CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 4/96

WILLEM M PRINSLOO Applicant

versus

GERHARDUS STEPHANUS VAN DER LINDE First Respondent

THE MINISTER OF FORESTRY AND WATER AFFAIRS Second Respondent

Heard on: 7 November 1996

Decided on: 18 April 1997

JUDGMENT

ACKERMANN J, O'REGAN J AND SACHS J:

[1] Much of South Africa is tinder dry. Veld, forest and mountain fires sweep across the land, causing immense damage to property and destroying valuable forest, flora and fauna. The Forest Act 122 of 1984 (the "Act") has as one of its principal objects the prevention and control of such fires. A major method of achieving this is to create various fire control areas where schemes of compulsory fire control are established, with special emphasis on the clearing and maintenance of fire belts between neighbouring properties.[1] Landowners in areas outside of such fire control areas are, on the other hand, encouraged but not required to embark on similar fire

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[1] Part VI of the Act deals with these issues.

control measures.[2] A number of provisions prescribe criminal penalties for landowners in fire control areas who fail to fulfil their statutory obligations.[3] In addition, an offence is created in respect of persons who are wilfully or negligently responsible for fires "in the open air",[4] while it is an offence for any landowner in any area to fail to take such steps as are under the circumstances reasonably necessary to prevent the spread of fires.[5]

[2] One provision in the Act dealing expressly with responsibility for a fire on land outside of a fire control area is section 84. It reads as follows:

> **"84. Presumption of negligence.** - When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved."

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2 Section 24.

3 Sections 75(7) and (8).

4 Section 75(2)(b).

5 Section 75(8)(f).

It is the constitutionality of this provision which is under consideration in the present matter.

THE REFERRAL

[3] The present matter comes before us by way of a referral made in terms of section 102(1) of the Constitution of the Republic of South Africa, 1993 (the "interim Constitution")[6] by Van der Walt DJP in the Transvaal Provincial Division of the Supreme Court (as it was then called). Action had been instituted in that division by the first respondent (as plaintiff) as a result of damage allegedly caused to his farmlands by the spread of a fire from the neighbouring land of the applicant (defendant in those proceedings).[7] It was common

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6 Which provides the following:

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision . . ."

7 When the matter was referred to this Court, the Minister of Water Affairs and Forestry, acting in terms of section 102(10) of the interim Constitution, intervened as second respondent, in order to defend the validity of section 84 of the Act.

cause in this Court that the fire occurred on land situated outside a fire control area.

[4] As this Court has held on a number of occasions, a court should only exercise its power under section 102(1) after it is satisfied: first, that the issue falls within the exclusive jurisdiction of the Constitutional Court; secondly, that it may be decisive for the case; and, thirdly, that it would be in the interest of justice for the referral to take place.[8]

[8] *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 8; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 2; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 (CC) at paras 4-6.

[5] Dealing with the second requirement, Didcott J in *Luitingh v Minister of Defence* held that the requirement was satisfied "once the ruling given there may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled".[9] In *Brink v Kitshoff NO,* Chaskalson P commented that this would include an issue which, if decided in favour of the party who raised it, would put an end to or materially curtail the litigation.[10] It would also include an issue such as the onus of proof in relation to the admissibility of a confession in a criminal trial, which arose in *S v Zuma and Others*[11] and *S v Mhlungu and Others*.[12] In *Zuma*'s case the decision of the entire case in fact depended on where the onus lay. In *Mhlungu*'s case a ruling would determine the way in which the voir dire was to be conducted, and was also necessary in fairness to the accused to enable them to decide whether or not to give evidence.

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9 Id at para 9.

10 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 10.

11 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA).

12 Supra n 8.

[6] Van der Walt DJP issued an order granting the application. His reasons appear from an annexure to the order in the following terms:

> "1.3 Dit is van wesenlike belang dat die geskilpunt of die vermoede van skuld geskep soos in Artikel 84 ongrondwetlik is al dan nie, en daarop staat gemaak kan word al dan nie, beslis word voordat die verhoor tussen die Applikant en eerste Respondent 'n aanvang neem, omdat dit sal bepaal watter getuies die gedingspartye (indien enige) gaan roep as getuies om die party wat die bewyslas dra hom daarvan te laat kwyt, en wie die beginlas om met die verhoor op die meriete te begin dra.
>
> 1.4 Hierdie is nie 'n geval waar die vraag of Artikel 84 grondwetlik bestaanbaar is al dan nie eers uitgemaak kan word nadat getuienis oor die ander geskilpunte tussen die partye aangehoor is en feitebevidings [sic] daaroor gemaak is wat tersake kan wees nie, omdat die vraag na wie die bewyslas en beginlas dra, van deurslaggewende belang is vir hoe die saak deur die partye in die hof aangevoer moet word."[13]

[13] As contained in annexure "B" to the referral judgement entitled: "Formulering Van Geskilpunt En Redes Vir Verwysing".

[7] In the case of *Stevens v Stevens*,[14] Wright J came to the opposite conclusion in an action which was also brought under the Act. His opinion that a referral of the constitutionality of section 84 of the Act was, at that stage, not in the interest of justice was based on the probability that either of the parties would be able, without the assistance of the presumption, to either prove or disprove the negligence of the defendant. It is neither necessary nor desirable to attempt to resolve the apparent conflict between the conclusions of Van der Walt DJP and Wright J because every case must be decided on its own particular facts and circumstances and what is essentially a judgment on the peculiar facts and pleadings before a judge requested to refer a matter in terms of section 102(1) cannot be elevated to a rule of law which is capable of automatic application to the referral of all other cases brought under the Act.

