

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between -

THE DEMOCRATIC PARTY

APPELLANT/
APPLICANT

and

THE MINISTER OF HOME AFFAIRS

1ST RESPONDENT

THE ELECTORAL COMMISSION

2ND RESPONDENT

FIRST RESPONDENT'S HEADS OF ARGUMENT

A: INTRODUCTION

- 1 The main relief sought by the applicant in the court *a quo* is an order declaring s 6 of the Electoral Act, No 73 of 1998, read with s 1(xii) and s 38(1), (2) and (3), read with s 1(xxv), to be inconsistent with the Constitution of the Republic of South Africa Act, No 108 of 1996 to the extent that they require adult South African citizens to be in possession of green bar-coded identity documents as a prerequisite to voting in the national elections of 1999.

2 This matter was argued on 3, 4 and 5 March 1999 in the Transvaal Provincial Division of the High Court. Judgment was delivered on 12 March 1999. The application was dismissed by the Full Bench. No order as to costs was made.

3 3.1 On 12 March 1999, in response to a request from the applicant, the President of this Court indicated that, after consulting the other members of this Court, he would be willing to consider giving directions in regard to the conduct of this matters as disclosed in the letter of that date if the parties are agreed that an appeal should be noted to this Court and that it should be disposed of as a matter of urgency.

3.2 The matter comes before this Court by way of agreement and as envisaged in the aforementioned directions.

4 SUMMARY OF THE APPLICANT'S CASE

The grounds of the applicant's case are that the challenged provisions -

4.1 infringe or threaten to infringe the s 19(2) rights of the Constitution ("rights to free and fair elections");

4.2 infringe or threaten to infringe the s 19(3)(a) rights of the Constitution ("right to vote");

4.3 infringe or threaten to infringe the s 9 rights of the Constitution ("right to equality");

4.4 infringe or threaten to infringe the s 16(1) rights of the Constitution ("the right to freedom of expression"),

5 In amplification of the grounds in paragraph 4 above, the applicant contends -

5.1 that the challenged provisions are neither reasonable nor justifiable limitations in an open and democratic society

based on human dignity, equality and freedom;

- 5.2 that the challenged provisions disenfranchise or threaten to disenfranchise between 4.7 and 5.3 million adult South African citizens;
- 5.3 that the challenged provisions unfairly discriminate directly or indirectly against groups or classes of adult South African citizens on the grounds of age, race, conscience, belief and political affiliation in violation of s 9(3) of the Constitution;
- 5.4 that the challenged provisions deny or threaten to deny between 4.7 and 5.3 million adult South African citizens a fundamental form of political expression, namely the right to make and express their political choices in a free and fair democratic election in violation of the right to freedom of expression protected in terms of s 16(1), s 1, s 7(1) and s 19 of the Constitution.

**6 SUMMARY OF THE RESPONDENT'S
ANSWER TO THE APPLICANT'S CASE**

The response offered on behalf of the first respondent to this attack is that -

6.1 Parliament is the institution expressly authorised by the Constitution to pass national legislation [s 44(1) of the Constitution];

6.2 Parliament, in the exercise of that power, enacted the electoral system by virtue of the Electoral Act, No 73 of 1998. This legislation is authorised by the Constitution [s 46(1) of the Constitution];

6.3 the prescription of the requirement to register as a voter as a precondition to voting, falls within the plenary powers of Parliament. It is more importantly a constitutional imperative by necessary implication flowing from the peremptory requirement therein of a national voters' roll [s 46(1) of the Constitution];

6.4 the condition precedent to voting is a policy matter which falls within the exclusive competence of Parliament;

- 6.5 the requirement of the green bar-coded identity document or a temporary identification certificate for voting ensures that each and every eligible voter votes only once [s 38(1) of the Electoral Act];
- 6.6 the requirement of a green bar-coded identity document ensures that eligible voters do not appear more than once on the voters' roll [ss 8(3) read with 7(1)(b) and 38(3)(c) of the Electoral Act];
- 6.7 the requirement of a green bar-coded identity document guarantees that the outcome of the election is free and fair [s 19(2) of the Constitution];
- 6.8 no one who, out of his or her own conduct, fails to register and/or vote, can place a constitutional complaint at the door of the Government;
- 6.9 the applicant has failed to produce a single individual who, on any of the grounds of attack recognized under the Constitution, has been refused registration by reason of the fact that he or she does not possess a green bar-coded

identity document;

- 6.10 the right to vote is not peremptory. It is a constitutional right to vote no less than it is a constitutional right not to vote;
- 6.11 the Department of Home Affairs ("the Department") has the capacity to produce such green bar-coded identity documents as are applied for;
- 6.12 there is no factual basis furnished by the applicant that the alleged 4.7 to 5.3 million persons intend to vote in the national elections for 1999;
- 6.13 no factual basis is provided by the applicant to suggest that between 4.7 and 5.3 million persons have applied or will apply for green bar-coded identity documents;
- 6.14 there is no basis or reason offered by the applicant as to why any of the alleged 4.7 to 5.3 million persons have not availed themselves of the facility to register through temporary registration certificates;

6.15 the figure of between 4.7 to 5.3 million persons furnished by the applicant was only good, if at all, as at August 1998 and not beyond;

6.16 until the voters' roll is closed, it is premature for the applicant to suggest that any person has been disenfranchised, whether by Government conduct or otherwise;

6.17 the green bar-coded identity document is the only document in which the identity number of a person is correlated to the finger-print classification of that person. This applies equally to a TRC and a TIC furnished after 1 July 1986. The same cannot, however, be said for other forms of legally valid identity documents.

