

***Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministres***

**Case C-236/09 ECJ**

*Gender equality in insurance*

## **1 Introduction**

The recent judgment by the European Court of Justice (ECJ) in the case of *Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministres* that the unequal treatment of men and women in the assessment of insurance risks is in fact unlawful discrimination, has rocked the international insurance industry. The applicants brought the case from the *Cour constitutionnelle* (Belgium) to the ECJ for a preliminary ruling under Article 234 of the Treaty establishing the European Community. The effect of the ruling is, in a nutshell, that insurers will be required to restructure and reinvent current actuarial factors and information used for risk profiling to prevent disparate rates for the different genders for personal insurance cover. The ruling cuts both ways, as it will clearly affect the lower costs payable by men for pension annuities, and the lower car insurance premiums that women are currently charged.

## **2 Judgment**

On 1 March 2011 the ECJ, the highest court in the European Union (EU), handed down its judgment and held that insurers, who offer different prices and premiums to men and women, are acting in contravention of the EU's laws on gender equality. The EU Gender Directive, Article 5(2) of the Council Directive 2004/113/EC of 13 December 2004, implements the equal treatment of men and women in the access to and supply of goods and services. The Directive applies to both direct and indirect discrimination based on gender. The Court ordered that these unlawful practices must stop by 21 December 2012, which leaves very little time to effect changes in actuarial tables. It found that the mere statistical correlation between a group and a higher risk cannot justify discrimination on prohibited grounds. Such a correlation accepts the very stereotyping that is targeted by human rights legislation, in that prohibited grounds form the basis to ascribe the characteristics of a group to all individual members in that specific group. Discrimination based on statistical correlation is simply discrimination in a more exceptionable form.

To avoid a knee-jerk negative readjustment of the market, the ruling only applies to contracts concluded after the date of transposition of the Directive. States are, however, allowed to continue to use gender as a determining factor to allow for proportionate differences in insurance

premiums, provided their data is published and the ECJ judgment is reviewed by 21 December 2012.

### 3 EU Law and Responses to the Judgment

One must keep in mind that a directive is a legislative act of the European Union that prescribes a certain end result for its member states, without prescribing the means to achieve that goal. Article 288 of the Treaty on the Functioning of the European Union forms the legal basis for the enactment of directives that are binding upon EU member states. Each state retains its independence to determine the forms and methods that it must implement to effect changes in its law to achieve the end result in accordance with the directive. The EU published guidelines on 22 December 2011 (Directory Code 05.20.05.10), to assist states in implementing non-discrimination unisex insurance premiums. Types of insurance affected are car insurance, term life insurance, health insurance and annuities.

Reactions from the insurance industry have been vehement. The industry will have no choice but to respond by adapting its actuarial tables to comply with the directive. Insurers warn that it will inevitably have an adverse effect on the consumer, as it could mark the end for cheaper insurance products based on what actuarial science considers to be hard statistical evidence. Clearly in this case, what you win on the swings, you lose on the roundabout. What one gender will lose for one type of product, the other might win, and *vice versa* for other products, yet not necessarily with the same margins. Insurers predict an inevitable increase in insurance premiums across the board. Simply put, the higher the likelihood that someone will claim, the more expensive the insurance product.

### 4 South African Law

Due to the international nature of insurance, comparative legal studies play a major role in the search for answers on issues pertaining to insurance. The laws of especially the United Kingdom and, more recently the EU, are often referred to where national law is lacking. In view of the sensitivity to discrimination in South Africa and the possibility of a similar judgment being handed down locally, this ruling has been received with interest.

As a constitutional state, South Africa must abide by the Constitution of the Republic of South Africa, 1996 and the right to equality as contained in section 9 of the Bill of Rights in Chapter 2 of the Constitution. Although the Constitution only enjoys an indirect horizontal application in the relationship between individuals (s 8(2)), the fundamental rights will impact on the private law relationship between insurers, insureds, brokers and agents as role players in the insurance industry. Two important constitutional issues in this context include the inequality of bargaining power and outright discrimination. Furthermore, the Constitution also requires that the law must be developed (s 8(3)) and interpreted (s 39(2)) in the spirit, purport and objects of the Constitution,

yet does not contain any statutory provisions that apply directly to insurance matters.

