

**RACE AND TRANSFORMATION: DOES THE DECISION OF THE SUPREME COURT OF UNITED STATES IN FISHER V UNIVERSITY OF TEXAS AT AUSTIN HAVE LESSONS FOR SOUTH AFRICA?**

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Writing for the Constitutional Court in **Minister of Finance v Van Heerden**<sup>1</sup>, Moseneke J (as he then was) said:

*“However, it is also clear that the long term goal of our society is a non-racial common non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity and our equality as citizens within it, is something our Constitution celebrates and protects.”*

What is meant however by a non-racial and non-sexist society? How do we define the concept of transformation towards such a society or to put it in the words of Etienne Mureinik, what bridge are we constructing in order to direct our society from its authoritarian past to a non-racial and non-sexist future?

In answering these questions, it would be manifestly dishonest to deny that, however much we once described our country as being inhabited by a rainbow nation, colour and class have suddenly become irrelevant. Nothing could be further from the disturbing reality which confronts millions of historically and regrettably presently disadvantaged South Africans on a daily basis.

In addressing this question, Professor Njabulo Ndebele<sup>2</sup> writes that:

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<sup>1</sup> 2004 (6) SA 121 (CC) at para 44

<sup>2</sup> Mail & Guardian 23 September 2009

*“The moral imperative of our vision for equality (that is if you are black) and non-racialism ..... enshrined in the Constitution has enjoined you to look ahead to new and positive relationships with your fellow white citizens. However, your wish for such a world is constantly undermined by the persistence of the landscape of inequality and by recidivist acts of racism that enrage you. You experience your ethical resolve being eroded, a condition you feel driving you towards lowest, common denominator responses that are easy to make but never fulfilling.”*

Professor Ndebele adds the following to the context in which our Constitution was drafted:

*“It seems as if instead of setting out to create a new reality we work merely to inherit an old one. Perhaps in retrospect some of the elements in the negotiated settlement had led to the historical elections of 1994 served to subvert the higher order mission. Redistribution was given priority over creation and invention. That way reaffirmed the structures of inequality by seeking to work within their inherent logic.”*

In his view, this has led us to a destructive impasse. Although we have built millions of new houses we have not built communities. We have merely added to the dormitory.

*“To transform the dormitory over planned time into coherent, integrated communities each with a new tax base in which responsible taxpaying citizens make local decisions about their livelihood, would be a signal of the greatest love the country has for itself and its people. The overriding issue is not that race has no role in our attempt to understand and explain both the history and the contemporary challenges of South Africa; rather, it is about how much we are willing to accord it primacy of explanation.”*

My task this evening is not to respond to these broad seemingly insoluble challenges but to concentrate on one aspect thereof, namely the role of law in general and the

Constitution in particular in dealing with questions of redress and the related issue of race.

The Constitution was designed to embrace an aspiration together with a firm intention to realise in South Africa a democratic egalitarian society committed to social justice and self-realisation for all. It sought to nudge us in the direction of transcending the boundaries of race, gender, belief or class. Given the scope of one paper, it is necessary to truncate the scope even further and to focus attention on the specific question of affirmative action and thus whether the Constitutional Court in particular has risen to the challenge of reconciling the need for transformative justice with the integration in a fair and proportional manner of a diversity of rights and interests which are at stake in the country.<sup>3</sup>

Section 9 of the Constitution<sup>4</sup> was drafted with a clear understanding of American equality jurisprudence. Thus s 9 (2) of the Constitution provides equality includes the full and equal enjoyment of all rights and freedom. To promote the achievement of equality legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken. Section 9(2) was thus concerned with a potential constitutional challenge to affirmative action programmes, meaning preferential treatment which is given to disadvantaged groups of people, where the preference is for the distribution of some benefit over someone who is not a member of that group.<sup>5</sup>

Accordingly, it is instructive to turn to the struggles that American jurisprudence has encountered with this concept and its relationship to equality.

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<sup>3</sup> I take this framing of the debate from Professor J L Pretorius "Fairness and transformation: A critique of the Constitutional Court's Affirmative Action Jurisprudence" 2010 (26) SAJHR 536

<sup>4</sup> Republic of South Africa Constitution Act 108 of 1996

<sup>5</sup> See Currie and De Waal "The Bill of Rights Handbook (6<sup>th</sup> ed) at 241

## **Bakke, Gratz and Fisher**

In **Regents of University of California v Bakke**<sup>6</sup> the court considered an admission system which was employed by the medical school of the University of California, Davis. From an entering class of a 100 students, the school set aside 16 seats for minority applicants. The court held that this programme breached the equal protection clause. In so finding Powell J held:

*“Decisions based on race or ethnic origin by faculties and administrations of State universities are reviewable under the Fourteenth Amendment.”<sup>7</sup>*

Accordingly, the Fourteenth Amendment admitted ‘no artificial line of a two-class theory that permits the recognition of special wards entitled to a degree of protection greater than that accorded others’.<sup>8</sup> For this reason, any form of racial classification had to be subjected to a process of strict scrutiny review, for when a government decision effects questions of race or ethnicity, the affected person is entitled to a judicial determination which shows that the burden that he has asked to bear must promote a compelling interest of government.

Powell J went on to find that a compelling interest that could justify the consideration of race was an interest in educational benefits that flowed from a diverse student body. Diversity served values beyond race alone, including enhancement of classroom dialogue, a lessening of racial isolation and stereo types. In dealing with this objective he said:

*“It is not an interest in simple ethnic diversity in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups with the remaining percentage undifferentiated aggregation of student. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a simple though important element.”<sup>9</sup>*

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<sup>6</sup> 438 US 265

<sup>7</sup> At 287

<sup>8</sup> At 295

<sup>9</sup> At 315

Following *Bakke*, the decision in **Gratz v Bollinger**<sup>10</sup> endorsed these principles. The Court affirmed that obtaining educational benefits as a result of student diversity constituted a compelling state interest which could justify the use of race in student admissions. In its finding, the Court eschewed a race conscious admission policy which employed a quota system and insisted that any policy must ‘remain flexible and have to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’<sup>11</sup>

This year the court decided a similar problem in **Fisher v University of Texas at Austin**. Over the years the university had developed three different programmes to evaluate candidates for admission. The initial programme consisted of a numerical score reflecting an applicant’s test scores and academic performance in high school as well as the applicant’s race. Following challenges to this programme, the university adopted a holistic assessment of the candidate’s potential contribution to the university which was used in conjunction with academic performance. The so-called ‘personal achievement index measured a student’s leadership and work experience, awards and extra curriculum activities, community service, and other special circumstances that might give the university insight into the students background. These latter considerations included growing up in a single parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant and the general socio economic condition of the student’s family.

After the court’s decisions in **Grutter** and **Gratz** in 2003, the university adopted a third programme in which it reverted to explicit considerations of race. A student’s race was now included as part of the personal achievement index score. In doing so, the university asked students to classify themselves amongst five predefined racial categories in the application form. Race was not assigned an explicit numerical value but it was undisputed that it was a meaningful factor in the

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<sup>10</sup> 539 US 244 See also *Grutter v Bollinger* 539 US 306

<sup>11</sup> At 337

assessment of the score. It was against this programme that a challenge was brought against the university which led to the opinion of the Supreme Court.

In so deciding, the majority of the court (only Justice Ginsberg dissented) followed the approach in Gratz and Grutter. It held that a court should ensure that there was a reasonable principled explanation for the academic decision to develop the admissions policy, although the university would not be permitted to define diversity as some 'specified percentage of a particular group merely because of its race or ethnic origin'. Once the university had established that its goal of diversity was consistent with strict judicial scrutiny, a further requirement would need to be met, namely that the university proved that the means chosen to attain diversity were narrowly tailored to meet this specific goal. Justice Kennedy writing the majority said:

*"Narrow tailoring also required that the reviewing court verified that it is "necessary" for a university to use race to achieve the educational benefits of diversity... This involves a careful judicial enquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "narrow tailoring does not require exhaustion of every conceivable race neutral alternative", strict scrutiny does require a court to examine with care not to defer to a university's 'serious good faith consideration of workable race neutral alternatives'."*

While a plaintiff would bear the burden of placing the validity of the university's adoption of an affirmative action plan in issue, the requirements of strict scrutiny imposed the ultimate burden upon the university of demonstrating, before it could turn to any form of racial classification, that available, workable race neutral alternatives were not available to it to fulfil its objectives. The court therefore held that the university had to provide sufficient evidence to prove that its admission policy was sufficiently narrowly tailored to obtain the educational benefits of diversity. On the facts, it then remanded the case for further proceedings.