[8] Van der Walt DJP clearly formed the view, as is evident from the above reasons, that the ruling on the constitutionality of section 84 of the Act might have a crucial bearing on a significant aspect of the way in which the parties would conduct their cases. This brings it within the formulation of the requirement in *Luitingh* quoted above. It cannot confidently be stated that Van der Walt DJP was wrong in the judgment he formed in this regard and accordingly it cannot be concluded that this particular referral requirement was not met. That Van der Walt DJP must have considered it in the interest of justice to refer the matter at that stage follows inevitably from the reasons furnished regarding the crucial importance of deciding the incidence of onus at the commencement of the proceedings. The learned judge did not

[14] 1996 (3) BCLR 384 (O) at 390E-G.

furnish explicit reasons why he considered that there was a reasonable prospect of the section being declared unconstitutional, but at the time that the referral was made there was little guidance on the construction of section 8, which is a matter of some complexity. Under these circumstances it is fair to infer that, at the time and in the context of the referral, Van der Walt DJP must have considered that there was such a reasonable prospect. In any event no useful purpose would be served in the circumstances of this particular case by considering how the applicant's prospects of success on the constitutional challenge looked at the time of the referral. Full argument has been heard on the challenge and the Court is in a position to deal with that definitely and finally. In our view the referral should be accepted and the merits of the constitutional challenge to section 84 considered.

[9] The issues in the referral were formulated as follows:

> "2. Die geskilpunt tussen die partye is meer in die besonder die vraag of die vermoede van skuld wat geskep word deur Artikel 84 van die Boswet nie in botsing is met die fundamentele regte vervat in Hoofstuk 3 van die Grondwet nie, en meer in die besonder:
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> 2.1 Die reg op gelykheid voor die reg en op gelyke beskerming deur die reg soos vervat in artikel 8(1) van die Grondwet;
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> 2.2 Die verbod op diskriminasie soos vervat in artikel 8(2) van die Grondwet;
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> 2.3 Die reg om onskuldig geag te word totdat skuld bewys word soos vervat word [in] Artikel 25(3)(c) van die Grondwet."

Whether there is a constitutional right to a fair civil trial and, if so, whether an onus provision such as that provided for in section 84 might infringe such right, are issues with

which we are not concerned in this case and on which we need express no view. Counsel for the applicant expressly renounced reliance on any such argument.

PRESUMPTION OF INNOCENCE: SECTION 25(3)(c)

[10] In his written and oral argument, counsel for the applicant focused primarily on the third point, namely an alleged violation of the right to be presumed innocent, as contained in section 25(3)(c) of the interim Constitution. The obvious difficulty he had to overcome was that the applicant was a defendant in a civil trial and not an accused in a criminal trial. In order to circumvent this problem, he argued that the test to be adopted was an objective one, which did not depend upon the subjective situation of the applicant, but rather on the objective reach of the provision. Thus, if the impugned section, objectively speaking, was unconstitutional, it would be of no force and effect for civil as well as criminal trials. The word "action", he contended, was ambiguous and had to be read in its context, particularly in relation to the fact that the Afrikaans text used the word "geding", which corresponded to the wide English term "proceedings".[15] Furthermore, criminal prosecutions in fact frequently took place and section 84 of the Act was used to establish guilt.[16] It followed that the word "action" was wide enough to include criminal as well as civil proceedings, with the result that it infringed the rights of accused persons as protected by section 25(3)(c). Once it was invalid because of its application to criminal trials, he concluded, it lost all its force and effect and accordingly could not be invoked in civil

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[15] The English text is the signed copy.

[16] Other than this assertion, no evidence was placed before the Court to support this contention.

proceedings.

[11] In our opinion, counsel was wrong both in relation to his approach to interpretation and in respect of the consequences of the construction he urged upon us. We shall make the following assumptions (most of them very questionable) in his favour (without deciding the correctness of any of them): That standing of a civil claimant to challenge a "reverse onus" in a civil trial provides standing to challenge the constitutionality of a statutory reverse onus provision relating to criminal trials, even when that claimant is not in jeopardy of prosecution;[17] that the word "action" in section 84 is wide enough to encompass criminal proceedings; that there is sufficient material before this Court to enable us to determine whether a reverse onus in a criminal trial would be unconstitutional; and that in fact such a reverse onus in a criminal trial would be unconstitutional.

[12] Even on these assumptions, there is one insuperable obstacle to counsel's argument, and that is the approach to interpretation enjoined upon us by section 35(2) of the interim Constitution, which reads as follows:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

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[17] See the majority judgment in *Ferreira v Levin* supra n 8 at paras 165-6.

[13] Its terms are peremptory. Our task is not to find the one "correct" interpretation of a statutory provision, but, given more than one reasonably possible construction, to prefer one which is consistent with the interim Constitution. In this respect, ambiguity does not help the applicant. On the contrary, any ambiguity must be resolved by favouring the construction which keeps the provision constitutionally alive, provided the construction is reasonable. In keeping with this approach, we have no difficulty in deciding that even if the word "action" was capable of including criminal proceedings, and even if such inclusion resulted in an unconstitutional invasion of a right to a fair criminal trial, it was also reasonably capable of a more restricted meaning which excluded criminal trials and thereby avoided unconstitutionality. It follows that in terms of section 35(2) the latter interpretation would be preferred. Even if all the assumptions made in paragraph 11 above were correct, a proposition which is open to doubt, the attack based on section 25(3)(c) would still fail.

[14] In addition, even a finding in favour of the applicant's argument concerning section 25(3)(c) would not enable him to get around a further obstacle. The very kind of situation contended for by counsel, namely that section 25(3)(c) rendered section 84 unconstitutional in part, appears to have been contemplated by the interim Constitution, and answered in quite a different way to that for which he contends. Section 98(5) of the interim Constitution provides as follows:

> "In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency . . ." (our emphasis)

Thus, even if this Court were to hold that section 84 necessarily included criminal as well as civil proceedings, and that the presumption in relation to criminal trials was unconstitutional, it would have to declare in any order that it made that the provisions of the section were inconsistent only to the extent that they applied to criminal proceedings.[18] The applicant can therefore not succeed in the attack based on section 25(3)(c) of the interim Constitution.

