



Collaboration Space / UCT Equality Law Database / 1998

# THE CITY COUNCIL OF PRETORIA V WALKER

Created by Jenny Erasmus [Administrator], last modified on Jul 15, 2013

YEAR: 1998PLAINTIFF / APPLICANT / APPELLANT: APPLICANT/APPELLANT: THE CITY COUNCIL OF PRETORIADEFENDANT / RESPONDENT: RESPONDENT: J WALKERCOURT: CONSTITUTIONAL COURTCITATION: 1998 (2) SA 363 (CC), 1998 (3) BCLR 257POST / PRIOR ACTION:Magistrates CourtHigh Court: *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); 1997 (3) BCLR 416 (T)JUDGE(S): Chaskalson P, Ackermann, Goldstone, Kriegler, Madala, Mokgoro, O'Regan JJ, Langa DP (majority), Sachs (minority)GROUND(S) OF DISCRIMINATION: RACESTATEMENT OF FACTS:

Post 1994, two townships, namely Atteridgeville and Mamelodi ("the townships"), and 1 predominately white suburb referred to as "Old Pretoria" amalgamated and fell within the catchment area of the City Council of Pretoria ("the Council"). Despite falling under one council, the residents of the townships were charged a flat rate for electricity and water services (but for the businesses within the townships) while old Pretoria residents were charged on a metered consumption basis. The flat rate was lower than the metered rate. In addition the council was instituting legal action for arrear accounts only against the residents of Old Pretoria.

Prior to the amalgamation the townships were charged a flat rate for electricity and water services as there existed no electrical installations and infrastructure to oblige payment of the services. Post amalgamation the flat rates continued to apply as there was no meters to record the usage of the services despite a public announcement that the a metered consumption rate would apply across the board. The council failed to meet its deadline for the installation of all the designated meters within the townships. It claimed it applied the flat rate pending the complete installation of meters to avoid vandalism and violence.

The respondent's electricity and water account was in arrears. He was a white resident of Old Pretoria, and had only paid his account based on the flat rate as applied to the residents of the townships. As such there remained a balance due and owing. The Council sued the respondent for the balance. The respondent did not deny that he owned the amount. He argued that:-

1. he was entitled to withhold the payment of the arrears as the Council's conduct amounted to a violation of his Constitutional right to equality in terms of s 8 of the Interim Constitution; and
2. that the Council had breached s 178(2) of the Interim Constitution.

The contested conduct by the Council was that:

- The flat rate charged in the townships was lower than the metered consumption rates in Old Pretoria. This meant that Old Pretoria was subsidising the townships;
- The flat rate was being charged despite the introduction of the meters in the townships; and
- The residents of Old Pretoria were being targeted for arrear accounts through legal action whilst no legal action for arrear accounts was being brought against the residents of the townships.

The Magistrate's Court dismissed the arguments raised by the respondent, and ordered the respondent to pay the outstanding amounts. The respondent appealed to the High Court. The High Court set aside the Magistrate's Court decision and substituted its order for an order in absolution from the instance with costs.

Note to reader: The matter was decided under the relevant provisions of the Interim Constitution.

#### ISSUE OF LAW

Whether the use by the Council of differential tariffs in the recovery of service charges, and the selective enforcement of debt recovery, amounted to a breach of the equality provisions in the Interim Constitution.

#### DECISION, RATIO AND OUTCOME (including minority judgment):

The majority granted the application for leave to appeal to the Constitutional Court. It upheld the appeal against the judgment of the High Court. It held that the selective enforcement of arrear accounts constituted unfair discrimination on the grounds of race.

It found that the Council's conduct resulted in the differential treatment of the residents of the townships to that of the residents of Old Pretoria. The court held that the differential treatment did not violate the right to equality within s 8 of the Interim Constitution. It held that the differentiation on the facts was rationally connected "to legitimate governmental objectives." It found the "measures to be of a temporary nature" and designed to achieve "continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources..."

A differentiation which does not breach the right to equality can still be regarded as unfair discrimination under s 8(2) of the Interim Constitution. The court proceeded to investigate whether the differentiation constituted discrimination, and if so, whether such discrimination was unfair.

The court held that the differentiation constituted indirect discrimination on the grounds of race. While the differential treatment applied to geographical areas and not specifically to persons of a particular race, it nonetheless differentiated between black residents and white residents. It held that "To ignore the racial impact of the differentiation is to place form above substance." In turn it established that both indirect and direct discrimination were covered by s 8 of the Interim Constitution. It determined that there was no evidence produced that evoked the protection of s 8 (3) of the Interim Constitution which allows for measures designed to "achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination..."

As the discrimination was on a ground specified in s 8 (2) of the Interim Constitution, it was presumed to be unfair. The court assessed whether the Council had rebutted the presumption of unfairness which required "an examination of the impact of the discrimination on the respondent." It assessed the concept of "unfairness" as examined by local case law, and the role of the intention to discriminate. It held that the intention to discriminate is not a threshold requirement for either direct or indirect discrimination. Discrimination and unfairness is an objective assessment on the facts.

