

'Come back when you are 65, Sir': Discrimination in respect of access to social assistance for the elderly*

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1 INTRODUCTION

Messrs Roberts, Whitebooi, Casling and Visagie are four elderly gentlemen who live in poverty in Gelvandale, Port Elizabeth. At the end of 2005 they wished to apply for social assistance from the State. At the time of their applications, the men were over the age of 60, but none of them had attained the age of 65. Had they been female, they would have qualified for social assistance in the form of old age pensions at the age of 60.¹ These pensions would not have made them rich, but would have enabled them to sustain themselves.²

The Social Assistance Act 13 of 2004³ provides for a non-contributory social assistance system for children, the disabled and the elderly. In order to qualify for what is colloquially known as a state old age pension, the applicant has to meet certain requirements.⁴ Only South African citizens or members of a group or category of persons prescribed by the Minister of Social Development by notice in the *Government Gazette*, who are resident in South Africa and unable to maintain themselves, may apply. The person should neither be a recipient of another grant nor be cared for in a state institution. Finally, the scheme provides that females are eligible for old age pensions at the age of 60, while males become eligible at the age of 65. This differentiation between males and females is the root of the predicament of the men referred to above. Messrs Roberts,

* Based on a paper delivered at the Third Annual Law Conference of the Universities of the Western and Eastern Cape, hosted by NMMU 30-31 January 2006.

1 Matyu J 'Men challenge ruling which allows women earlier pension' *The Herald* (11 November 2005) available at http://www.theherald.co.za/herald/2005/09/16/news/n04_16092005.htm, accessed on 3 March 2006. The applicants had made enquiries regarding application for old age pensions with the Department of Welfare, but were informed that they did not qualify for the pension in the light of the age requirement as set out in the Act (telephone conversation between author and Mr Mike Burmeister, attorney for the applicants 4 May 2006).

2 The amount has recently been raised from R 780 to R 820 per month (See *Government Gazette* GN 294 in GG 28672 of 31 March 2006).

3 Date of commencement 1 April 2006 (Proc. R15 in GG 28652 of 31 March 2006).

4 S 10 of Act 13 of 2004, read with S 5 and regulation 2 of the Regulations in terms of the Social Assistance Act 13 of 2004 (GN R162 in GG 27316 of 22 February 2005).

Whitebooi, Casling and Visagie allege that this differentiation amounts to unfair discrimination on the basis of sex and/or age.⁵ They do not challenge the contents of the social assistance scheme, but merely contest the restrictions placed on their access to the scheme. My goal with this article is to determine whether these restrictions are justifiable.

2 THE CONTEXT

2.1 Legislative history⁶

Old age pensions for whites and coloureds were first introduced in South Africa in 1928 by means of a non-contributory needs-based scheme created in the Old Age Pensions Act 22 of 1928. The passing of the Act in 1928 was preceded by a report commissioned by the Department of Finance in 1926.⁷

The Commission on Old Age Pensions and Insurance⁸ compiled a report that contained a thorough comparative analysis of pension schemes from different countries around the world. In respect of pensionable age the Commission considered the ages provided for in legislation of some twenty countries.⁹ The Commission indicated that only two countries, namely Australia and New Zealand, had different pensionable ages for men and women.¹⁰ The Report refers briefly to suggestions by witnesses who testified before the Commission in respect of pensionable age, but stated that no reason existed to recommend a pensionable age that is different from that adopted in other countries.¹¹ Accordingly, it recommended that the pensionable age for both men and women should be fixed at 65.¹² The Commission noted that some witnesses who appeared before the Commission were in favour of granting the old age pension to women five years earlier than to men, but the Report contains no detail on that point. However, a minority report filed by one of the Commission members, Mr Sampson, gives some idea of what these witnesses might have said.¹³ Mr Sampson suggested that the pensionable age for women should be fixed at 60 and that of males at 65. His argument for

5 Telephone conversation between author and Mr Mike Burmeister, attorney for the applicants on 4 May 2006. An application challenging the constitutionality of the age differentiation was launched by the applicants in the TPD in November 2005. The respondents had to file their answering affidavits by 15 May 2006. At the time of writing, the date for the hearing had not been finalised.

