

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

The Minister of Finance and Another v Frederik Jacobus Van Heerden

CCT 63/03

Decided on 29 July 2004

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This is an application for leave to appeal from the order of the Cape High Court (the High Court) declaring Rule 4.2.1 of the Political Office-Bearers Pension Fund (Pension Fund) discriminatory and constitutionally invalid. The applicants in this Court are the Minister of Finance and the Pension Fund. The respondent is Mr. Frederik Jacobus Van Heerden, a former parliamentarian who is a member of the Pension Fund. He is also a member of the Closed Pension Fund, a fund set up by the tricameral Parliament in 1993 to provide pensions exclusively for political office bearers of that time.

The respondent brought this matter in the High Court complaining that the differentiation in the employer contributions laid down by Rule 4.2.1 was arbitrary, unreasonable, unfairly discriminatory and consequently unconstitutional. The applicants defended the measures on the grounds that they constitute “limited affirmative action”. The High Court reasoned that a person who relies on section 9(2) of the Constitution to justify discriminatory measures bears the “onus” of establishing on a balance of probabilities that the measures have been taken to promote the achievement of equality, and accordingly found that the Minister and the Fund had failed to discharge the ‘onus’. The High Court accordingly found that Rule 4.2.1 was not a measure designed to advance a previously disadvantaged group. It was arbitrary and overhasty and amounted to unfair discrimination.

In this Court, the gravamen of the applicants’ complaint is that the High Court misconceived the true nature of the equality protection recognised by our Constitution, by resorting to a formal rather than a substantive notion of equality. They argued that the purpose of the differentiated scheme of employer benefits was to advance equality. The respondent contended that the scheme is unfair because the state does not allege that in order to benefit the favoured group it was essential that the disfavoured group should receive lower employee benefits.

This Court unanimously holds that leave to appeal must be granted; that the appeal must be upheld; that the order of the High Court declaring Rule 4.2.1 unconstitutional and invalid must be set aside together with its order as to costs and that no cost order be made in this application.

Moseneke J writing for the majority, (Chaskalson CJ, Langa DCJ, Madala J, O’ Regan J, Sachs J, Van der Westhuizen J and Yacoob J) found that legislative and other measures that properly fall within the requirements of section 9(2) are not presumptively unfair. He found that remedial measures are not a derogation from, but a substantive and composite part of section 9 and of the Constitution as a whole. Furthermore, the differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2). It was further held that if a restitutionary measure, even based on any of the grounds of discrimination listed in section 9(3), passes muster under section 9(2), it cannot be presumed to be unfairly discriminatory. The impugned pension contribution scheme does pass muster as a restitutionary measure. It is directed at achieving equality between old and new

parliamentarians, the overwhelming majority of whom have been disadvantaged by past unfair discrimination and exclusion. The measure is not unfairly discriminatory.

The majority held that the High Court is clearly mistaken in approaching this matter on the limited basis that it need not decide whether and the extent to which members of Parliament who were members of the Closed Pension Fund were better off than those who were not.

In a separate judgment, Mokgoro J (Sachs J and Skweyiya J concurring) held that the impugned measure was not restitutionary in nature. One of the requirements of a restitutionary measure is that it must advance a person or group of persons who were previously disadvantaged by unfair discrimination. Mokgoro J further held that the class of Members of Parliament who benefited from the higher contributions in the Pension Fund included people who had not previously been disadvantaged by unfair discrimination for the measure to qualify as restitutionary in terms of section 9(2). However, Mokgoro J, after considering the question of unfair discrimination under section 9(3), concurred in the order of the main judgment upholding the appeal because she was of the view that the challenged measure did not constitute unfair discrimination and, along with the main judgment, held that the measure did not violate section 9 of the Constitution.

In a separate concurring judgment, Ngcobo J (Sach J concurring) agreed with Moseneke J on the requirements that must be met under section 9(2). However, he expressed some doubts whether, on the facts of the case, the persons targeted by the measure are persons or categories of persons who have been disadvantaged by unfair discrimination. His doubts arise from the fact that the beneficiaries of the Pension Fund included persons who were not disadvantaged by past discrimination. In view of the fact that this question was not argued, he considered it unnecessary to reach any firm conclusion on it, in particular, because he was satisfied that the rules of the Pension Fund do not discriminate unfairly against the old members of parliament.

Ngcobo J found that old Members of Parliament had a pension fund from which new members were excluded. As a result of this the old members were financially better off than the new members in relation to parliamentary pension benefits. He found that the differentiation made by the rules was aimed at minimizing the gaps in the parliamentary pension benefits between old and new members of parliament. Its aim was to achieve an important societal goal of furthering equality in the entitlement to parliamentary pension benefits. He concluded that the Pension Fund rules do not therefore discriminate unfairly against old members of parliament and they were therefore constitutional.

Sachs J supports both the majority and minority judgments, finding that, although they follow different paths they are united by the same constitutional logic based on achieving substantive equality. In his view the fairness inherent in affirmative action measures under section 9(2) is no different from the fairness required by the state when it discriminates against persons under section 9(5). Measures taken to dismantle the structures of inequality that still plague our society are manifestly authorised by the Constitution. They may impose burdens on some negatively affected, provided such burdens are not so disproportionate as to undermine the goal of a non-racial and non-sexist society.