THE EQUALITY ISSUES: SECTION 8

[15] While the attack based on section 8 was not strongly pressed by counsel for the applicant, it must nevertheless be given due consideration. For present purposes the relevant provisions of Section 8 of the interim Constitution read as follows:

> "**Equality.**
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> **8.** (1) Every person shall have the right to equality before the law and to equal protection of the law.
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> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
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> (3)(*a*) This section shall not preclude measures designed to achieve the

[18] *Ferreira v Levin* supra n 8 at para 131; *Bernstein v Bester NNO* supra n 8 at para 49.

> adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
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> (*b*) . . .
>
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

[16] In his written argument, counsel pointed to the differentiation between defendants in veld fire cases and those in other delictual matters. According to him, this differentiation had no rational basis, because the apparent object that the legislature sought to achieve by reversing the general rule regarding the incidence of onus that whoever avers must prove, could have been, and, indeed, already was, accomplished by means of common law aids to proof. He referred in particular to the concept of res ipsa loquitur[19] and the practice of triers of fact to require less evidence to establish a prima facie case if the facts in issue are peculiarly within the knowledge of the opposing party.[20] A second differentiation which was raised by first respondent, relates to the fact that the presumption of negligence applies only in respect of fires in non-controlled areas, and not to those spreading in controlled areas, which at first blush appears to be incongruous. The challenge to constitutionality in both cases would be based either on a breach of the right to equality as guaranteed in section 8(1) or on a violation of the prohibition of

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19 Hoffmann and Zeffertt *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 551.

20 *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4. See also Hoffmann and Zeffert id at 512.

discrimination contained in section 8(2). To determine whether either challenge in terms of section 8 is correct, it is necessary to consider first the proper approach to be taken to sections 8(1) and (2).

[17] If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. As Hogg puts it:

> "What is meant by a guarantee of equality? It cannot mean that the law must treat everyone equally. The Criminal Code imposes punishments on persons convicted of criminal offences; no similar burdens are imposed on the innocent. Education Acts require children to attend school; no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than the manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distribution of the property of a person who dies leaving a will from that of a person who dies leaving no will. The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with low incomes. Indeed, every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone."[21]

[21] Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) at para 52.6(b).

The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory "in the constitutional sense".[22]

[18] Even a cursory summary of international experience indicates that there are no universally accepted bright lines for determining whether or not an equality or non-discrimination right has been breached. The varying emphases given in different countries depend on a combination of the texts to be interpreted, modes of doctrinal articulation, historical backgrounds and evolving standards. Questions of institutional function and competence might play a role when reviewing, for example, legislation of a social and economic character.[23]

[19] In relation to the text and context of the interim Constitution, it would therefore seem that a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny, might create more problems than it solved. At the same time, we must be mindful of section 35(1) which states:

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22 A phrase used by Didcott J in *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 19.

23 Nowak and Rotunda *Constitutional Law* 5 ed (West Publishing Co., St. Paul, Minnesota 1995) at 362.

> "**Interpretation.**
>
> **35.** (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality . . ."

[20] Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage. While our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality. At the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity. All this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.

[21] In *Brink v Kitshoff NO*, a general review was conducted of the approaches adopted in

Canada, the United States of America, India and in international conventions and covenants.[24] That review concluded:

> ". . . that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality."[25]

The Court emphasised that section 8 is the product of our own particular history, that perhaps more so than in the case of other provisions in Chapter 3 the interpretation of section 8 must be based on its own language and that our history was particularly relevant to the concept of equality.[26]

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24 Supra n 10 at paras 34-9.

25 Id at para 39 per O'Regan J, a judgment concurred in by all the members of the Court.

26 Id at para 40. The preamble to the interim Constitution underlines the need for this approach.

[22] When section 8 is read as a whole it appears that the concept of equality is referred to in different ways. In section 8(1) it is described positively as a "right to equality before the law" and as a "right . . . to equal protection of the law". In section 8(2) it is formulated negatively: "No person shall be unfairly discriminated against, directly or indirectly. . .". It may be neither desirable nor feasible to divide the various subsections or descriptions into watertight compartments. Nonetheless, it would appear that the right to "equality before the law" is concerned more particularly with entitling "everybody, at the very least, to equal treatment by our courts of law".[27] It makes clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered. This right, or this aspect of the right guaranteed, does not apply to the present case.

[23] The idea of differentiation (to employ a neutral descriptive term) seems to lie at the heart of equality jurisprudence in general and of the section 8 right or rights in particular. Taking as comprehensive a view as possible of the way equality is treated in section 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination. This needs some elaboration. We deal with the former first.

[24] It must be accepted that, in order to govern a modern country efficiently and to harmonise

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[27] Supra n 22 at para 18 per Didcott J for the Court.

the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later.

[25] It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences"[28] that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good,[29] as well as to enhance the coherence and integrity of

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[28] Sunstein "Naked Preferences and the Constitution" 84 *Columbia Law Review* 1689 (1984).

[29] See Tribe *American Constitutional Law* (Foundation Press Inc., Mineola 1988) at 1451.

legislation.[30] In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority . . . to a culture of justification".[31]

[26] Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe section 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present.

[27] It is to section 8(2) that one must look in order to determine what this further element is. For reasons which will subsequently emerge it is unnecessary to consider the precise ambit or limits of this subsection. It is, however, clearly a section which deals not with all differentiation

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30 Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed (Kluwer, Deventer 1990) at 539.

31 Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SA Journal of Human Rights* 31 at 32, cited in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 156 n 1.

or even all discrimination but only with unfair discrimination. It does so by distinguishing between two forms of unfair discrimination and dealing with them differently.

