

## **City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)**

### **1) Reference Details**

Jurisdiction: South African, Constitutional Court of South Africa

Date of Decision: 17 February 1998

Case Status: Concluded

Link to full case:

<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/jfn5sP1cBL/MAIN/64690039/9#top>

### **2) Facts**

The respondent, Walker, was a resident of old Pretoria, an overwhelmingly white district. Old Pretoria was amalgamated with two black townships to form a new administrative district under the authority of the appellant council (City council of Pretoria). The city council of Pretoria continued the practice of charging for electricity and water on a differential basis, the residents of old Pretoria being charged a consumption-based tariff and those of the townships being charged a lower flat rate. A programme to install meters in all properties in the townships was implemented but the council decided not to start charging those residents in the townships who had meters installed at the consumption-based tariff until all the installation work had been completed. The council's officials also adopted a policy of selective enforcement against defaulters; they continued to take legal action to recover arrears from residents of old Pretoria but failed to take similar action in the townships, where a culture of non-payment for services existed. Instead, the officials took a strategic decision to encourage payment of arrears by residents in those areas but not to take legal action against them while the installation of meters was still in progress.

### **3) Laws**

Section 8 of the Interim Constitution of South Africa

### **4) Legal Arguments**

#### *The Respondent*

The respondent contended that the council's conduct breached s. 8 because there was no rational connection between the discriminatory measures taken and the legitimate governmental purpose. He also argued that, because the flat rate charged to residents in the townships was lower than a consumption-based rate, the ratepayers of old Pretoria were unfairly subsidising those in the townships. Similarly, the council failed to apply a metered rate uniformly even after meters had been installed on some properties in Atteridgeville and Mamelodi. Finally, he argued that only residents of old Pretoria were sued by the council for the recovery of arrears while defaulters in Atteridgeville and Mamelodi were not sued.

### **5) Decision**

#### *The Majority Opinion*

The Court opined that the amalgamation that occurred between the different areas resulted in a new relationship between the areas which had to be administered differently. The two black areas were poorly developed in terms of infrastructure for municipal services, necessitating a flat rate charging system, while the affluent white area had adequate facilities and the necessary infrastructure.

The Court concluded that the differentiation was rationally connected to legitimate governmental objectives. Not only were the measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality, in terms of facilities and resources, during a difficult period of transition. Therefore there was no violation of s. 8(1).

However, the council's differential treatment of residents in black areas and residents in white areas constituted indirect discrimination on the grounds of race in violation of s. 8(2). The court suggested it would be artificial to make a comparison between such areas on the grounds of geography alone. The effect of apartheid laws was that race and geography are inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. Further, proof of intention to discriminate is not required for either direct or indirect discrimination under s. 8(2), although the purpose of the conduct or action in question may be relevant in determining whether the discrimination was 'unfair' (*Harksen v Lane NO* [1998] 2 LRC 171, 193 (SA CC) followed).

Subsequently, the respondent belongs to a group that has not been disadvantaged by the racial policies and practices of the past but, as a racial minority could in a political sense, be regarded as vulnerable (*dicta* of O'Regan J in *Hugo v President of the Republic of South Africa* [1998] 1 LRC 662, 721 (SA CC) followed).

However, it is inconsistent with the equality jurisprudence to hold that all cross-subsidisation is precluded by s. 8(2) as there may well be cases where it is not unfair to charge according to different rates for the same services.

The court went on to state that viewed objectively, the policy of selective enforcement implemented by council officials affected the respondent and other similarly placed persons in a manner which is at least comparably serious to an invasion of their dignity. It set out that no members of a racial group should be made to feel that the law is likely to be used against them more harshly than others who belong to other race groups. The Court concluded that as the presumption of unfairness in s. 8(4) had not been rebutted by the appellants, the officials' conduct amounts to unfair indirect discrimination within the meaning of s. 8(2).

*Justice Sachs (dissenting in part)*

Justice Sachs dissented on the following issues:

Justice Sachs contended that the council's policy of selective enforcement was based on the identification of objectively determinable characteristics of different geographical areas, and not on race. The mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not enough to constitute indirect discrimination on the grounds of race.

He considered further that in light of South Africa's history of institutionalised racism, there might be sound reasons for treating direct differentiation on the prohibited grounds as *prima facie* proof of discrimination without further evidence of prejudice being required. In order to invoke the presumption of unfairness in s. 8(4), however, some element of actual or potential prejudice, whether of a material kind or to self-esteem, has to be established. In the present case, there was no evidence that the respondent was prejudiced by discrimination, whether direct or indirect.

Consequently, s. 8(2) is not triggered as the decision not to enforce payment in the townships did not in any way threaten or impose burdens or reinforce disadvantage for the respondent, withhold benefits from him or undermine his dignity or sense of self-worth.

Even if the policy pursued by the council resulted in discrimination against the respondent, any discrimination that may have been practised would not have amounted to unfair discrimination in breach of s. 8(2). The respondent did not belong to a socially vulnerable group that had been the victim of past disadvantage.