In assessing whether the discriminatory conduct impacted unfairly on the respondent, the court considered the following factors, based on an extract of factors from the Constitutional judgment of *Harksen v Lane*:-

1. The interplay between the discriminatory measure and the person or group affected by it. It held that the respondent belonged to a group which was not historically disadvantaged. It however regarded the respondent as belonging to a racial minority which in a political sense was vulnerable.
2. The nature and purpose of the power. The Council was under an obligation to eliminate the disparities and disadvantages of the past, and promote equality within its resources.
3. It questioned the flat rate applied to the residents of the townships but found no reasonable alternative due to the lack of infrastructure. It regarded the application of a flat rate as an interim measure until all the meters were installed as a practical solution.
4. The permissibility of cross- subsidization. The application of the flat rate meant that the residents of Old Pretoria were subsidizing the residents of the townships. It rejected the High Court's assessment that cross-subsidization is discriminatory and differentials in rates for the same services are always unfair. It held that there existed cases where it is not unfair to charge different rates for the same services. On the facts the court accepted the existence and role of cross-subsidization.
5. Assessment of the flat rate and cross-subsidization. The court found that the application of the flat rate and its application despite some of the meters being installed in the townships, as well as the presence of cross-subsidization, did not impact adversely on the respondent in a material way. There existed no breach of the respondent's dignity or evidence that he was affected in a manner comparably serious to a violation of his dignity.

In assessing the selective enforcement of outstanding accounts for services rendered the court found that such conduct was not rational and was not part of a coherent plan. It was held to be a decision adopted by officials within the Council. On the evidence the Council had not rebutted the presumption of unfairness which flowed from the court's determination that the Council's conduct amounted to unfair racial discrimination. The selective enforcement of debt was unfair discrimination in terms of s 8(2) of the Interim Constitution.

The court regarded it unnecessary to determine the alleged breach of s 178(2) of the Interim Constitution in light of the breach of s 8 (2).

The court assessed whether the High Court's order of absolution from the instance was appropriate when the Council sued for recovery of a debt which was due.

The court held that the finding of unfair discrimination does not vindicate the respondent's obligation to pay. When a right is breached the person who suffers the harm is entitled to appropriate relief under s 7(4)(a) of the Interim Constitution. Relief should be tailored to the facts. The court held that the respondent should not have withheld payment. He should have instead applied to court for declaration of his rights or a mandamus in order to vindicate the breach of his section 8 right. The breach of s 8 of the Interim Constitution was not a defence to the Council's claim for the balance of account. Accordingly the High Court's relief was inappropriate.

#### Minority Judgment:

The minority judgment diverged from that of the majority in that it held that the selective enforcement of legal action did not constitute unfair discrimination.

The respondent while treated differently was not unfairly discriminated against. He was being sued for an account that was legally due, and for services which were properly rendered. The minority agreed with the findings of the magistrate court's decision in that the selective enforcement of arrears accounts was based on geographical areas and not on race. There existed no indirect racial

discrimination merely because white people lived in one area, and black people lived in another area. Nothing on the papers proved that the respondent was prejudiced directly or indirectly by the conduct of the council. The respondent failed to prove a prima facie case of discrimination as no actual or potential prejudice followed from the differentiation.

The minority adopted a "focused approach" to indirect discrimination. It discussed the presumption of unfairness. It stated that the presumption operated effectively within the confines of direct discrimination on the listed grounds. However the presumption can counter the effects of rectifying past discrimination when applied to cases of indirect discrimination. It gave examples of such instances. To prove indirect unfair discrimination under s 8 (2), "something more must be shown than differential impact on persons belonging to groups specified in section 8(2). .... 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 measures, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected." In the minority's opinion the Council's selective enforcement of arrears accounts did not "in any way threatened to or was capable of imposing burdens or reinforcing disadvantage for the complainant, withholding benefits from him or undermining his dignity or sense of self worth. It did not discriminate against him; it did not even reach him."

The purpose of the concept of indirect discrimination was to ensure that apparently neutral criteria did not subversively perpetuate historical patterns of discrimination. It was not intended to favour those previously advantaged. South Africa's past required more than the presence of differential impact "before indirect discrimination under section 8 can be inferred."

In the event that discrimination could be proven, it was not unfair. The minority applied the approach and criteria on unfairness as set forth in the Constitutional case of *Harksen v Lane*.

- 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

The residents of Old Pretoria were advantaged by the supply of services and recognized by local government. The conduct of the Council did not perpetuate or create a pattern of disadvantage, nor was the respondent and the residents of Old Pretoria vulnerable to being marginalized and disadvantaged.

- The nature, purpose and duration of the power being exercised

The respondent owed the debt which formed the subject matter of the summons from the Council. The respondent was not being singled out. The fact the Council was lenient towards the township residents did not add to the respondent's burden. He was required to pay the account as he had enjoyed the services. The interim action of the Council not to pursue the arrear accounts of the residents of the townships was to overcome previous inequality.

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

The respondents rights were not affected nor was his dignity impaired. The minority referred to the concept of substantive equality.

The minority emphasized that the Council's task of eliminating the inequalities of the past, and that the Council's selection legal action was reasonable in achieving such results.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZACC/1998/1.html>

LABELS: