South Africa

Interpretation of equality clause in Bill of Rights

by Erika de Wet

Since April 1994 South Africans have a constitutional right to equality. The interim constitution of 1993, which was in force between April 1994 and December 1996, protected this right in s. 8, and the final constitution of 1996, which has been in force since January 1997, protects it in s. 9. Since the Constitutional Court of South Africa ('the court') started its work early in 1995, it has had to interpret the right to equality on six different occasions, all relating to the interim constitution. In spite of differences in the wording of the equality clauses in the respective constitutions, the protection provided by them is essentially the same. The decisions rendered under the interim constitution therefore laid the foundation for the court's future approach to the concept of equality.

This paper will illustrate that the court interprets the right to equality in a historical context, restricting the protection provided by it to severe forms of unequal treatment, comparable to the humiliation suffered by non-white South Africans in the past. Although this commentary is limited to four of the decisions, this line of argument is present in all six. It is submitted that although the court has a special responsibility to provide protection against historical patterns of discrimination, the right to equality encompasses more than protection against these severe forms of unequal treatment. By focusing only on the latter, the court runs the risk of excluding several groups from the protection provided by the equality clause. (The two decisions not treated are *President of the Republic of South Africa v Hugo* 1997 (4) SA 1(CC) and *City Council of Pretoria v Walker*.)

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City Council of Pretoria v Walker was decided on 17 February 1997

HISTORICAL INTERPRETATION

Before commenting on the court's decision, it is necessary to take note of the relevant subsections of s. 8 and 33 of the interim constitution. The latter is the general limitation clause, which applies to all the rights in the Bill of Rights (a similar clause is contained in s. 36 of the final constitution).

Section 8 reads as follows:

'(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 ss. (2) shall be presumed to be sufficientproof of unfair discrimination as contemplated in that subsection, until the contrary is established.'

Section 33(1) reads:

'The rights entrenched in this chapter may be limited by law of general application, provided that such limitation –

(a) shall be permissible only to the extent that it is –

(i) reasonable;

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question...'

Gender discrimination

The first decision in which the court was confronted with a possible violation of s. 8 was *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC). The question was whether s. 44(1) and (2) of the *Insurance Act* 1943 were in conflict with the equality clause. It deprived married women of all or some of the benefits of life insurance policies ceded to them or made in their favour by their husbands, in cases where their husband's estate was sequestrated. The Act contained no similar limitation upon the effect of a life insurance policy ceded or effected in favour of a husband by a wife. According to the court it was clear that the discrimination in s. 44(1) and (2) was sex-related and therefore in violation of s. 8(2) of the interim constitution (para. 43). Furthermore, this limitation could not be justified in terms of the limitation clause in s. 33(1) either (in the final constitution the limitation clause is contained in s. 36).

According to the court, the purpose of s. 44(1) and (2) was, inter alia, to protect the interests of creditors from possible collusion or fraud that could result from the close relationship between spouses. However, it was difficult to see how the distinction which was drawn between men and women – which was the nub of the constitutional complaint – can be reasonable or justifiable. No cogent reasons were provided as to why s. 44(1) and (2) apply only to transactions in which husbands effect policies in favour of or cede them to their wives, and not to similar transactions of wives in favour of their husbands. In other words, there is no reason why fraud or collusion does not occur when husbands, rather than wives, are the beneficiaries of insurance policies. It was also not demonstrated by the

respondent that there were no other legislative provisions which could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights (para. 48–49).

Although the decision is submitted to be correct, its reasoning as to why the equality clause was included in the Bill of Rights is subject to criticism. After referring to the systematic patterns of discrimination in South Africa's history, the court submitted that s. 8 was adopted:

'in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination.' (para. 42)

Unfairness to be proved

The court is correct in so far as it recognises that art. 8 reflects the special responsibility towards those groups subjected to discrimination in the past. It is for this reason that s. 8(4) creates a presumption of unfairness once discrimination on one of the specified grounds in s. 8(2) has been established (according to the majority decision in the *City Council of Pretoria* case, this presumption applies to direct as well as indirect discrimination on one of the specified grounds). Furthermore, s. 8(3) allows for positive measures for the advancement of such persons. However, what s. 8 does *not* do, is to protect only these historically disadvantaged groups. Neither does it limit the grounds for unfair discrimination to those enumerated in s. 8(2), *or* to those comparable (in their severity) to such grounds. The subsection explicitly states that the specified grounds contained in it do not derogate from the generality of the equality provision. In other words, all patterns of unequal treatment – also those which are less severe than for example racial discrimination – could amount to unfair discrimination and a subsequent violation of the equality clause. The only difference is that where the discriminatory measures do not relate to one of the specified grounds in s. 8(2), the presumption of unfairness formulated in s. 8(4) does not apply. It would thus be up to those claiming discrimination to prove its unfairness.

Paradoxically, the court acknowledges the generality of the equality clause. In the *Brink* case it stated that the list provided in s. 8(2) should not be used to derogate from the generality of the prohibition of discrimination. However when it comes to applying the right to equality to the case at hand, the court time and again limits its inquiry to whether those subjected to the discriminatory measures would qualify as historically 'disadvantaged' or 'vulnerable' and whether the discrimination would simultaneously result in a violation of human dignity comparable to that suffered by disadvantaged groups in the past. This became apparent in the decision of *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), which was the second decision on equality and which illustrates the court's interpretation of the equality clause in much greater detail.

DISCRIMINATION AND HUMAN DIGNITY

The *Prinsloo* case related to the *Forest Control Act* 1984, which has as one of its principal objectives the prevention and control of veld and forest fires. In order to achieve this it creates 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. A number of provisions prescribe criminal penalties for landowners in fire control areas who fail to fulfil their statutory obligations. 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. However, according to s. 84 of the Act:

'when in any action by virtue of this Act or the Common Law the question of negligence in respect of a veld fire which occurred on land situated outside a fire control areas arises, negligence is presumed, until the contrary is proved'.

Action had been instituted by the first respondent as a result of damage allegedly caused to his farmlands by the spread of a fire from the neighbouring land of the applicant. The fire occurred outside a fire control area. The Transvaal Provincial Division of the Supreme Court (as it was then called) referred the matter to the court, in order to clarify whether the presumption of negligence might (inter alia) violate the right to equality in s. 8 of the interim constitution, since the presumption applies only in respect of fires in non-controlled areas, and not to those spreading in controlled areas.

In this decision the court developed an unfair discrimination test which has also been applied in subsequent cases. In summary (taken from *Harksen v Lane NO* 1997 (1) SA 300 (CC), para. 53), the first question to be asked is whether the provision in question differentiates between people or categories of people. If so, it has to be asked whether the differentiation bears a rational connection to a legitimate government purpose. If it does not, then there is a violation of s. 8(1). If it does have a rational basis, it would not violate s. 8(1), but it might nonetheless violate s. 8(2).

Two-stage analysis

In order to establish whether there has been a contravention of s. 8(2), a two-stage analysis is required. Firstly, it has to be established whether the 'differentiation' would amount to 'discrimination'. This would be established if the differentiation resulted from one of the specified grounds. If it is not on a specified ground, then whether or not there is discrimination will depend on whether 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.

The second stage of the analysis requires a decision on whether the discrimination would amount to 'unfair discrimination'. If it is 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. To determine whether the 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. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair then there will be no violation of s. 8(2). If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s. 33(1)).

Differentiation v discrimination

Several aspects of the court's approach could be criticised (see, for example, criticism of the relation between s. 8 and the limitation clause in I M Rautenbach, 'Die verband tussen die gelykheidsbeginsel en die algemene beperkingsbepaling in die handves van regte' – *Prinsloo v Van der Linde* en *President RSA v Hugo*', *Journal of South African Law* (1997) 571). However this author will only address the issue of equating discrimination with 'measures that impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'. The court justified this equation as follows:

> *'The proscribed activity is not stated to be 'unfair differentiation' but is stated to be 'unfair discrimination'. Given the history of the country we are of the view the '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 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 s. 8(2), in the context of s. 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.'*

Once again it must be emphasised that the court has a particular responsibility to sanction these grave forms of discrimination. However this may not imply that discriminatory measures which do not amount to a violation of human dignity, but are nonetheless unjustified and unproportional, may be discarded as 'unfair differentiation'. Unfortunately this is exactly the message that was conveyed in the *Prinsloo* decision. The court opined that the differentiation in s. 84 of the Forest Control Act between owners and occupiers of land in fire control areas and those outside of these areas, and the respective burdens and obligations accompanying this 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.'*
> (para. 41)

The court should have evaluated the impact of these differentiating measures (in particular the presumption of negligence) independently from the question as to whether their human dignity was violated. In other words, the latter question is superfluous – as is the distinction between unfair differentiation and unfair discrimination. Once it was established that s. 84 differentiates between people or categories of people, the court should have proceeded with the question whether this differentiation would be unfair, in the light of its impact on the group in question (since these measures do not relate to one of the specified grounds, the unfairness cannot be presumed and must be proved). By first asking whether the discriminatory measures could impair the fundamental dignity of those affected, the court erected an additional, artificial and difficult barrier which effectively prevented it from dealing with the real issue at hand.

INSOLVENCY AND EQUALITY

The same criticism applies to the subsequent decision of *Harksen v Lane NO*. The court had to decide whether certain provisions of the *Insolvency Act* 1936 violated the equality clause. According to s. 21 of the Act, the sequestration of the estate of one of the two spouses has the effect of vesting in the master or trustee, the property of the spouse (which includes a live-in partner for the purposes of the Act) whose estate has not been sequestrated. It was contended that the vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them. It imposes severe burdens on them beyond those applicable to other persons with whom the insolvent had dealings or close relationship, or whose property is found in the possession of the insolvent.

Relying on the test developed in the *Prinsloo* decision, the court submitted that the differentiation does arise from the complainant's attributes or characteristics as solvent spouses, namely their close relationship with the insolvent spouse and the fact that they usually live together as a household. According to the court these attributes have the potential to demean persons in their human dignity. However it also submitted that the solvent spouses are not a vulnerable group which has suffered discrimination in the past (*Harksen* decision, para. 70). The majority of the court then concluded that the inconvenience and potential prejudice that could result for the solvent spouses from s. 21 do not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature (*Harksen* decision, para. 63).

It may well be that the fundamental dignity of the solvent spouses is not affected by the disputed provision; one might even question the court's assumption that the particular attributes of solvent spouses have the *potential* to demean their human dignity. Nonetheless, this does not explain whether it is justified that the spouse of the insolvent is treated differently from other people closely associated with the insolvent and with whom the latter could also collude at the expense of creditors. The core issue thus remained unanswered.

TEACHERS AND EQUALITY

In the decision of *Larbi-Odam v MEC for Education (North West Province)*, it was claimed successfully that a provincial regulation restricting foreign teachers with permanent residence permits for South Africa from applying for certain permanent teaching posts, violated the equality clause. The court identified the permanent residents as a vulnerable group, being a minority with little political muscle. Furthermore, the disputed governmental regulation was discriminatory, as it was based on attributes and characteristics which have the potential to impair their fundamental dignity (para. 20). Since the impact of the regulations would be to cause great insecurity among people who have been granted the right to remain in the country permanently, and who are generally entitled to compete with South Africans in the employment market, the discrimination

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Larbi-Odam v MEC for Education (North West Province), decided on 7 October 1997, is currently only published on the Internet

was also seen to be unfair. It could not be justified in terms of the limitation clause, since the aim of the provincial government to reduce unemployment among South African teachers at the expense of permanent residents would be illegitimate (*Larbi-Odam* decision, para. 31).

Although the outcome of the decision is to be welcomed, one might ask what the fate of the permanent residents would have been, had they not been perceived as a vulnerable group whose fundamental dignity might be at stake. Had they not passed this hurdle, the impact of the regulation on their interests and the idiosyncrasy of granting people permanent residency and then excluding them from the employment market, might not have been considered at all.

CONCLUSION

In the final analysis, the main criticism against the historical interpretation followed by the court is that it results in a very restrictive concept of equality. Only those categories of persons who would qualify as a vulnerable group, or whose fundamental dignity could be affected by the discriminatory measures, have a realistic chance of succeeding with a claim of unfair discrimination. It seems that the court assumes that treating less severe forms of discrimination as 'unfair discrimination' might trivialise the severity of the humiliating discrimination suffered by the country's black population in the past. Consequently, many patterns of less severe but nonetheless unfair treatment would be excluded from the protection provided by the equality clause, unless the court develops artificial constructions of vulnerable groups, or artificial connections between discriminatory measures and the fundamental dignity of those affected. The court would be well advised to reconsider this interpretation, if it is truly committed to providing extensive equal treatment to the members of the South African society.

