

**NOT SO HUNKY-DORY: FAILING TO DISTINGUISH BETWEEN  
DIFFERENTIATION AND DISCRIMINATION**

**Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty)  
Ltd (No 1) 2010 1 SA 627 (C)\***

## **1 INTRODUCTION**

Section 9(3) of the Constitution of the Republic of South Africa, 1996 introduces the vexed concept of “unfair discrimination”:

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\* The author wishes to express his thanks to the anonymous referees whose comments improved this case note.

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law . . .
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

In terms of this section, three kinds of distinctions are envisaged: (a) A distinction that does not amount to discrimination at all, (b) a distinction that amounts to fair discrimination and (c) a distinction that amounts to unfair discrimination (cf *Harksen v Lane NO 1998 1 SA 300 (CC)* para 46).

The Constitutional Court termed the first distinction referred to above as “mere differentiation” and held that mere differentiation must be rational to pass constitutional muster (*Prinsloo v Van der Linde 1997 3 SA 1012 (CC)* para 25). Courts are not always astute in treating these concepts (rational or irrational differentiation versus fair or unfair discrimination) separately. A recent example is to be found in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1) 2010 1 SA 627 (C)*.

I will briefly set out the facts of this judgment below, whereafter I will provide a summary of the judgment. I will then set out how the Constitutional Court has defined the terms “differentiation” and “discrimination” and finally show how the court in *Hunkydory* conflated these concepts.

## 2 Facts

The plaintiff bank sought summary judgment against the first defendant, a company, based on four mortgage bonds. The first defendant raised the argument that sections 4(1)(a), 4(1)(b) and 4(2)(c) of the National Credit Act 34 of 2005 were unconstitutional to the extent that these sections provided that the Act was not applicable to juristic persons. The first defendant argued that as the Act currently read, the agreements entered into between the plaintiff and first defendant were not governed by the Act, but that the Act should afford the first defendant the same protection as any other natural person and that the plaintiff should have complied with the provisions of the Act before suing the first defendant.

## 3 Judgment

The court per Steyn AJ dismissed this argument in a few brief paragraphs.

The purpose of the National Credit Act, the court held, is to prevent the reckless provision of credit by institutions to people who cannot afford credit (para 20 of the judgment).

The court then referred to the test laid down in *Harksen* at 320: If the relevant provisions of an Act of Parliament differentiate between people or categories of people, then it must be asked if there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to achieve. If these requirements are met, the differentiation does not fall foul of the Constitution (para 22 of the judgment).

Bearing this in mind, the differentiation contained in the impugned sections of an Act of Parliament could still amount to discrimination, and if the discrimination was unfair, it would be unconstitutional (leaving aside for the moment the

effect of s 36 of the Constitution). The most important factor determining whether the discrimination is fair or unfair is the impact of the discrimination on the complainant. Other factors to consider would be the position of the complainant in society, whether the complainant has suffered in the past from patterns of disadvantage, the nature of the provision containing the discrimination, and the purpose sought to be achieved by the discrimination (paras 23–24 of the judgment).

The court then held that a rational connection existed between the differentiation created by section 4 of the Act and the legitimate governmental purpose underpinning the Act. The “differentiation or discrimination” was not unfair and the first defendant’s exclusion from the Act did not have any negative effect on it (para 25 of the judgment).

Finally, the defendants did not set out in their heads of argument or in open court the constitutional rights that would be infringed should summary judgment be granted. On the papers, the second defendant admitted that he transferred the property which was the subject of the summary judgment application to the first defendant as an estate planning measure to avoid certain tax implications. This, the court stated, was the reason why the first defendant did not have the protection of a natural person and why it would be fair that it should not be offered the same protection as a natural person (para 26 of the judgment).

The court dismissed the defendants’ defences and granted summary judgment. Leave to appeal was refused, the Supreme Court of Appeal confirmed the refusal, as did the Constitutional Court (see *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (No 2)* 2010 1 SA 634 (WCC) 637B–C. We are not told on what basis the Supreme Court of Appeal and Constitutional Court agreed with the first court.)

#### 4 Discussion

In my view the judgment conflates the concepts of “differentiation” and “discrimination”. Each of these terms bear their own specific meaning and each has their own peculiar set of criteria to be met before each would be deemed unconstitutional. Below I will discuss these concepts in general terms before discussing the way the court dealt with these concepts.

##### 4.1 Differentiation

In terms of Constitutional Court jurisprudence, “differentiation” occurs if a distinction is made based on a ground *not* protected by the equality clause (*Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 35; *Harksen* para 46). The equality clause contains a list of prohibited grounds, but clearly implies that the list is not closed as the list in section 9(3) is introduced by the word “including”. To determine whether an additional prohibited ground should be read into section 9, a court must ask if this prohibited ground “is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner” (*Harksen* para 46; Pieterse “Finding for the applicant? Individual equality plaintiffs and group-based disadvantage” 2008 *SAJHR* 397 399).