The Constitution clearly states that “[n]o person, including the state, may unfairly discriminate against any other person” (s 9). The insurance industry, by its nature, is built on the basis of discrimination. Persons who pose a higher risk or chance of loss pay higher premiums than others for the same insurance cover, and stereotypes are used to predict insurance risks. Whether this discrimination is fair or not, depends on constitutional norms. Grounds of discrimination include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), for example, gives effect to the Constitution in its goal to prevent or limit unjustified discrimination.

In terms of our common law, any statute or contractual provision that is contrary to public policy, as tested against constitutional values, is unenforceable. The values that underlie our constitutional democracy, among them the values of human dignity, the achievement of equality, the advancement of human rights and freedoms and the rule of law, all form the principles on which the determination of public policy must be based. Leading case law on this point includes *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7 for a discussion of public policy *ex ante* the Constitution; and *ex post* the Constitution *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) and *Barkhuizen v Napier* 2007 5 SA 323 (CC). The validity requirement that a contract must conform to public policy is especially relevant when one has to determine the constitutionality of clauses in insurance policies that limit or infringe upon the policyholder’s constitutional rights.

The effect of the Constitution on insurance contracts in particular, was illustrated by the judgment handed down by the Constitutional Court in the case of *Barkhuizen v Napier* 2007 5 SA 323 (CC). The court held that the principle of *pacta servanda sunt* is not “a sacred cow that should trump all other considerations”, as it is subject, as all law is, to constitutional control. Public policy in fact requires parties to comply with contractual obligations that have been freely and voluntarily undertaken, yet must also take into account the necessity to do simple justice between individuals. As public policy is now deeply rooted in our Constitution and its underlying values, its interpretation is simplified. It does not deny, but accommodates the application of the principle of *pacta servanda sunt*. Public policy cannot be separated from the notions

of fairness, justice and equity and reasonableness. Where insurance contracts affect fundamental rights such as the right to equality, section 36(1) of the Constitution on the limitation of rights does not apply, because a contractual clause that limits the operation of a fundamental right is not a law of general application as envisaged by this section.

What will be deemed an acceptable contractual limitation of a constitutional right depends not only on the facts and circumstances in each situation, but also that, irrespective of our Constitution, one remains at the mercy of the subjective interpretations of presiding officers. This has been reiterated by our courts in the *Barkhuizen* case, where Moseneke DJ referred to the “subjective yardstick” (par 95), and Sachs J to the “*ad hoc* determination by each judge in accordance with his or her predilections as to what is fair nor not” on whether a specific limitation is in line with the constitutional values or not (par 146).

Equality and discrimination are also the focal points of the Equality Act that binds the state and all persons, including juristic, non-juristic and even a group or category of persons. Inequality could potentially affect the validity of a contractual clause, as it may be contrary to public policy to enforce an agreement that was entered into while labouring under the inequality.

Section 6 of the Equality Act prohibits unfair discrimination in general. To prove that the discrimination is fair, one must take into account whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria that are intrinsic to the activity concerned. The relevant factors referred to in section 14(2)(b) include:

- (a) whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds or to accommodate diversity.

The following discriminating factors are identified in Part 5 to the Schedule of the Equality Act specifically regarding insurance services:

- (a) unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person;

- (b) unfair discrimination in the provision of benefits, facilities and services related to insurance; and
- (c) unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/Aids status.

Case law in South Africa on discrimination in insurance is scant. In the case of *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC), the Constitutional Court was confronted with the issue whether differentiated employer contributions to a pension fund was in fact discrimination. The rules of the Political Office-Bearers Pension Fund provided for differentiated employer contributions in respect of the three different groups or categories of members of Parliament and other political office-bearers between 1994 and 1999. The case by the defendant, who was classified as a Category C member, was that the differentiated employer contributions improperly disfavoured him and other Category C members and constituted an unfair discrimination. The case was contested by the appellant on the basis that the differentiation in the rules of the Fund is not unfairly discriminatory because it constitutes a “tightly circumscribed affirmative action measure” permissible under the equality provisions of our Constitution (s 9). In its judgment, the court once again pointed out that the achievement of equality goes to the bedrock of our constitutional architecture. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance. It goes beyond the individual or the personal affront of the claimant (Albertyn & Goldblatt “Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality” 1998 *SAJHR* 248 272-273). From the major constitutional object to create a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights, emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. Moseneke J (as he was then) explained at length the tests that had to be applied to determine whether section 9 of the Constitution was infringed upon. Briefly, section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons previously disadvantaged by unfair discrimination. In view of this, the differentiation was found not to be unfairly discriminatory, and was therefore held to be constitutional.