[28] The first form relates to certain specifically enumerated grounds ("specified grounds") on the basis whereof no person may unfairly be discriminated against. The specified grounds are race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. When there is prima facie proof of discrimination on these grounds it is presumed, in terms of subsection (4), that unfair discrimination has been sufficiently proved, until the contrary is established. These are not the only grounds which would constitute unfair discrimination. The words "without derogating from the generality of this provision", which introduce the specified grounds, make it clear that the specified grounds are not exhaustive. The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.

[29] The question arises as to what grounds of discrimination this second form includes. A purely literal reading and application of the phrase "without derogating from the generality of this provision" would lead to the conclusion that discrimination on any ground whatsoever is proscribed, provided it is unfair. Such a reading would provide no guidance as to what unfair meant in regard to this second form of discrimination. It would provide very little, if any, guidance in deciding when a differentiation which passed the rational relationship threshold constituted unfair discrimination. It also seems unlikely that the content of the concept unfair discrimination would be left to unguided judicial judgment. We are of the view, however, that

when read in its full historical and evolutionary context and in the light of the purpose of section 8 as a whole, and section 8(2) in particular, the second form of unfair discrimination cannot be given such an extremely wide and unstructured meaning.

[30] Proper weight must be given to the use of the word "discrimination" in subsection (2). The drafters of section 8 did not, for example, follow the model of the Fourteenth Amendment to the Constitution of the United States which, in paragraph 1 thereof, refers only to the denial of "the equal protection of the laws." Section 8(1) certainly positively enacts the encompassing and important right to "equality before the law and to equal protection of the law", but section 8 does not stop there. It goes further and in section 8(2) proscribes "unfair discrimination" in the two forms we have mentioned.

[31] The proscribed activity is not stated to be "unfair differentiation" but is stated to be "unfair discrimination". Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.[32] Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the

[32] See *S v Makwanyane* id at paras 262 and 328-30.

grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

[32] In Dworkin's words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.[33] We find support for the approach we advocate in the following passage from the judgment of this Court in *The President of the Republic of South Africa and Another v Hugo*:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[34]

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33 *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass 1977) at 227.

34 Case No CCT 11/96, in which judgment is being delivered simultaneously with this judgment, at para 41.

and in which the following passage from *Egan v Canada*[35] was quoted with approval:

[35] (1995) 29 CRR (2d) 79 at 104-5, internal footnotes omitted.

> "This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society . . . More than any other right in the *Charter*, s.15 gives effect to this notion . . . Equality, as that concept is enshrined as a fundamental human right within s.15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."[36]

[33] Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well. It is not necessary to say more than this in the present case, for reasons which emerge later in this judgment.[37]

[34] Since the adoption of the interim Constitution, the provisions of section 8 have been referred to in a number of reported Supreme Court judgments. In some the reference has been somewhat in passing; in others provisions have been held to be merely regulatory while in certain instances they have been held to constitute a clear breach of the section 8(2) prohibition

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[36] Supra n 34 at para 41.

[37] See para 41 infra.

against unfair discrimination. The question whether, and to what extent, the protection of section 8 may be invoked by juristic persons has also been considered. None of these cases has been concerned with the constitutionality of a statutory onus provision in civil cases. Nor has an attempt been made in any of them to conduct a comprehensive analysis of the proper interpretation of section 8 and in particular the relationship between section 8(1) and 8(2). It therefore does not seem necessary for us to consider or comment on any of them individually.

[35] Turning now to the case before us, it is necessary in the first place to enquire whether the necessary rational relationship exists between the purpose sought to be achieved by section 84 of the Act and the means sought to achieve it. The objectives of the Act as set out in the long title, are "[t]o provide for . . . the prevention and combating of veld, forest and mountain fires; . . . and matters connected therewith." In essence, applicant contended that section 84 lacked rationality because it did not use the least onerous means of achieving its objectives. This approach, however, is based on two misconceptions. First, the applicant is prematurely importing a criterion for justification into a test to be applied at the infringement enquiry (definitional or threshold) stage. The question of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry. Second, underlying the argument is an assumption that somehow there should be a "presumption of innocence" in civil matters as weighty and untouchable as that in criminal cases, so that a reverse onus in a civil matter should be as vulnerable to impeachment as one in a criminal trial.

[36] In regard to the first misconception, a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way. In any civil case, one of the parties will have to bear the onus on each of the factual matters material to the adjudication of the dispute. So, in the case of an aquilian claim for damages arising from a veld fire, one of the parties will bear the onus concerning negligence. As long as the imposition of the onus is not arbitrary, there will be no breach of section 8(1). In rare circumstances, it may be that the allocation of onus will impair other constitutional rights and a challenge will then arise. That is not the case here.

[37] In regard to the second misconception, an onus in a civil case cannot be equated with the overall onus of proof in criminal cases. In *Mabaso v Felix*[38] the Appellate Division described the fundamental difference between the incidence of the onus of proof in civil and criminal cases in the context of assault as follows:

[38] 1981 (3) SA 865 (A).

> "In its anxiety that no accused should be punished for a crime without proof of his guilt our common law deliberately places the burden of proving every disputed issue, save insanity, on the prosecution. But in civil law . . . considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct."[39]

[38] There is indeed nothing rigid or unchanging in relation to the question of the incidence of the onus of proof in civil matters, no established "golden thread" like the presumption of innocence that runs through criminal trials.[40] As Davis AJA, quoting Wigmore, put it:

> ". . . all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness.'"[41]

As long as the rules relating to the onus are rationally based, therefore, no constitutional challenge in terms of section 8 will arise.

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39 Id at 872G-H.

40 *S v Zuma* supra n 11 at para 33 quoting *Woolmington v Director of Public Prosecutions* (1935) AC 462 (HL) at 481.

41 *Pillay v Krishna and Another* 1946 AD 946 at 954.