For example, consider an insurance company that loads the premiums of owners of red vehicles as according to their statistics, red vehicles are involved in disproportionately more collisions than any other colour of vehicle. This would

be an example of “mere differentiation”, as “vehicle colour” is not a prohibited ground recognised in section 9 of the Constitution – “vehicle colour” is not explicitly listed in section 9(3) and it could not be said that vehicle colour attaches to the dignity of vehicle owners.

Likewise, in *Prinsloo* the potential prohibited ground of “ownership of land outside fire-controlled areas” was not recognised because “such 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” – see para 41. This distinction therefore also amounted to “mere differentiation”.

For “mere differentiation” to pass constitutional muster, it must have been (a) rational, and it must have been underpinned by a (b) legitimate (c) governmental purpose (*Harksen* para 53).

The insurance differentiation example mentioned above (red vehicles) amounts to private differentiation while the differentiation in issue in *Prinsloo* amounted to State differentiation, as the differentiation was contained in legislation. The test devised in *Harksen* only speaks to State differentiation as it talks of a “governmental purpose” and it is difficult to conceive of a *governmental* purpose underpinning *private* differentiation.

At the risk of taking an unnecessary detour, *Harksen* referred specifically to executive conduct and legislation, however (para 42 of the judgment). That leaves two options. On the one hand it may mean that the test devised for State differentiation does not find application in cases of private differentiation. That would mean that a non-state respondent may irrationally or arbitrarily differentiate (as long as the differentiation does not amount to unfair discrimination). On the other hand, none of the equality cases that had reached the Constitutional Court by the time *Harksen* dealt with private differentiation. Obviously the qualifier “governmental” purpose would be used when analysing State differentiation. By analogy courts could adapt the *Harksen* test to fit private differentiation. The adapted test could read “whether a rational connection exists between the mere differentiation and a legitimate *private or institutional or business* purpose”.

Sprigman and Osborne “Du Plessis is not dead: South Africa’s 1996 Constitution and the application of the Bill of Rights to private disputes” 1999 *SAJHR* 25 45 find this possibility “disturbing”. They argue that should section 9(1) be held to reach private behaviour, every instance of private irrationality will offend the Constitution. They read more into section 9(1) than I do. If I choose to invite to my wedding only those co-workers who support the same rugby team that I do, and should a disgruntled colleague who was not invited decide to challenge me in court, the presiding officer has to ask three questions: (a) what is the purpose of this distinction? (b) is it a legitimate distinction? and (c) does a rational link exist between the purpose and the distinction? I submit that in highly personal, intimate situations the threshold will be very low and almost any answer will suffice: I want to enjoy my wedding, I will not enjoy it if guests that support other teams attend my wedding, I do not like people who support other teams.

There is another reason why these examples will not fall foul of the Constitution: section 8(2) of the Constitution allows the leeway to courts to decline to apply section 9(1) in appropriate circumstances. Sprigman and Osborne seem to argue that courts have two choices: either apply section 9(1) in all cases of

private discrimination, or decline to apply section 9(1) in all cases of private discrimination. Section 8(2) is more subtle than that – in some circumstances it will manifestly be inappropriate to hold private actors to section 9(1), as in the examples provided above. In other cases, section 9(1) could very appropriately be applied to private actors, such as insurance companies.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) was explicitly enacted to concretise the equality guarantee in section 9. As the Equality Act currently stands, “mere differentiation” is not addressed at all, and South African discrimination law is unclear whether private differentiation may occur on any basis at all, or whether it must (at least) be rational or non-arbitrary. The constitutional principle that the State must act rationally when it chooses to differentiate has also not been taken up into the Equality Act. In most cases, as discussed above, the requirement of rationality will not impose a meaningful burden on respondents. As suggested above, truly intimate decisions, such as who to marry or who to invite to one’s home, should be held to have been rational decisions under almost all circumstances. However, I would argue that respondents who make it their business and who derive profits from differentiating between different groups, such as insurance companies and banks, should be held to a higher standard of rationality.

Private differentiation was not in issue in *Hunkydory* as the differentiation was contained in legislation – therefore it amounted to State differentiation. The *Harksen* test could therefore be applied without adaptation. The Equality Act could also not be applied. The Equality Act prohibits unfair “discrimination” by the State in section 6 but does not address “differentiation” by the State.

#### 4.2 Discrimination

The Constitutional Court seems to hold that differentiation based on a listed (or unlisted) prohibited ground recognised in section 9, automatically amounts to discrimination (*Harksen* para 54 but see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras 33 and 39). This approach negates the pejorative meaning of “discrimination”. (For what it is worth, the Equality Act contains a somewhat different definition of “discrimination”, and retains the lay person’s conception of “discrimination” as carrying an element of harm – “[D]iscrimination’ means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly – (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds” (my emphasis.))

For discrimination to be constitutional, it must have been fair, or if found to have been unfair, it must have been justified in terms of section 36 of the Constitution – *Harksen v* para 52. (That is if s 36 applies – s 36 is only applicable in discrimination disputes if the discrimination occurred in terms of law of general application.)