A more critical approach to any form of affirmative action, unsurprisingly, emerged from the pen of Justice Thomas. He rejected the idea that diversity was a sufficient objective to justify some form of race classification. Thus, 'it follows ... that the putative educational benefits of student body diversity cannot justify racial discrimination: if a State does not have a compelling interest in the existence of a university, it certainly cannot have a compelling interest in the supposed interest that might accrue to that university from racial discrimination.' If a court applied the test of strict scrutiny, it would either require the university to close or to cease discriminating against applicants based on their race. Not only would Justice Thomas have overruled the *ratio* in **Grutter** but:

*"While I think the theory advanced by the university to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the university' programme was instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts racial minorities."*

By contrast, in her lone dissent, Justice Ginsberg held:

*"Only an ostrich could regard this supposedly neutral alternative as race unconscious".*

Government actors, including universities, need not be blind to the lingering effects of an overtly discriminatory past and the legacy of State sanctioned inequality. There was no basis by which to remand this case. In her view, the university admissions policy flexibly considered race, only as "*a factor of a factor of a factor in the calculus*" which universities admitted students.

Justice Ginsberg's comment resonates in the South African condition namely, that only an ostrich or someone struck down by an acute case of social amnesia could think that the total absence of race within the context such as South Africa could produce a neutral and fair conclusion. But what underlines **Fisher** and the previous jurisprudence is the role that race plays in these considerations, in particular, when

the Constitution seeks to proclaim principles of equality and hence prefigures a society based upon non racialism and non sexism.

In this connection, two South African cases are worthy of consideration. In **Pretoria City Council v Walker**<sup>12</sup> the court was concerned with the constitutionality of water and electricity charges which were levied in a different manner, depending upon whether the taxpayer was located in a black or white area in Pretoria. The court was also required to consider a decision of the City Council to institute legal proceedings for debt collection for the non-payment of service charges in the white areas only, and to divine the purposes of s 8 (3) (a) of the Interim Constitution which, in its present application in s 9(2), has been cited. Langa DP (as he then was), writing on behalf of the majority, accepted that differential tariffs had been introduced to provide continuity in the rendering of services by the Council while, at the same time, 'phasing in equality in terms of facilities and resources during a difficult period of transition.'<sup>13</sup>

The Court found that the policy of selective enforcement of the charge of municipal services placed a burden upon the Council to rebut the presumption of unfairness. Langa DP then wrote:

*"Section 8 (3) permits the adoption of special measures which may be required to address past discrimination. In the present case however although there was mention of it in argument, it was not part of the council's case that the policy of selected enforcement or arrear charges was a measure adopted for the purpose of addressing the disadvantaged experience in the past by residents of Atteridgeville and Mamelodi. The reasons given for the policy were pragmatic ... No member 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 that belong to other race groups. That is the grievance that respondent has and it*

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<sup>12</sup> 1998 (2) SA 363 (CC)

<sup>13</sup> At para 27

*is a grievance that the council officials foresaw when they adopted their policy. The conduct of the council officials seen as a whole over the period ... was on the face of it discriminatory. The impact of such a policy on the respondent and other persons similarly placed viewed objectively in the light of the evidence, would, in my view, have affected them in a manner which is at least comparably serious to an invasion of their dignity.”<sup>14</sup>*

Only Sachs J dissented, holding that the differential tariffs served to overcome historical disparities between the different residential areas and was therefore designed to promote substantive equality through a form of affirmative action which stood to be classified as remedial action.

The majority decision in **Walker** is authority for the proposition that, although the location of the complainant in the structure of advantage and disadvantage would be a central element in the determination of the fairness of the challenge to a discriminatory practice, members of a previously advantaged group were not excluded from the protection of the non-discrimination clause.

A different approach appears to have been taken in the second of the two cases to which I wish to make reference, **Minister of Finance and another v Van Heerden**.<sup>15</sup> This case dealt with questions of alleged discrimination in the rules of the Political Office Bearers Pension Fund which provided for differentiated employer contributions in respect of members of Parliament and other political office-bearers between 1994 and 1999. Dealing with the concept of equality Moseneke J said:

*“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The*

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<sup>14</sup> At paras 74 and 81

<sup>15</sup> 2004 (6) SA 121 (CC)

*Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.*<sup>16</sup>

In comparing South African to American jurisprudence, Moseneke J observed that American jurisprudence rendered a particular limited and formal account of the reach of the equal protection clause and considered affirmative action measures to be a suspect category which had to be subjected to strict judicial review. By contrast, he held that affirmative action was not a deviation from the right to equality as guaranteed by the Constitution but was integral to the achievement of equality protection.<sup>17</sup> Accordingly, without a positive commitment to eradicate socially constructed barriers to equality on a progressive comprehensive and systematic basis, the constitutional promise of equality would 'ring hollow'.<sup>18</sup>