6 In this section I provide an overview of the legislative history of social security legislation only insofar as it is relevant for my discussion regarding pensionable age. The discriminatory nature of the social security system (prior to 1994), insofar as race is concerned, does not form part of the discussion.

7 Commissioned in terms of GN 321 of 23 February 1926 published on 26 February 1926.

8 *First Report of the Commission on Old Age Pensions and National Insurance* (1927) UG 21-27.

9 *Ibid* at para 55.

10 *Ibid*.

11 *Ibid* at para 53.

12 *Ibid* at para 57.

13 *Ibid* at para 145.

the differentiation went as follows: men most commonly married between the ages of 25 and 29, while 'the most favourable marriageable age' for women was between the ages of 20 and 24. According to Mr Sampson, this would lead to a man attaining pensionable age 5 years earlier than his wife, which would force the couple to live on a single pension which was inadequate to meet their financial needs. Mr Sampson bolstered his argument with reference to the greater need on the part of women for financial support from the government because industry regarded women as less employable at an earlier age.¹⁴ Mr Sampson's plea remained a lone voice and when Parliament passed the Act on 5 June 1928, section 1 provided for 65 as the pensionable age for both men and women.

During the early 1930s, the economic hardship caused by the Great Depression forced the government to tighten its financial belt. During 1931 Parliament passed legislation amending the Old Age Pensions Act of 1928 so as to give greater discretion to the Commissioner of Pensions in respect of the determination of the amount to which a pensioner was entitled.¹⁵ For the first time, financial contributions by children and a spouse of the pensioner had to be taken into consideration in the determination of the pension amount.¹⁶ Question-time in both houses of Parliament from 1932 to 1936 often focused on the hardship older people suffered because of the 1931 pension restrictions.

By 1937 the Depression was something of the past and the South African economy had recovered to the extent that the Minister of Finance announced a surplus on the budget of £5 000 000 for the 1936-1937 financial year.¹⁷ As a result of the surplus, the Minister of Finance announced in his budget speech of 1937 that Cabinet intended to increase the pension amount and means limit set for old age pensions paid to whites.¹⁸ The Minister furthermore proposed the reduction of the pensionable age of women to 60 which would expand the provision of social benefits with immediate effect.¹⁹ When the proposed amendments to the Old Age Pensions Act came before the houses of Parliament²⁰ in 1937, not one objection was raised to the lowering of the pensionable age for women. In fact, the issue was not even debated.

The economic prosperity that followed the Great Depression of the early 1930s initiated a differentiation between men and women in respect of pensionable age. The differentiation was carried through in subsequent legislation without motivation being provided, at any stage, for its existence and perpetuation. The Old Age Pension Act 38 of 1962 repealed the 1928

14 *Ibid.*

15 Old Age Pensions (Amendment) Act, 1931 s 2 and s 4.

16 *Ibid* 15 s 6.

17 *Assembly Debates* (1937) 15 March 1937 at 3227.

18 *Ibid* at 3245.

19 *Ibid.*

20 The proposal to reduce the pensionable age for women to 60 served before the House of Assembly on 5 May 1937 and before Senate on 7 May 1937. See *Assembly Debates* at 6253-6254 and *Senate Debates* (1937) at 1011-1015.

legislation but retained the differentiation between men and women in respect of pensionable ages. When the Old Persons Act 81 of 1967 and the Social Pensions Act 37 of 1973, which repealed the 1967 legislation, were passed, the differentiation remained. The Social Assistance Act 59 of 1992 which repealed the Social Pensions Act of 1973 perpetuated the differentiation through its regulations.²¹ The distinction is so deeply embedded in practice that it was included in the Social Assistance Act of 2004 without serious consideration.²²

2.2 The socio-economic context

Millions of South Africans, most of them black South Africans,²³ live in abject poverty. Those who face the worst socio-economic challenges are women in the rural areas.²⁴

According to the 2001 census, 7,3% of the total South African population of 44,8 million people are over the age of 60. Women make up 61% of that figure. The 2001 report of the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons estimated that 80% of elderly persons had no source of income other than the social assistance grant.²⁵ These old age pensions play a vital role in sustaining many older South Africans and often extend to the support of unemployed children and grandchildren.