The test for fairness is much more stringent than the test for rationality. Rationality review entails enquiring whether the differentiation complained of is arbitrary or irrational or manifested naked preference (*Prinsloo v van der Linde* 1997 3 SA 1012 (CC) para 25; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 SA 1 (CC) para 17), and to ask if the legislative scheme is coherent and has integrity (*Prinsloo* para 25). It is not part of rationality review to consider whether the legislative scheme could have been differently devised (*Jooste* para 25).

An enquiry into fairness, on the other hand, encompasses an overall assessment of the cumulative effect of factors such as whether the dignity of the complainant was infringed, the impact of the discrimination on the complainant, the group that was disadvantaged, the nature of the power in terms of which the discrimination occurred, the nature of interests that were affected by the discrimination and the purpose of the discrimination (*President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras 43 51; *Harksen* paras 50 51). Whether the legislative scheme could have been devised differently would fit this part of the enquiry (*Prinsloo* para 35), although it is a matter of debate whether it belongs to the fairness enquiry, or to the assessment of justification under section 36. (For what it is worth, section 14 of the Equality Act treats fairness and justifiability as if it is the same concept).

#### 4.3 The court's treatment of "differentiation" and "discrimination"

In paragraph 22 of the judgment the court in *Hunkeydory* correctly states the requirements which differentiation by the State must meet to be constitutional. Puzzlingly the court then moves on to discrimination in paragraph 24, before returning to differentiation in paragraph 25. Paragraph 25 contains a bland statement: "There is no doubt that there is a rational connection between the differentiation created by the relevant provisions of s 4 of the National Credit Act and the legitimate governmental purpose behind its enactment". Earlier in the judgment (para 20) the court defines the Act's purpose as the prevention of reckless provision of credit by institutions to *people* who cannot afford credit (my emphasis). The statement in paragraph 25 implies that this purpose is legitimate, but the court does not explain why this would be so. If the purpose is to prevent reckless credit being granted, why not also include the provision of reckless credit to juristic persons? Why is it rational to exclude juristic persons? The court does not explain its reasoning and treats its conclusion as self-evident.

The court continues as follows in paragraph 25: "I have not been persuaded . . . by the defendants . . . that any *differentiation* or discrimination, even if it exists, is *unfair*" (my emphasis). As explained above, the test whether differentiation is acceptable is based on rationality, not fairness. The court at this point had not held that discrimination was present, which means that the reference to unfairness was misplaced.

The last sentence in paragraph 25 reads "I have not been persuaded that the first defendant's exclusion from the protection of the relevant sections of the Act has any negative effect on it". It is not clear which concept the court has in mind here – differentiation, or discrimination? The section 9 test for differentiation does not contain a requirement of harm, which means that differentiation had been established. The "negative effect" the court refers to must then be a reference to the determining factor whether discrimination is unfair – the impact of the discrimination on the complainant. However, the court has nowhere found that discrimination was present and neither could it because the impugned sections in the National Credit Act do not differentiate based on a prohibited ground – the status of being a natural person or a juristic person is not protected in terms of section 9. (This status is not explicitly listed in s 9 and the application of the Constitutional Court's dignity test does not lead to the conclusion that this status should be read into s 9). At best then, differentiation had been established, and the reference to discrimination and the impact of the discrimination was misplaced.

Paragraph 26 of the judgment is also puzzling. The court states that the defendant failed to set out the constitutional rights which would be infringed should judgment be granted as prayed. But in paragraph 18 of the judgment, the court mentions that the defendants relied on the right to equal protection and benefit of the law set out in section 9. It is then clear that the defendants based their argument on the right to equality.

Paragraph 26 harks back to the purpose of the Act. The court explains that the second defendant (a natural person) admitted that the property which the plaintiff claimed should be declared executable was transferred to the first defendant (a juristic person) as an estate planning measure and to avoid certain tax implications. This, the court says, was the reason why the first defendant did not have the protection of a natural person and why it would be *fair* that it should not be granted the same protection (my emphasis). This finding also displays a conflation of differentiation and discrimination. The distinction between a natural person and a juristic person amounts to differentiation, not discrimination, and should be measured against rationality, not fairness. This finding is also puzzling for a second reason. In paragraph 20 the court identified the purpose of the Act as an attempt to prohibit the reckless provision of credit. Now the court seemingly suggests that the aim of the National Credit Act is to off-set the use of juristic persons as an estate planning measure against juristic persons' exclusion from this Act. Put differently, the court now seems to suggest that because juristic persons are used in tax-avoidance schemes, it is rational to exclude them from the protection of the National Credit Act. The court does not explain the relationship between tax avoidance schemes and the National Credit Act and again treats this conclusion as self-evident.

## 5 Conclusion

South African discrimination law calls for a clarity of concepts reflected in the precise use of language. Differentiation is a different and lesser kind of social ill than discrimination and calls for a different response from courts. This case was about a clear-cut differentiation between natural persons and juristic persons, nothing more. The correct measure to adjudge this kind of differentiation is rationality, not fairness. What this judgment should have done was to clearly explain (a) what is the purpose of the National Credit Act; (b) whether this purpose is legitimate; (c) how does the differentiation between natural and juristic persons link with this purpose; and (d) whether this link is rational. The court treated each of these steps as self-evident and in the process unnecessarily invoked the concept of discrimination.

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