[39] The purpose of the Act is to prevent veld fires. There can be no doubt that the State has a legitimate and strong interest in preventing veld, forest and mountain fires. It has chosen to fulfil its responsibility by means of the scheme set out in the opening paragraph of this judgment. In fire control areas there is compulsory participation in schemes to prevent fires spreading, involving shared information, planning and execution.[42] Specific statutory duties are imposed with prescribed penalties for disobedience.[43]

[40] In non-controlled areas, on the other hand, there are opportunities for joint management on a voluntary basis only, with no obligation, and no necessity for shared management and pooled knowledge.[44] Persons are left in the dark as to what steps their neighbours have taken to avert fires. The causes of the fire and its spread will often be peculiarly within the knowledge of the neighbour. The specific duties imposed on landowners in fire control areas are accordingly counterbalanced by the general inducement contained in section 84 for those responsible for land in non-controlled areas to be specially vigilant lest they find themselves saddled with

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42 Sections 18 to 23.

43 Sections 75(7) and (8).

44 See section 24.

responsibility for damage caused by fire spreading from their land. The purpose of section 23 of Act 72 of 1968, the predecessor of the present section 84, was identified by Fannin J as follows:

> "It was argued on behalf of the plaintiff that the presumption was created in recognition of the peculiar difficulties faced by a person who suffers damage as a result of a fire whose origin he may be wholly unable to establish, and of the fact that, in most cases, if not all, a person from whose land a fire spreads will be in a much better position to show how and where the fire originated, whether it was lit by himself or by anyone for whose acts he is in law responsible and the manner in which the fire was dealt with, if at all, by him or by his servants or agents. This, I think, is undoubtedly correct. Furthermore, a person who has suffered as a result of a fire which has come from another's land will often not be in a position to embark upon any investigation as to the origin or cause of the fire, and will certainly have no right to enter upon that land to conduct any such investigation. That such difficulties in relation to fires have long been recognised appears from a perusal of *Voet*, 9.2.20, which however relates to fires in buildings."[45]

In our view, there can be no doubt that a rational relationship is demonstrated between the purpose sought to be achieved by section 84 and the means chosen.

[41] This does not end the matter, because despite the existence of the aforementioned rational relationship between means and purpose, the particular differentiation might still constitute unfair discrimination under the second form of unfair discrimination mentioned in section 8(2). The regulation effected by section 84 in the present case differentiates between owners and occupiers of land in fire control areas and those who own or occupy land outside such areas.

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[45] *Quathlamba (Pty.) Ltd. v Minister of Forestry* 1972 (2) SA 783 (N) at 788B-D.

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. There is likewise no basis for concluding that the differentiation in some other invidious way adversely affects such owner or occupier in a comparably serious manner. It is clearly a regulatory matter to be adjudged according to whether or not there is a rational relationship between the differentiation enacted by section 84 and the purpose sought to be achieved by the Act. We have decided that such a relationship exists. Accordingly, no breach of section 8(1) or (2) has been established.

CONCLUSION

[42] In the result the applicant has not established that section 84 of the Act is in any way inconsistent with the provisions of section 8(1) or (2) or section 25(3)(c) of the interim Constitution. The case should accordingly be referred back to the Transvaal Provincial Division of the High Court. No order for costs was asked for, indeed counsel specifically agreed that none should be made, and there is no reason to make one.

[43] *ORDER*

1. It is declared that the provisions of section 84 of the Forestry Act 122 of 1984 are not inconsistent with the interim Constitution.
2. The case is referred back to the Transvaal Provincial Division of the High Court to be dealt with in the light of this judgment.

Chaskalson P, Mahomed DP, Goldstone, Kriegler, Langa, Madala, Mokgoro JJ concur in

the judgment of Ackermann, O'Regan and Sachs JJ.

DIDCOTT J:

[44] The point that has been put to us for our ruling on it in these civil proceedings concerns section 84 of the Forest Act (122 of 1984), which decrees that:

> "When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved."

The section has been invoked in the present litigation, an action awaiting trial before the Transvaal Provincial Division of the Supreme Court, or of the High Court as it is now called, where damages are claimed at common law for the burning by a veld fire of the plaintiff's orchards and pasturage. The fire occurred outside a fire control area. It started on, or ran at all events across, land owned and controlled by the defendant. It then spread to the plaintiff's adjoining farm. The defendant is blamed for the destruction that it wrought there. He or his servants, acting in the course of their employment by him, are said to have caused that by their negligence. The effect of the section in all those circumstances, if it survives our adjudication on it, will be to load him with the burden of disproving such negligence when the action goes to trial. He contends that the section fell foul of the interim Constitution (Act 200 of 1993), however, which was in force when the proceedings began and continues to govern them.[1] Whether the section was so

hit is what we must now decide.

[45] The main ground on which the defendant bases his contention is the store that he sets by section 25(3)(c) of the interim Constitution. No part of that touched civil matters. It dealt only with criminal prosecutions. The right to a fair trial was guaranteed by subsection (3), but explicitly and solely to persons accused of crimes. Paragraph (c) then proclaimed the presumption of innocence and the privilege of silence as particular features of that general right, and therefore as those enjoyable under it by such persons alone.[2] Counsel who represented the defendant maintained that subsection (3)(c) was nevertheless pertinent to the present proceedings. His argument went like this. Section 84 covered all matters indiscriminately, embracing civil and criminal ones alike. It was constitutionally objectionable in its application to criminal cases, since there it provided for a reverse onus of the kind which, on the very strength of subsection (3)(c), we had condemned in comparable situations posed on several earlier occasions, holding that the reversal violated the presumption of innocence. The defect tainted the entire section. It was consequently invalid as a whole, and thus in a civil as well as a criminal setting.

[46] The statute creates a host of crimes and a wide variety also. Negligence is specified as an element of merely one which has caught my eye, that emerging from section 75(2)(b)(iii). But it may well become a material factor elsewhere too. The additional offences that I have in mind are any requiring *mens rea* for their commission where *culpa* serves that purpose. Room of one size or another could accordingly have been found for the accommodation within section 84 of criminal prosecutions.

