately accomplished on the basis of a broad sweep which included the new generation as a whole.

[156] Had there been a suggestion of special benefits being paid simply because of past political affiliation, then serious questions of equal protection would have arisen. The reward of the generations that fought for the new democratic dispensation was to achieve the right to stand for office in a new constitutional democracy. It was not a cash bonus for having backed the winning side, to be smuggled in under the guise of affirmative action. Similarly, if there had been an issue of hand-outs given simply on the basis of race, section 9 would clearly have been engaged. In reality, however, Parliament chose none of these paths. It adopted a measure that met objective criteria, served an important remedial governmental objective and was substantially related to the achievement of that objective. The measure promoted equality and was fair. The egalitarian principles of section 9 were upheld and, indeed, advanced by it.

[157] Basing myself heavily on the reasons in the other judgments, but formatting them in a different way, I accordingly agree that the decision of the High Court to invalidate the pension scheme must be set aside, and support the order made by Moseneke J.