In 2000, Cabinet requested a committee (which subsequently became known as the Taylor Committee) to launch an inquiry into a comprehensive system of social security for South Africa. The report of the Taylor Committee, entitled 'Transforming the Present – Protecting the Future', was published in 2002. It paints a bleak picture of the socio-economic reality and challenges facing this country.²⁶ The Report explained that the demands on our social security system were, and still are, severe in the face of

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- 21 Regulation 2 of the Regulations in terms of the Social Assistance Act 13 of 2004 (GN R162 in GG 27316 of 22 February 2005).
- 22 S10 of Act 13 of 2004. Prior to the enactment of the Bill, numerous different statutes provided for different forms of social security. The aim of the 2004 legislation was to consolidate existing provisions regarding social security. The *White Paper for Social Welfare* (Notice 1108 of 1997) which provided the policy framework for the 2004 legislation, stipulated that equity and non-discrimination were basic principles in all matters of social security policy formulation (chapter 2, paras 9,10 and 28). The legislation, however, eradicated racial discrimination only. Despite the observation by the Taylor Committee that constitutional requirements and financial constraints might require an increase in the retirement age of women to bring it in line with that of men, the 2004 legislation retained the *status quo*: V Taylor et al *Transforming the Present – Protecting the Future* (2002) at 98.
- 23 *Ibid* at 28-29. The number of South Africans living in poverty depends on the poverty line used and, accordingly, one could say that between 20 and 28 million people are living in poverty.
- 24 Statistics South Africa *Rural Survey* (1999) 15. See also *White Paper for Social Welfare* chapter 1.
- 25 *Mothers and fathers of the nation: The forgotten people* (2001) Report of the Ministerial Committee on abuse, neglect and ill-treatment of older persons accessed available at http://www.polity.org.za/html/govdocs/reports/welfare/2001/main_report.html.
- 26 See specifically chapter 2 (fn 22 above).

poverty and inequality. The bulk of the budget of the Department of Social Development is spent on social grants for children, the disabled and elderly people in need. In respect of state old age pensions, the cost and number of people entitled to these pensions are expected to increase dramatically over the next 15 years.²⁷ In future, the demands on our social security system will increase and not only because our population is growing older. The impact of HIV/AIDS will become more visible as time goes on and the social security system will have to be responsive to the changes necessitated by this pandemic.²⁸ This will have a direct impact on the elderly and on children, as the economically active part of the population will shrink, resulting in greater vulnerability and poverty on the part of those who are dependent on the economically active population.²⁹

2.3 The constitutional context

Two fundamental rights are directly relevant to the constitutional challenge made by Mr Roberts and his co-applicants. These are the right to equality as provided for in section 9 of the Constitution³⁰ and the right of access to social security as provided for in section 27(1)(c) of the Constitution. On the one hand we have a civil and political right (a so-called first generation human right) and, on the other, a socio-economic right (a so-called second generation human right). This classification of these rights, as well as their different natures, must not be used to create a hierarchy of rights or to juxtapose them. The Bill of Rights protects a network of rights. Yacoob J in the *Grootboom*³¹ judgment makes it clear:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The two rights are thus to be interpreted conjunctively and not disjunctively.³² In order to do so, a brief consideration of the approach of the Constitutional Court to each of these rights will be instructive.

27 See (fn 22 above) at 98.

28 See (fn 22 above) at 18.

29 *Ibid.*

30 The Constitution of the Republic of South Africa, 1996. Hereinafter referred to as 'the Constitution'.

31 *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC); 2001 (11) BCLR 1169 (CC) para 23.

32 The approach of Mokgoro J in *Khosa and others v The Minister of Social Development and others* 2004 (6) BCLR 569 (CC); 2004 (6) SA 505 (CC) regarding intersecting rights at paras 38-39, 79 is instructive. *Khosa's* case turned upon the rights of permanent residents in relation to social security. The ground for discrimination at stake in that case is decidedly different from the one relevant to the current discussion. Despite the

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2.3.1 Equality and the prohibition of unfair discrimination