[47] Whether the space was filled is a different matter. That sounds doubtful, to say the least. Section 84 speaks of "any action", not of "any proceedings" as its statutory predecessors did in section 23 of the Forest Act (72 of 1968) and section 26 of the Forest and Veld Conservation Act (13 of 1941). The word "action", when used with reference to forms of legal procedure, denotes in common parlance the civil type. One does not normally describe a criminal prosecution as an "action", and we were told of no other legislation which had attached that label to any. Nor have I managed to find a single reported case where section 84 has been brought to bear on criminal proceedings. The current statute seems itself, I mention in parenthesis, to recognise the distinction in terminology. For section 83(1), which enacts its own separate presumption, applies that specifically to every "prosecution for an offence". The defendant's counsel drew our attention to the word "geding", which appeared in the Afrikaans text of section 84 as the counterpart to "action" and tended to have broader connotations. The English text was the one signed. But that is not a conclusive consideration. The Afrikaans version remains relevant, even so, to the interpretation of the section. Yet it takes the matter no further. The reason is a helpful rule of statutory construction catering for the situation that we have here, where the one text happens to be couched in terms which are wider than but encompass those of the other. The texts must then be reconciled, ordinarily at any rate and especially when they impose fresh burdens, by attributing to the legislation the narrower meaning, since that is the denominator common to both.[3] It follows that, if the English version envisages nothing but a civil "action", the rule requires "geding" to be read in the same way so that the two words may match each other.

[48] Let us suppose, however, that "action" like "geding" is a word quite capable in such a context of identifying either a civil one alone or any legal proceedings, including the criminal sort, and furthermore that their interpretation in that second and wider sense, if chosen, would result in the incompatibility of section 84 with section 25(3)(c). Another rule of statutory construction would then come into play and eliminate the choice, a special rule which section 35(2) of the interim Constitution dictated when, with regard to the Chapter containing section 25(3)(c), it stipulated that:

> "No law which limits any of the rights entrenched in this Chapter shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

So that rule too would enjoin us, on the supposition which I have made, to avoid a clash between section 84 and section 25(3)(c) by putting on both words the interpretation that restricted their ambit to civil cases only.

[49] Nor, in any event, would the defendant's case have prospered from the success of his counsel in persuading us that section 84 did cover criminal prosecutions and collided with section 25(3)(c) by doing so. A declaration of nullity that dealt solely with the application of section 84 to those particular proceedings would then have been the maximum that he could obtain. For section 98(5) of the interim Constitution empowered us to go no further in condemning any law than its invalidation "to the extent of its inconsistency" with a constitutional

command.[4] The defendant's lack of any apparent interest in the grant of relief so circumscribed would have disqualified him, what is more, from gaining even that.

[50] We need not decide in the end, I believe, whether section 84 purports to affect criminal trials and, if it does, whether section 25(3)(c) forbade that. I say so because, in my opinion, the reliance placed on that section has no merit on any footing and the main argument advanced on behalf of the defendant must therefore be rejected.

[51] An alternative objection which the defendant has taken to section 84 then enters the picture. He protests that its regulation of the civil actions to which it applies, when viewed on their own, was repugnant to section 8 of the interim Constitution. That section entrenched the right of every person to enjoy "equality before the law", to be afforded the "equal protection of the law", and not to be "unfairly discriminated against, directly or indirectly".[5] The discrimination and inequality now asserted is said to lie in the differentiation between defendants engaged in actions that are governed by section 84 and those involved in all other delictual cases casting no onus of proof on them, to the disadvantage and detriment of the former category.

[52] Complaints about discrimination and inequality have been heard frequently in the attacks launched here on statutory provisions since we began our work two years ago. We have found it unnecessary to deal with the point on some occasions, either because jurisdictional or procedural obstacles to its consideration were insuperable or because separate constitutional challenges succeeded. On others we have disposed of it. The complaint failed in *S v Rens.*[6] It was upheld

in *S v Ntuli,*[7] in *Brink v Kitshoff NO*[8] and in *Fraser v Children's Court, Pretoria North, and Others.*[9] Not even then, however, have we yet developed a complete and coherent jurisprudence on the subject of equality. Sooner or later, no doubt, we shall have to enunciate one. But so complex, so subtle and so delicate a task ought not to be undertaken in a case inappropriate for it. We may otherwise overlook nuances and implications of the principle to which our thoughts are not immediately attuned. I do not regard the present case as a suitable opportunity for any such general endeavour. It suffices for our purposes there, I consider, to say no more than this. Mere differentiation can never amount, in itself and on its own, to discrimination or unequal treatment in the constitutional sense. The law differentiates between categories of people on innumerable scores which sound unobjectionable and may often be unavoidable. A few examples that spring to mind straight away are their levels of income at which the rate of the tax assessed on that is fixed, their ages when or the length of their employment before pensions become payable to them, and the criteria for their entitlement to the benefits of social welfare. What surely counts at least in those and all other instances of differentiation is always how rational in its basis, nature, scope and objectives the particular one appears to be, and sometimes how fair it also looks in those respects. It follows that I cannot imagine our denunciation of any differentiation which we evaluated as both fair and rational.

[53] In appraising the differentiation assailed by the defendant we had better try at first to get some clarity in our minds on what section 84 means when, alluding to the set of circumstances which puts into operation the presumption and its accompanying switch in the onus of proof, it describes that as the one where "the question of negligence . . . arises". The same vague phrase appeared in both section 26 of the 1941 statute and section 23 of the 1968 successor to that, and

its scarcely informative use became a topic of judicial discussion in those days. Watermeyer J had this to say about section 26 in *Van Wyk v Hermanus Municipality*:[10]

> "It may well be, but I express no opinion on the point, that the wide meaning of the section has to be cut down in some way so as to make it operate only where there is some *nexus* between the fire and the person alleged to have been negligent, but if so there was in my opinion a sufficiently close *nexus* shown in the present case arising from the fact that the defendant was the owner, and in control, of the land upon which the fire burned, and that its servants were in attendance and attempted to extinguish it."

