

Old age pension decision Out of sync with legal developments

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Christian Roberts and Others v Minister of Social Development and Others Case No. 32838/05 (TPD) [*Christian Roberts case*]

On 17 March 2010, the North Gauteng High Court finally handed down judgment in the *Christian Roberts case*, which the Court had heard on 11 and 12 September 2007. It concerns a constitutional challenge to section 10 of the *Social Assistance Act 13 of 2004* and the relevant regulations, which set the age for accessing the old age grant at 60 for women and 65 for men.

The facts of the case and the arguments of the applicants and respondents were stated and discussed in detail in an earlier issue of the *ESR Review* (Heleba, 2007). Basically, the applicants (who were four males above the age of 60 but below 65 at the time of the application) challenged the differentiation on the ground that it violated the equality clause and the right of access to social assistance, both guaranteed by the Constitution (sections 9(3) and 27(1)(C), respectively). The government argued that the differentiation was not unfair as it was aimed at addressing inequalities faced by women in general, and particularly African women during apartheid, such as race, class and social discrimination (para 17). The Community Law Centre, the Centre for Applied Legal Studies and the South African Human Rights Commission intervened jointly as friends of the court (*amici curiae*) in the case.

Following the hearing of the case, the government made a dramatic legislative change to progressively equalise the age at which men and women receive their old age pension. The *Social Assistance Act* was amended so that men aged above 60 years would access social grants at progressively lower ages from 2008 until 2010: namely, at 63 by April 2008 and 61 by April 2009, ultimately achieving equality with women, at 60, by April 2010. The government thus responded positively to the applicants' claims over two years ago.

The issues

The following questions were put to the Court:

- whether the discrimination referred to above was reasonable, fair and justifiable in a democratic system;
- whether to amend the discriminatory statute if it found the discrimination to be unfair; and
- whether the government could afford to extend social grants to men between the ages of 60 and 64.

The decision

In respect of the first question, the Court held that there was no doubt that the challenged provisions were discriminatory, as they favoured women and discriminated against men (para 26). In answering the question, the Court relied on the Constitutional Court's decision in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) [*Jooste*], where the Court had outlined an approach to follow in dealing with claims alleging an infringement of section 9(1) and (2) of the Constitution. In the *Jooste* case, it was stated that the first question to ask was whether there was a rational relationship between the differentiation and a legitimate government purpose (para 28). If no such relationship could be established, then the differentiating scheme was in breach of the provisions mentioned. But if such relationship did exist, then the next question to ask was whether the differentiation (discrimination) was unfair. Finally, if the differentiating scheme was found to be unfair in terms of section 9(3), it had to be asked whether the impugned measure could be saved by section 36 of the Constitution (the limitation clause).

According to the Court, Africans had generally suffered under the apartheid regime. Women in particular had been further marginalised by social structures and stereotypes (para 29). Consequently, because women had suffered the most disadvantage, it was imperative that government preferred women over their male counterparts aged 60, in its efforts to rid society of the legacy of apartheid (para 30).

The Court sought further guidance from the Constitutional Court's decision in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), arguably the leading authority on equality. In that case, the Court outlined a three-pronged inquiry in answering a constitutional challenge based on section 9(1) and (2). The questions to ask were, firstly, whether the challenged measure targeted persons or categories of persons previously disadvantaged by apartheid; secondly, whether the measure was designed to protect and advance such disadvantaged persons or class of persons; and, thirdly, whether the challenged scheme promoted the achievement of equality. In the present case, the Court found the discrimination to be fair on the basis that it was necessary and reasonable to address and protect women since they had been the most disadvantaged and marginalised during apartheid (paras 35–37).

Regarding the second question put to the Court in the *Christian Roberts case* – namely, whether it should amend the discriminatory statute if it found it to be unfair – the Court simply held that courts should refrain from stepping

into the legislative jurisdiction to create or amend statutes, and must respect the separation of powers (para 39).

Regarding the third question, and in response to an argument by the applicants and *amici* that the government could afford the financial burden resulting from equalising the old age pension, the Court held that it was the prerogative of government to determine its financial resources and the deployment thereof (para 40). Furthermore, the Court accepted the government's contention that it could not afford the equalisation (para 40).

The Court then dismissed the application with costs against the applicants and the *amici* (para 41).

Some concerns with the decision

This is a troubling decision, because it seeks to uphold a dead legislative scheme. Moreover, the decision seeks to give effect to rights in the Constitution, yet ignores a legislative development that seeks to give effect to constitutional rights. The case was heard nearly three years ago. Since then, there has been a fundamental legislative development that effectively renders the key challenge moot. The government, after the hearing, decided to amend the contentious legislation so as to extend access to old age grants to the excluded class of persons on a progressive basis. This development essentially made the judge's task so much easier. It is very likely that the amended legislation was not subsequently put before the Court by any of the parties, which thus explains the Court's overlooking of it. However, a court should not ignore relevant legislation when giving effect to the Constitution. It is therefore unfortunate that the Court did not take it upon itself to consider the legislative development.

An important aspect of the decision, and perhaps the most negative one, is the Court's costs order against the applicants and the *amici* without hearing them on the issue and without the government seeking costs against the *amici* in its submissions. This was not entirely unexpected, given the court's rather strong language: 'The *amici curiae*, in essence, had ganged with the applicants against the respondents ... and they should be regarded as having failed in their quest, thus attracting costs against them' (para 41). The decision ignores constitutional jurisprudence from several cases providing that as a general rule in constitutional matters, costs should not be issued against private litigants who raise constitutional claims against the state, or against an *amicus curiae*, regardless of the side it joins. (See, among other cases, *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 32; *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at paras 22–25; *Mohunram and Another v National Director of Public Prosecutions and Another* 2007 (4) SA 222 (CC) at para 105; *Hoff-*

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man v South African Airways 2001 (1) SA 1 (CC) at para 63.); The government should therefore as a general rule bear its own costs when resisting a constitutional challenge.

Quite correctly, the *amici* and applicants have submitted applications for leave to appeal against the court's cost order.

Conclusion

Based on legislative developments after the hearing of the case that extended old age grants to the aggrieved class of persons progressively, the case has effectively been rendered inconsequential. The decision is a very negative contribution to the jurisprudence on socio-economic rights in South Africa and especially the jurisprudence on who bears costs in constitutional litigation. The Court appears to be raising a red flag to socio-economic rights adjudication in general, and public interest litigation in particular, by awarding a punitive costs order against the *amici*. The approach of the Court in relation to costs is unfortunate in a country where litigation is beyond the means of its poor majority and public interest litigation fills a crucial void and remains the poor's best hope of a better life.

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The full judgment is available at http://www.community-lawcentre.org.za/court-interventions/archive-of-court-interventions/OAP_HC_judgment.pdf.

Reference

Heleba, S 2007. Towards equalising the age for accessing pensions. 8(4) *ESR Review*: 14.