Equality is protected in the Constitution as a right and as a value. In the context of the current constitutional challenge, it provides the applicants with an enforceable right and with a value framework for the interpretation of all human rights. After the expression of tentative ideas about equality as protected in the interim Constitution in *Makwanyane*,³³ the jurisprudence developed gradually³⁴ until its culmination in the formulation of the so-called 'Harksen test'.³⁵ The *Harksen* analysis (or test) rests on the assumption that all human beings have equal dignity, that they have the same inherent moral worth, and that this is protected in our Constitution.³⁶ A legislative provision that impairs the fundamental dignity of

differences, the similarities of the constitutional challenges involving alleged discrimination and social security legislation require a careful consideration of the *ratio* of the *Khosa* case. See Govindjee A and Ristow L 'Permanent residents and eligibility for social security grants: *Khosa v Minister of Social Development: Mahlale v Minister of Social Development* 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC)' (2005) 1 *Speculum Juris* 107. See discussion at 2.3.3 below.

- 33 In *Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 655 (CC) a number of the judges noted that the death penalty impacted negatively on the right to equality; e.g. Chaskalson P (as he then was) at paras 43-46; Ackermann J at paras 153, 154, 156, 158, 160, 161, 163 and 166; Didcott J at para 185; Kentridge AJ at para 196 and Mahomed J at paras 262, 273 and 274.
- 34 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (T); *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 795 (CC).
- 35 *Harksen v Lane NO and others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54 sets out the test:
- '(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
 - (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is one a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributed and characteristics which have the potential to impair the fundamental human dignity or to affect them adversely in a comparably serious manner.
 - (ii) If the discrimination amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and other in his or her situation.
 - (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s33 of the interim Constitution).'
- 36 The formulation of the *Harksen* test was preceded by *President of the Republic of South Africa v Hugo and Others* 1997 (4) SA 1 (CC); 1997 (6) BCLR (CC) in which Goldstone J set the table for the central role that dignity came to play in our equality jurisprudence: '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 memberships of particular groups' (at para 41).

complainants will not pass constitutional muster. The *Harksen* analysis is useful, but it is not always necessary to engage in the rationality analysis as prescribed by its first enquiry.³⁷ In instances where a specified ground can clearly be identified as the ground for the differentiation, the presumption of unfairness created in section 9(5) will arise and is it up to the respondent to show that the discrimination is fair.

2.3.2 *The right of access to social security*

Our courts recognise that the socio-economic rights protected in the Bill of Rights are justiciable.³⁸ However, these rights are subject to internal limitation and possibly to the general limitations clause contained in section 36.³⁹ In respect of all socio-economic rights, the text of the Constitution provides that the rights pertain to: (a) access to a socio-economic service or commodity for 'everyone'⁴⁰ or a specified group, like children;⁴¹ (b) that the rights are to be realised progressively within (c) reasonable legislative and policy frameworks and programmes that are (d) attuned to budgetary constraints.⁴²

Socio-economic rights impose both negative and positive obligations upon the state. The negative obligations require the state (or third parties) not to interfere with access to existing socio-economic rights,⁴³ whilst the positive obligations require progressive realisation of the rights within a reasonable framework. In view of the complexity of these rights, matters involving socio-economic rights must be dealt with on a case-by-case basis taking into consideration the textual, historical and social context of the particular case.⁴⁴ The *locus classicus* on socio-economic rights in South Africa is the case of *Grootboom*,⁴⁵ which placed emphasis on the reasonableness standard in relation to the positive obligations imposed by socio-economic rights.⁴⁶ The plan (legislative and otherwise) for progressive

37 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 18.

38 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 78.

39 Our courts have not provided clarity on the relationship between socio-economic rights and s 36. See 2.3.3 below.

40 S 26, s 27 and s 29 of the Constitution.

41 S 28 of the Constitution.

42 In *Khosa* at para 64 Mokgoro J acknowledges the important effect of budgetary constraints on social welfare programmes. It stands to reason that it cannot be expected of the state to provide social assistance which it cannot afford. See in this regard Jansen van Rensburg L 'The *Khosa* case – opening the door for the inclusion of all children in the child support grant?' (2005) 20 *SAPL* 102 at 119-120.

43 *Grootboom* at para 34.

44 *Grootboom* at paras 21-22.

45 *Grootboom* at paras 39-44. This approach was subsequently confirmed in *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at 33-34 and in *Khosa* at paras 43-45, 48-49.