That passage struck Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry*[11] as "a useful start to the search for the answers to the questions . . . posed". Referring to section 23, the one in force by that time, his judgment then commented and elaborated on the ideas which Watermeyer J had voiced by continuing thus:[12]

> "The section does not provide that whenever negligence is alleged in any proceedings, negligence shall be presumed. The use of the word 'arises' instead of the verb 'is alleged' does, I think, provide some justification for the suggestion made by Watermeyer J, for it can hardly be said that any question of negligence in respect of a fire will really arise if there is no connection or *nexus* shown to have existed between the fire and the person sought to be fixed with responsibility for it. But it may be argued with some force, I think, that to require only some *nexus* is not enough, for unless the *nexus* between the fire and the person alleged to have been negligent is such as to be at the least consistent with negligence, the plaintiff will have taken the matter no further than if he had merely alleged negligence and done no more. I would prefer, therefore, to suggest that 'the question of negligence' in respect of veld or forest fires can be said properly 'to arise' in any proceedings only where-
>
> (a) negligence is alleged against a party to such proceedings; and
>
> (b) the party making such allegation has established a *nexus* or connection, between the fire and the party against whom the allegation is made, which is consistent

with such negligence.

Thus where, as here, negligence is alleged against a defendant in civil proceedings and the fire is shown to have spread from the defendant's property, the presumption created by the section comes into operation against the defendant."

The case went on appeal under the name of *Minister of Forestry v Quathlamba (Pty) Ltd*.[13] Ogilvie Thompson CJ, whose judgment was the sole one delivered then, did not react in so many words to the manner in which Fannin J had approached and treated the problem. What he in turn said instead follows:[14]

"Manifestly the presumption created by the section cannot be invoked merely by averring negligence, without anything more. The contesting submissions of the parties centre around what additional averment or proof is required of a plaintiff to entitle him to call the presumption in aid. More specifically, the real enquiry is whether or not the terms of the section embrace the duty of care. For defendant it was argued that, inasmuch as negligence is the breach of a legal duty, no 'question of negligence arises' unless and until the particular duty of care which a plaintiff claims to have been breached is first established. Counsel for the plaintiff, on the other hand, submitted that both the duty of care and the breach thereof fall within the ambit of the section . . . . I do not find it necessary for the decision of this appeal to pursue counsel's above-mentioned conflicting submissions. For . . . the circumstances that the fire . . . was not shown to have been started by any servant of the defendant, or indeed by any human agency, does not in my opinion by itself relieve the defendant of responsibility for the damage sustained by plaintiff. Consequently, the latter's averments of negligence in relation to the fire which caused it damage, coupled with proof that the fire . . . emanated from (and also originated upon) landed property owned and controlled by defendant, sufficed, in my judgment, to bring the case within the ambit of section 23. The effect of this was that the onus thereafter rested upon defendant to show either that in the particular circumstances harm to plaintiff was not, and could not reasonably have been, foreseen or, alternatively, that, notwithstanding the exercise by him of such care as the circumstances reasonably required, defendant could not prevent the fire from extending beyond the boundaries of

> its (*sic*) property and occasioning harm to plaintiff."

The somewhat different ways in which the two *Quathlamba* judgments had handled section 23 were considered in three subsequent cases. Leon J expressed the opinion in *Titlestad v Minister of Water Affairs*[15] that the judgment of Fannin J had been "substantially upheld" by Ogilvie Thompson CJ "with regard to the proper interpretation of section 23". So did Kannemeyer JP in *Louw and Others v Long*.[16] Nestadt JA, on the other hand, took this contrary view in *Steenberg v De Kaap Timber (Pty) Ltd*:[17]

> "Ogilvie Thompson CJ affirmed the principle that the presumption cannot be invoked merely by averring negligence. The learned Chief Justice did not, however, adopt the approach of Fannin J. It was simply held that the additional element required could be satisfied by proof that the fire originated upon land owned and controlled by the defendant."

[54] I am not sure about the correct classification of the enquiry into when and how "the question of negligence . . . arises", whether the ascertainment of that depends at its heart on the interpretation of those words or, as Ogilvie Thompson CJ seems to have considered, on their judicial application in each case to its own particular facts. Neither *Quathlamba* judgment, one then notices, went beyond the facts of that matter by indicating what circumstances, apart from the defendant's ownership and control of the land from which the fire had come, would or might augment the bare allegation of negligence sufficiently to trigger the presumption and its consequence. Nor am I aware of any judicial pronouncement since then which has shed further or fresh light on the difficulties encountered elsewhere in determining how the question of negligence could rightly be thought in the past to arise for the purposes of sections 26 and 23 and

can truly be said to do so now for those of section 84. That problem is obviously not posed by the present case, seen in isolation. For here the defendant did own and control the land from which the fire spread to the plaintiff's farm, with the result that both *Quathlamba* judgments hit him. We are concerned in this investigation, however, not with the application of the presumption to any individual matter, but in principle with its general operation. Questions potentially relevant to our deliberations at that level are whether, if the necessary process is one of interpretation, section 35(2)[18] requires us to construe section 84 restrictively on the aspect of it scrutinised now and whether, if that is not the true area of enquiry, the circumstances setting the presumption in motion can and must be defined more narrowly than they were by either Ogilvie Thompson CJ or Fannin J. But those questions do not present themselves at this stage. They will become pertinent to our decision only if and when we conclude eventually that, with the effect attributed in the *Quathlamba* case to its precursor, the section is unconstitutional on the grounds of the second objection to it which the defendant has lodged.

