

IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) No. 10/05

CIV/APN/629/2004

In the matter between:

The Road Transport Board

& 3 Others

Appellants

and

Northern Venture Association

Respondent

12, 20 April 2005

Section 18 of Constitution of Lesotho – right to equality - regulation 7 of Road Transport Regulations, 2004 – disqualification from licensing for public transport of particular make of motor vehicle – whether constituting discrimination.

CORAM:

Steyn, P

Smalberger, JA

Gauntlett, JA

JUDGMENT

GAUNTLETT, JA

[1] This appeal has been heard on an urgent basis at the special request of the parties, in view of the effect of the order issued by the High Court (Monapathi J) on the general public as well as the parties. The order against which the appeal lies was made on 1 April 2005. The court a quo

has not yet handed down its reasons. Again by consent, and in view of the importance of the matter, this court has been obliged to deal with the matter in their absence.

[2] The order appealed against is as follows (it is reproduced exactly):

- “1. There should not be any refusal of respondents to renew the certificates of fitness for applicant’s members’ venture vehicles because it’s a venture. Such refusal is declared null and void.

2. The use of the provision of Regulation 7 of the Road Transport Regulations, 2004 which has the effect of excluding the applicants members venture vehicles is declared discriminatory in terms of Section 18 of the Constitution of Lesotho and therefore null and void.

3. Costs are awarded to the applicant on the ordinary scale.”

[3] Before us counsel for the parties were agreed that two questions arise for determination. The first is whether the court a quo was correct in holding that regulation 7 of the Road Transport Regulations, 2004 (“the regulation”) is inconsistent with s.18 of the Constitution because it is discriminatory, in the sense contemplated by the latter. The second is whether, if that is so, the court a quo was correct in making the order in the terms it did.

[4] The respondent is a registered society of persons who are owners of a particular make of passenger vehicles known as Ventures. These are evidently used, with other makes, for the commercial conveyance of passengers. Late last year the first appellant refused to grant requisite permits for that purpose in respect of Ventures, because they were found not to comply with the requirements of the regulation, introduced shortly before by Legal Notice 166 of 2004, pursuant to s.29 of the Road Transport Act, 1981.

[5] Regulations 6 and 7 provide as follows:

“Passenger safety and comfort to take precedence

6. (1) Notwithstanding regulation 4, the Board shall, when considering an application for a permit, consider the type of vehicle for which the permit is sought, its design and suitability for carrying passengers as well as its carrying capacity, and having regard to the safety and comfort of passengers, may decide that the vehicle is not suitable for passengers and refuse to grant the permit.

(2) The Board shall, once a year, after consultation with the Traffic Commissioner, issue a list of types of vehicles considered suitable for passenger transport for both long and short routes.

Specifications for passenger public motor vehicles

7. The Board shall not grant a C or F permit unless [the] motor vehicle to which the application relates complies with the following specifications-
 - (a) that the bus has at least one entrance, leading to the passenger compartment of the bus, in the left side of the vehicle no less than 530mm wide and not less than 1.29m high, measured from the level of the lowest step, and such entrance shall be fitted with sufficient hand rails to provide adequate assistance to passengers entering or leaving the bus;
 - (b) that a passenger compartment of a bus with more than one row of seats is provided with a straight and unimpeded longitudinal passageway down the centre of the bus, at 220mm wide up to seat level and at least 350mm wide at the top of the backrest of each seat;
 - (c) that the width of every seat is at the rate of 360mm where standing passengers are not allowed and 400mm where standing passengers are

allowed, per person measured along the rear of such seat at seat level;

- (d) where the seats are parallel and face in the same direction that the horizontal distance between the front of the backrest of any seat level to the back of the backrest of the seat in front of it is at least 600mm”.

[6] The affidavits filed on both sides in this matter are unstructured, diffuse and unhelpful to the adjudication of the matter. Extracts from other proceedings are incorporated in no particular order. Parties in all cases are required to plead their cases: to allege the essential facts, and to invoke – clearly – the legal rights and remedies on which they rely. This applies as much in constitutional claims as any other (see in particular the analysis in National Director of Public Prosecutions v Phillips 2002 (4) SA 60 (W) at 106 C – 107 F, and further authorities there considered).

[7] It was however clarified at the hearing of the appeal that the issues for determination are those stated in paragraph [3] above. There is no further issue raised on the papers, such as an attack of irrationality or arbitrariness, on the disqualification of Ventures according to the criteria laid down in the regulation.