46 For a discussion of the reasonableness standard set by the Constitutional Court see D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) 47-52.

realisation of the right must be reasonable 'in ... conception and ... implementation'⁴⁷ when considered in historical, social and economic context. Progressive realisation, according to the Constitutional Court, means that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time'.⁴⁸

The Constitution does not define social security or social assistance, but the mere fact that both concepts are used means that they are to be distinguished. Olivier⁴⁹ points out that no universally accepted definition of the concept 'social security' exists. As used in the Constitution, social security is seen as being a broader concept that includes social assistance.⁵⁰ Social security is usually understood as insurance against social risks, e.g. illness, maternity, employment injury, unemployment, old age etc.⁵¹ Social assistance, on the other hand, is seen as 'tax-based benefit payments on a universal or targeted basis, aimed at minimum income-support'.⁵² Old age pensions, as provided for under the Social Assistance Act, will fall under social assistance.

2.3.3 Linking sections 9 and 27(1)(c)

What does a conjunctive interpretation of section 9 and section 27(1)(c) entail? How are these rights to be applied to the case at hand? Should one opt for the *Harksen* analysis while keeping the demands of s27(1)(c) in mind, or should the emphasis be on the reasonableness of the social security scheme while keeping the demands of equality in mind?

In this regard, the approach of Mokgoro J in the majority judgment of the *Khosa* case is instructive.⁵³ The right to equality and the right of access to social security are mutually supporting and mutually reinforcing at their point of intersecting.⁵⁴ In determining the scope of these rights, a broad and inclusive approach is to be taken. This requires a careful consideration of the scope of both rights and their combined effect within the context of the Bill of Rights as a whole.

In dealing with the intersecting rights to equality and access to social security, Mokgoro J opted for a socio-economic rights analysis supported by an analysis in terms of section 9 of the Constitution. She points out

47 *Grootboom* at para 42.

48 *Grootboom* at para 45.

49 Olivier MP 'The concept of social security' in Olivier MP, Smit N and Kalula ER (eds) *Social security: A legal analysis* (2003) 24.

50 See in this regard the broad approach to social protection favoured by the Taylor Commission, (fn 22 above) at 40-41. See also Jansen van Rensburg L and Lamarche L 'The right to social security and assistance' in Brand D and Heyns C (eds) *Socio-economic rights in South Africa* (2005) 209-212.

51 Olivier (fn 49 above) at 24-25.

52 ILO *Introduction to social security* (1989) 4-5 as quoted in Olivier (fn 50 above) at 24.

53 The minority judgment authored by Ngcobo J takes a different methodological approach which leads to the same conclusion as that of Mokgoro J's majority judgment. See *Khosa* at paras 102-104 in this regard.

54 *Khosa* at para 41.

that equality is implicit in respect of access to socio-economic rights because of the wording of the Constitution.⁵⁵ For her, the question is whether the legislative and other programmes providing for social assistance for older persons are reasonable within their contextual setting. Equality is one of the factors to be considered when determining the reasonableness, or otherwise, of the social assistance scheme. In order to be deemed reasonable, the scheme 'must not be arbitrary, or irrational nor must it manifest a naked preference' in differentiating between people or groups of people.⁵⁶

Socio-economic rights are clearly subject to internal limitations. However, the limitation of socio-economic rights in terms of section 36 has been more controversial.⁵⁷ Mokgoro J does not provide any further clarity on this point, but states that 'section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of sections 26 and 27'.⁵⁸ She concludes that a pronouncement on the relationship between section 36 and the socio-economic rights is not necessary for the purposes of the case and leaves the matter open.⁵⁹ Thus, in *Khosa's* case, Mokgoro J considered the two standards of reasonableness to be identical and considered the internal limitation to be sufficient to meet the requirements of section 36. It seems highly unlikely that an unreasonable legislative provision would be saved by section 36.⁶⁰

3 CONCLUSION

Utilising Mokgoro J's comprehensive approach as set out in *Khosa*, the question in the present matter can be summarised as follows: Are the criteria upon which government chose to limit the payment of social assistance benefits to older people consistent with the Bill of Rights as a whole?⁶¹

One needs to establish whether the social assistance scheme is reasonable and whether access to the scheme is reasonable. This will include an assessment of equality of access to the scheme. The applicants contend that they are denied access to the social assistance scheme because they are male. Sex is listed as a ground in section 9(3) of the Constitution. Therefore the presumption of unfairness provided for in section 9(5) will

55 *Khosa* at para 42. 'Everyone' is entitled to the socio-economic rights protected in the Constitution.