[55] Something must next be said generally about the onus of proof in civil actions, and especially about its location there, so that we may then proceed to focus within that field on the import of section 84. Wigmore wrote in his treatise on *Evidence*:[19]

> "The characteristic . . . of this burden of proof (in the sense of a risk of nonpersuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of nonpersuasion. By what considerations is this apportionment determined? Is there any single principle or rule which will solve all

> cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove . . . . It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential. Still another consideration has often been advanced as a special test for solving a limited class of cases, ie the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false . . . . But this consideration furnishes no universal working rule . . . . This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case. *The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations* . . . . There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. *There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness*."

I have quoted at length from the book because the state of affairs existing in South Africa echoes exactly, in all its force and resonance, that description of the American one. Our common law likewise contains no comprehensive rule on the onus of proof in civil proceedings which is inflexibly free from exceptions. Here too the onus does not always lie upon the plaintiff asserting a claim but, on issues peculiar to the nature of the case, is sometimes borne by the defendant in his or her resistance to that. One thinks, for

instance, of the issues raised when self-defence is pleaded in answer to a claim for damages suffered as the result of an assault, when a contract admitted or proved is said in an action for its enforcement to have been cancelled or novated, when some special defence is presented as a means of escape from liability on a bill of exchange, and when a host of other situations arise in which confessions and avoidances are familiar. Hoffmann and Zeffertt have discussed the topic in their *South African Law of Evidence*,[20] furnishing further examples of an onus placed on the defendant in this country and commenting on the lack of any general theory or policy to account for that site of it which seems logical, coherent and consistent. It is therefore no surprise to see that the sentences in earlier editions of Wigmore's work which are matched by the parts of my excerpt from the current one appearing in italics have been reproduced or paraphrased with approval by judges of our Appellate Division, the first passage in *Mabaso v Felix*[21] and the second in *Pillay v Krishna and Another*[22] and *Nydoo en Andere v Vengtas*.[23]

[56] In our adversarial system of civil litigation one side or the other has to bear the onus of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones. Veld, forest and mountain fires are calamities with which our country is well acquainted, and their consequences are frequently disastrous. In enacting section 84 Parliament evidently believed that the defendants embroiled in the actions which it defined were shown by experience to be better placed than the plaintiffs suing them, by and large, for investigations into and the ascertainment

of the causes, origins and progress of such fires when they occurred beyond the strict supervision inside fire control areas that was planned. The position of the same defendants was apparently thought in addition to be distinguishable, on the whole, from that occupied by other defendants opposing delictual claims, the general run of those in the first place and the particular group in the second who were blamed for fires that had started on or emanated from land lying within fire control areas. For no comparably peculiar knowledge or sources of information about the detailed causation of the harmful incidents resulting in the litigation could realistically be imputed, as a rule, to so vast and amorphous a category of defendants as the first lot. That goes without saying, given the infinite variety of circumstances relevant to the suits brought against them. Nor, when it came to the second category of defendants, would a *prima facie* responsibility imposed upon them have been warranted in the conditions prevailing throughout the controlled areas, where fire protection schemes operated, where measures devised to prevent conflagrations and their spread were in force, and where compliance with those was both compulsory and verifiable. That is a situation quite unlike the sort encountered elsewhere in which individual landowners are largely left to take their own precautions and they alone know what has or has not been done in that connection. We may agree or disagree, as we prefer, with the generality of those beliefs or with the way in which effect was given to them. But the assessment was one falling well within the zone of an essentially legislative judgment. I can find no substance whatsoever in the suggestion that the reaction of Parliament to the scene which it saw was either unfair or irrational once that is viewed in the light of the *Quathlamba* decisions. It follows, in my opinion, that on this leg of the course the defendant has fallen at the first hurdle.

[57] Two questions which my judgment leaves open, and a couple of possibilities occurring to me that it does not dismiss, will be mentioned in conclusion. The first question concerns the relationship between our constitutional provisions proclaiming the right to equality before and the equal protection of the law on the one hand and prohibiting unfair discrimination on the other.[24] It is whether the prohibition forms a corollary to the right which amplifies that or an independent and self-contained provision.[25] The second question asks whether the criterion of rationality suits the right alone while the one of fairness fits only the prohibition, or whether both criteria are apt for each. Neither question needs to be decided for the time being, since the defendant's case must fail irrespective of the true answer to it. I have accordingly tried to express myself in a manner which avoids suggesting a definite stance taken yet on either point. The possibilities to which I have referred, merely hypothetical ones at present, are these. The right to equality and the prohibition against unfair discrimination may well have an impact on the civil onus of proof in the highly imaginary situation where a class of litigants is generally saddled with or freed from the burden on account of their personal identities, and with no regard to the exigencies of any particular litigation or to the equipment for such of those persons or institutions. A civil onus may also be vulnerable to attack outside the perimeters of that right and prohibition, and on grounds laid elsewhere by the bill of rights,[26] once its incidence impedes the enforcement or defence of any other right entrenched there. Neither possibility is elevated by this case, however, to a real one. To expatiate on either is therefore unnecessary now.

[58] In the result I concur in the grant of the order which Ackermann J, O'Regan J and Sachs J propose in their joint judgment, the final draft of which I have read since writing this one of mine. The two judgments differ sometimes in their approach to the issues canvassed, in their

emphasis and in the extent to which they elaborate on their reasoning, but not otherwise as far as I can see. The clearest difference is visible where I have felt able to reach a confident conclusion on the second part of the case without analysing in similar detail either the concepts of equality and non-discrimination or their constitutional interaction. I do not dissent, however, from the opinions which my colleagues have expressed on those points. And I had better add, since nothing has yet been said by me about the referral, that I share the view of that taken by them.

For the applicant :	Mr D Mills, instructed by Gildenhuys van der Merwe Inc.
For the first respondent :	No appearance.
For the second respondent:	Mr JP Vorster, instructed by the State Attorney, Pretoria.