This deferential approach to s 9 (2) contrasts markedly with the American jurisprudence. It was reinforced by Mokgoro J in her concurring judgment in *Van Heerden* where she wrote:

*"It would frustrate the goal of s 9(2), if measure enacted in terms of it paid undue attention to those disadvantaged by the measure when that disadvantage is merely an invariable result and of the aim of the measure. The goal of transformation would be impeded if individual complainants who are aggrieved by restitutionary measures could argue that the measures unfairly discriminated against them because of their undue impact on them."*<sup>19</sup>

The problem which is posed by the approach adopted in this case is well reflected in the following criticism of Professor Pretorius:

*"The natural inference to be drawn from the Court's insistence that a s 9(2) compliant affirmative action measure is exempt from any comparative fairness*

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<sup>16</sup> At para 27

<sup>17</sup> At para 30

<sup>18</sup> At para 31

<sup>19</sup> At para 80

*scrutiny – coupled by the courts deferential approach is that the test for s 9 (2) compliance in essence would boil down to a rationality enquiry only. An affirmative action measure does not limit the right to equality if it is demonstrated that it is a remedial purpose and that it benefits a disadvantaged group. Its fairness or the proportionality of its impact as such should therefore be of no consequence.*<sup>20</sup>

As Professor Pretorius himself notes, this conclusion may not do complete justice to the approach, particularly of Moseneke J in **Van Heerden**, when the Justice wrote:

*“In assessing therefore whether a measure will in the long term promote equality, we must bear in mind the constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long – term constitutional goal will be threatened.”*<sup>21</sup>

This passage does not seem to embrace an approach in which ‘anything goes’, which purports to claim to be an affirmative action measure. It is to that particular question and challenge that I now wish to turn.

Many in this country would agree with the comment of Eusebius McKaiser<sup>22</sup> that ‘affirmative action is not racist; it is not an obstacle to non racialism and it is not an insult to black people. It is legally and morally justified because it serves to achieve a substantively equal society, one that has redressed the racist structural consequences of apartheid!

This in turn would justify the deferential approach that characterises much of the jurisprudence in the **Van Heerden** judgment. Take as an example, certain BEE programmes. If a BEE programme only promotes a tiny segment of increasingly influential plutocrats, it must surely fail a test of reasonable justification.

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<sup>20</sup> Pretorius at 561

<sup>21</sup> At para 44

<sup>22</sup> Eusebius McKaiser [A Bantu in my Bathroom](#) (2012) at 81

Some like retired Constitutional Court, Justice Laurie Ackermann, go further when they resist the idea of deference, relying on the wording of s 9(2) to balance dignity with equality. Thus:

*“The purpose of the s 9(2) measure is, after all, to make restitution for the disadvantage suffered by the person in question as a result of unfair discrimination. An individual person may belong to a race group, the majority of whose members might still suffer disadvantage as a result of unfair discrimination. The individual in question, thanks to superb pre-primary, primary, secondary and tertiary education, might suffer no current disadvantage. It is, in my view, not the purpose of s 9(2) for an individual like this to have the advantage of the part remedial measure.”<sup>23</sup>*

In so arguing, Ackermann seeks to grapple with the ‘inescapable tension between the entitlement of the plaintiff to restitutionary equality and the right of the defendant not to be unfairly discriminated against’.<sup>24</sup>

But can our jurisprudence in this area, given our race saturated history, be reduced to individual claiming? Twenty years into our democracy is surely too short a time to elide over the structural legacies inherited from our violent past. We need to address the systematic effects of three hundred years of racism and we cannot do it by individual claims. Yet, if the goal is to achieve a non-racial society under the umbrella of ss 9(1) and 9 (3) of our Constitution, the invocation of s 9 (2) must be tested against an overarching normative vision. In short the tests developed by the US Supreme Court in **Fisher** are too onerous to be compatible with our objectives. The approach of **Van Heerden** may be too deferential to guide us towards the prefigured objective. In turn, this means that Courts will need to engage with both the means to achieve and the objective of a non-racial society, if the judiciary is to promote an adequate principle of justification in this key area. Without a clear normative guide to ensure that programmes can be justified in terms of a defined

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<sup>23</sup> Laurie Ackermann Human Dignity: Lodestar for Equality in South Arica (2013) at 387

<sup>24</sup> 25 at 388

transformative purpose, the move beyond race may be much longer in its arrival. At the very least we must have the courage to debate the kind of measures we should adopt to ensure a decisive move towards a society which is non-racial, non-sexist and egalitarian.