In the case of *Robert v Minister of Social Development* Case Nr 32838/05 TPD, the plaintiffs contended that regulations issued in terms of section 19 of the Social Development Act 59 of 1962, and sections 1 and 10 of the Social Assistance Act 13 of 2004 discriminated against men,

especially poor old men between the ages of 60 and 64. Women qualify for the grant from the age of 60, whereas men only qualify after having attained the age of 65.

The Court conceded that the criteria to determine the eligibility for a social old age grant based on gender is discriminatory towards men, nevertheless, that it is not unfair. It was rationally necessary for the age differentiation to address inequalities against a previously disadvantaged group. Women, especially African women, were on the lowest rung of the social gender and race ladder. Poverty is means-based, and as such it is clear that women between the ages of 60 and 64 lag behind men in that age group. One should, however, keep in mind that the case law refers to state rather than private pensions.

In the last instance, the application of the Consumer Protection Act 68 of 2008 (CPA) should also be kept in mind. Although any “service” as defined in the CPA (s 1), that is regulated by any of the three primary statutes that regulate the insurance industry, namely the Short-term Insurance Act 53 of 1998, the Long-term Insurance Act 52 of 1998 and the Financial Advisory and Intermediary Services Act 37 of 2002, is excluded from the scope of application of the CPA, Schedule 2 of the CPA states specifically that the exclusion of the Long- and Short term Insurance Acts from its application is conditional. The exclusion is subject to the insurance industry aligning its consumer protection measures with the CPA within 18 months from date of commencement of the CPA (which was on 31 March 2011) (s 10). Currently, the Financial Services Laws General Amendment Bill 2012 is serving before Parliament, which will, upon enactment, exempt the financial industry from complying with the CPA (s 28(c)(ii) Bill). As it remains uncertain when this exemption will come into effect, the effect of the CPA will be included for the sake of a comprehensive discussion.

The right to equality is dealt with in Part A of Chapter 2 of the CPA. Goods or services may not be marketed to consumers by excluding specific groups or by charging different prices to any person or category of persons on one or more grounds of discrimination as set out in the Constitution (s 9), as well as in Chapter 2 of the Equality Act (s 8(1) CPA). The gender of the consumer is included in the list. The supplier may also not directly or indirectly treat any consumer differently on one of the grounds mentioned above (s 8(2) CPA). Section 10 enables a consumer to institute proceedings in terms of the CPA before an equality court or file a complaint with the Consumer Commission. In the event of the latter, the Commission must refer the complaint to the equality court. Should a similar issue as in the ECJ *Test-Achats* case arise in South African law the matter will serve before an equality court in the first instance.

## 5 Conclusion

Clearly the effect of the ECJ *Test-Achats* ruling is that insurers within the EU have a very short time period to revise the application of actuarial factors and information for purposes of risk profiling where factors that

effect gender are concerned. The same can be said for the South African insurance industry who serve consumers, and who must conform to the provisions of the CPA before 1 October 2012. In reviewing the South African position, it becomes clear that a similar outcome could be a reality should the issue serve before our courts.

From a business point of view, such a ruling might be seen as unrealistic, as the hope of reaching total gender equality triumphs over the reality that the different groups do not in fact present an equal risk. Introducing a universal formal equality in this respect will inevitably confront all individuals with the commercial reality that insurance premiums will increase across the board for all.

In view of the effect that a similar judgment might have on the insurance business in South Africa, one could support the views of Kok ("The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform" 2008 *SAJHR* 445) that urgent legislative reform in this regard is required. In anticipation of new insurance legislation to replace the Long-Term and Short-term Insurance Acts by 2015 (see the National Treasury *Policy Document* 2011-02-23), this opportunity might just be presenting itself. When considering such a legislative intervention, the legislator will have to keep in mind the three way test concisely explained in the *Van Heerden* case (par 37) to prevent the legislation from being contested as unconstitutional. The first question would be whether any measure targets persons or a category of persons from a previously disadvantaged group. The second, whether it is designed to protect and advance the interests of those persons previously disadvantaged, and in the third instance, whether the statutory measure promotes the achievement of equality.

**B KUSCHKE**

*University of Pretoria*