56 *Khosa* at para 53.

57 See *Khosa* at 84 and specifically note 88.

58 *Khosa* at para 83. See also Iles K 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20 *SAJHR* 448 and Govindjee and Ristow (fn 32 above).

59 *Khosa* at para 84.

60 If a court finds that a legislative provision regarding, for example, access to housing is unreasonable using the internal limitations set out in s 26 it would be illogical for it to conclude that such an unreasonable provision is acceptable in an open and democratic society based on freedom, equality and dignity (viz. the s 36 benchmark).

61 See in this regard *Khosa* at para 45; *Grootboom* at para 44.

arise. The State has to prove that the differentiation in respect of pensionable age does not amount to unfair discrimination.

The justification put forward by Mr Sampson in 1928 does not seem to be relevant in our current context. However, different reasons might serve to justify the differentiation in 2006. In order to determine whether discrimination is unfair, it is necessary to consider the impact of the discrimination on the complainants.⁶² That requires a consideration of their position in society and determining whether they have been the victims of unfair discrimination in the past.⁶³ The fundamental question is whether the discrimination 'has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature'.⁶⁴ In order for the state to justify the differentiation, it has to show that the fundamental dignity of the male complainants is not impaired by setting their pensionable age at 65 as opposed to 60 in the case of women. Women in South Africa, and particularly black women, have been marginalised by patriarchy and apartheid in the past.⁶⁵ The applicants in this matter are male. Men as a group did not suffer as a result of unfair discrimination in the past. But the applicants are also poor and their poverty makes them vulnerable.⁶⁶ In the *Khosa* case Mokgoro J remarked:⁶⁷

There can be no doubt that the applicants [permanent residents] are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance. Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.

The poverty of elderly men makes them an identifiable marginalised group in our society, placing them in a position similar to that of the permanent residents who were unfairly discriminated against in the case of *Khosa*. A statutory provision that differentiates between groups of people and disregards the vulnerability of a particular group impairs the fundamental dignity of that group. Accordingly, a strong argument could be made regarding unfair discrimination as a result of the differentiation in respect of pensionable age.

62 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 82 per O'Regan J.

63 *Harksen* at para 52.

64 *Ibid.*

65 *Brink v Kitshoff* at para 44.

66 The vast majority of the recipients of state old age pensions are black and therefore previously disadvantaged.

67 *Khosa* at para 74.

Furthermore, the intersection of sections 9 and 27 requires an assessment of the reasonableness of the scheme and the regulation of access to the scheme. In this, the availability of resources is an important consideration. It is difficult to determine exactly what the budgetary implications of lowering the pensionable age for men would be. It stands to reason that it would mean that more money would have to be set aside for old age pensions which could potentially result in budgetary shortfalls.⁶⁸ The reasonableness of the social assistance scheme will, furthermore, depend on the progressive equal realisation of the right for all similarly situated people entitled to such benefits, namely elderly people in need of social assistance. The current framework creates no space for the lowering of the legal hurdles facing poor elderly men. No provision is made in the legislation to facilitate greater accessibility to the scheme and this is in conflict with the requirement set out in *Grootboom*.⁶⁹ Accordingly, the scheme fails the reasonableness test insofar as accessibility is concerned and should be held to be unconstitutional.

The long term goal provided for in our Constitution is that of an equal society based upon non-sexism, amongst other values.⁷⁰ The legal barriers created in the statute are remnants of a past in which men were expected to be providers and women were expected to be dependants. The time has come to look beyond the sex of applicants for old age pensions and to consider need as a primary factor. The four individuals who are challenging the constitutionality of the differentiation are part of a marginalised group of poverty stricken, mostly black, South Africans. They deserve the protection of the Constitution.

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68 See *Khosa* at para 60.

69 See 2.3.2 above.

70 SI.

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