[8] Section 18 of the Constitution provides as follows:

“18. (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to

their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law to the extent that that law makes provision -

- (a) with respect to persons who are not citizens of Lesotho; or
- (b) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or
- (c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or
- (d) for the appropriation of public revenues or other public funds; or
- (e) whereby persons of any such description as is mentioned in subsection (3) may be made subject to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards of qualifications (not being standards of qualifications specifically relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.
- (6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5).
- (7) No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.
- (8) The provisions of this section shall be without prejudice to the generality of section 19 of this Constitution.”

[9] The appellants confirm the refusal to grant permits in terms of the regulation. Their case

is that the differentiation between Ventures and other makes as regards licensing in terms of the regulation does not amount to discrimination within the purview of s.18. The fact is that certain vehicles meet the specified requirements, but the Venture does not. They invoke public safety and comfort (see regulation 6, quoted above), referring to a study carried out by the Ministry of Transport some four years ago, in which it was “found that Venture vehicles were the worst in terms of non-compliance”. This study gave rise to a policy decision to phase out non-compliant vehicles, in accordance with a SADC protocol. The respondent was advised as early as 2001 that Ventures would be phased out (a fact not disclosed in the founding affidavit, where a case was advanced for the matter to be heard by the High Court on an urgent basis).

[10] The respondent’s reply is that the study in question also established that other makes did not comply with requirements then set. The regulation has however now reduced the specifications in a way which secures the compliance of all other makes except the Venture. It is this which is said to constitute the discrimination.

[11] That factual premise upon analysis is incorrect. The regulation is cumulative in its requirements: thus there must be compliance with every one of the specifications. Reference to the comparative table central to the respondent’s case disproves it. It shows that certain other makes used for commercial passenger conveyance in Lesotho appear not to comply with regulation 7 (b). Counsel for the respondent acknowledged this in argument. Whether the appellants intended this appears doubtful; if they did not, the regulations will require urgent amendment.

[12] On this basis alone, the respondent’s claim has to fail. It has to fail for the further reason that the endeavour to invoke s.18 in a case such as this seems to me misconceived. Careful consideration of s.18 read as an entirety indicates that it proscribes differentiation for reasons attributable to status. It is in this context that there is a reference to property. There is no discrimination in this sense where there is a legislative scheme differentiating between articles such as motor vehicles, firearms or agricultural products – to take a few examples – where that differentiation is not attributable “to [the owners’] respective descriptions by property or other status” (s.18 (3)).

[13] This conclusion is reinforced by a further consideration. Section 4 (1) contemplates the rights entrenched by s.18 being derogable – but only as specified in the limitations set out in s.18 (4), (5) and (6). S.18 however provides for no form of derogation which might apply to the kind of differentiation complained of here. The logical outcome of the respondent’s argument is to create an absolute right to equality in terms of s.18 for its members. That cannot be right.

[14] This leads to a related consideration. As the majority stated in Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) at 1024 E-F, applying the equality clause in the Constitution of South Africa:

“It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for their 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

(See too Harksen v Lane N.O. 1998 (1) SA 300 (CC) at 320 H).

[15] South Africa’s equality clause is in materially different terms to that of Lesotho, but this consideration holds good in the case of the latter too. Governments need to regulate, and in regulating, to differentiate. Here Ventures have been differentiated from other vehicles for the purpose of the safe and comfortable public transport of paying passengers. The differentiation is not directly in respect of those who operate Ventures. To the extent that the differentiation is indirect, it does not relate to or impact upon the status of those operators. They bear no proscribed characteristic, such as those indicated

by s.18, arising from the different categorization of their vehicles by the regulation. They are thus not the victims of discrimination.

[15] The first issue must accordingly be resolved in favour of the appellants, and the appeal in my view has to succeed. This is not an instance where the constitutional challenge has been mounted in the public interest. It relates to the commercial interests of the members of the respondent. In these circumstances there is no reason why costs should not follow the result (cf. Motsepe v CIR 1997 (2) SA 898 (CC) at 911E to 912A; Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) at 60B to 61B).

[16] The appeal is accordingly upheld, with costs. The order of the court a quo is set aside and replaced with this order:

“The application is dismissed with costs”.

J.J. GAUNTLETT

JUDGE OF APPEAL

I agree.

J.H. STEYN

PRESIDENT

I agree.

J.W. SMALBERGER

JUDGE OF APPEAL

For the Appellants : Mr. T.S. Putsoane

For the Respondent : Mr. K. E. Mosito