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Does legal set-off exist?

by Eugene Fung

In *Re Finbo Engineering Co Ltd* (unreported), 18 March 1998, Le Pichon J, the Court of First Instance in Hong Kong was asked whether legal set-off exists in Hong Kong. A petition was filed to wind up a company on the ground that it was unable to pay its debts and that it was just and equitable that it should be wound up. The petition was opposed by the company on the ground that it was entitled to a set-off against the debt owed to the petitioner.

If the company could show an arguable defence of legal set-off, the petition would have to be dismissed. Le Pichon J concluded that, given the complexity of the question, the company must at least have an arguable defence of legal set-off.

ORIGINS OF LEGAL SET-OFF

A 'set-off' has been defined as 'the setting of cross-claims against each other to produce a balance' (see R Derham, *Set-Off*, 2nd ed, (1996), Oxford, p. 1). Legal set-off has a statutory origin: the statutes of set-off were enacted in England in 1729 and 1735 ('the statutes of set-off'). Before the passing of the statutes of set-off, a debtor had to bring a separate action in order to enforce a debt owed to him by his creditor.

The statutes of set-off were designed to prevent the imprisonment as a debtor of a person not truly indebted because there was a mutual debt owing by his creditor. The plea of set-off under the statutes was available where each of the demands sounded in damages and was 'capable of being liquidated, or ascertained with precision at the time of pleading'(Tindal CJ in *Morley v Inglis* (1837) 4 Bing (NC) 58 at p. 71). (Recently, in *Stein v Blake* [1996] 1 AC 243 at p. 251, Lord Hoffmann similarly said that the 'legal set-off is confined to debts which at the time when the defence of set-off is filed were due and payable and either liquidated or in sums capable of ascertainment without valuation or estimation.')

Moreover, the debtor did not have to bring his cross-claim in a separate action. Thus, as Willes CJ thought, the statutes of set-off were intended to avoid circuity of action (*Hutchinson v Sturges* (1741) Willes 261 at p. 262).

The Supreme Court of Judicature in England was established by the *Judicature Act* 1873, which expressly allowed the court to entertain a counterclaim (s. 24, rule 3). It therefore appears that the passing of the *Judicature Act* 1873 rendered the statutes of set-off redundant. Accordingly, the statues of set-off were repealed by s. 2 of *Civil Procedure Acts Repeal Act* 1879 and the *Statute Law Revision and Civil Procedure Act* 1883. In each of the repealing statutes, there were savings to ensure that the repeal would not affect any jurisdiction, principle or rule of law or equity which had been established or confirmed by or under either of the enactments (*Civil Procedure Acts Repeal Act* 1879, s. 4(1)(b) and the preamble of the *Statute Law Revision and Civil Procedure Act* 1883). The saving provisions have been interpreted as preserving the right of set-off originally conferred by the statutes of set-off (e.g. *Hanak v Green* [1958] 2 QB 9 at p. 22 where Morris LJ said that 'the Judicature Acts conferred no new rights of set-off'). It follows that the right to a legal set-off under the statutes of set-off had come to be regarded as part of the common law of England and Wales at the time when the statutes of set-off were repealed.

LEGAL SET-OFF IN HONG KONG

The Supreme Court of Judicature at Hong Kong was established by Ordinance No. 15 of 1844 ('the 1884 Ordinance'). Section 3 of the 1884 Ordinance reads:

'And be it further enacted and ordained, That the Law of England shall be in full Force in the said Colony of Hong Kong, except where the same shall be inapplicable to the local Circumstances of the said Colony, or its Inhabitants: ... Provided also, that in all Matters relating to the Practice and Proceedings of the said Supreme Court... the Practice of the English Courts shall be in Force, until otherwise ordered by any Rule of the said Court...'

Le Pichon J said in her judgment that:

'local circumstances would not have made the statutes [of set-off] *inapplicable or subject to modification.'*

Although the 1884 Ordinance was subsequently amended several times, the application of the statutes of set-off was not