In its founding papers the applicant did not question the security features of the green bar-coded identity document.

The applicant, however, did question the capacity of the Department to produce the required identity document.

That aspect has been addressed in the first respondent's answering affidavit.

In light of the shift in focus of the applicant's attack on appeal and as there was previously no contention that other identity documents were equally capable of providing the security features that are to be found in the green bar-coded identity document, at the hearing of this matter the applicant will apply for leave to file a supplementary affidavit by Mr DAVID MAMABOLO on this aspect.

6.18 This appeal is argued at a time when -

6.18.1 registration in terms of s 14 of the Electoral Act has
been completed;

6.18.2 only such persons as have already registered may
vote in the national elections;

6.18.3 the applicant is neither seeking an interdict nor a
mandamus against the Electoral Commission
to re-open the voters' roll;

6.18.4 the applicant has taken the view that it seeks no order against the second respondent;

6.18.5 the applicant does not seek to invalidate the registration that has ensued in terms of the challenged provisions.

6.19 In light of the abovementioned observations, it is respectfully submitted that if -

6.19.1 the applicant does not seek to invalidate the registration that has already occurred; or

6.19.2 does not seek further registration by persons with other forms of identity documents,

then the applicant's request for a legislative correction in terms of which the legislated "identity document" is to include "other identity documents" would yield relief which constitutes a *brutum fulmen* in the circumstances.

6.20 On this score, it is furthermore respectfully submitted that

¹ *JT Publishing v Minister of Safety & Security* 1997 (3) SA 514 (CC).

this Court cannot properly direct the second respondent to re-open the voters' roll without first providing that body an opportunity of being heard thereon.

Full argument in respect of the abovementioned answers will be presented at the hearing of this appeal.

B: THE UNDERLYING LAW AND LEGAL PRINCIPLES

LEGISLATION

7 All persons who fit the description set out in paragraphs 8 and 9 below may in law obtain a green bar-coded identity document.

8 Section 4 of the Identification Act No. 72 of 1986 provides that there shall be included in the population register:

(a) All persons who are lawfully permanently resident in the Republic;
and

(b) All persons domiciled in the Republic and performing functions

outside the Republic as envisaged in section 4 including their spouses and children residing with them.

9 There are further requirements. The above-mentioned category of persons must -

9.1 be above the age of 16 years;

9.2 apply in the prescribed form and manner;

9.3 have their finger prints taken in the prescribed manner so that they may be included in the population register; and

9.4 the application must be accompanied by two photographs.

10 The constitutional constraints on the power of Parliament to prescribe an electoral system is that it must be one that -

(a) is prescribed by national legislation;

² Section 8 read with sections 10 & 11 of the Identification Act, No 72 of 1986.

- (b) is based on the national common voters' roll;
- (c) provides for a minimum voting age of 18 years; and
- (d) results, in general, in proportional representation.

11 In terms of s 19(3) of the Constitution every adult citizen has the right to vote.

12 The concept "*adult citizen*" is inevitably controlled by s 46(1)(c) of the Constitution which states that the electoral system has to provide for a minimum voting age of 18 years. Consequently, an adult citizen is a person of 18 years and older.

13 It is furthermore respectfully submitted that Parliament was either enjoined by the Constitution or has the competence to -

13.1 prescribe registration as a voter as a condition precedent to

³ Section 46(1) of the Constitution.

voting;

13.2 define which instrument or instruments will be valid for the purpose of registration as a voter and for the purpose of voting;

13.3 pass an Electoral Act that provides for a voters' roll;

13.4 pass an Electoral Law providing for one person to vote in only one district;

13.5 pass legislation that a voter can only vote once;

13.6 pass legislation authorising the process of an election whose outcome is free and fair.

⁴ *Scott v Attorney-General British Columbia*; Section 38(2) of the Electoral Act.

⁵ Section 6(1) and 38(2) of the Electoral Act.

⁶ Section 46(1)(b) of the Constitution.

⁷ Sections 6(1) and 38(2) of the Electoral Act.

⁸ Sections 38(1) of the Electoral Act.

⁹ Sections 5(1)(b) of the Electoral Commission Act.

INTERPRETATION

- 14 It may be appropriate to pause to examine the rules of construction applicable to the Constitution. Certain principles of constitutional interpretation are embodied in s 39 of the Constitution.
- 15 The Constitutional Court has adopted certain principles of constitutional interpretation for its guidance. It has become well established now that when interpreting the provisions of a constitution a generous, broad, liberal and purposive interpretation avoiding "the austerity of tabulated legalism" is to be adopted.
- 16 It may be helpful to discuss the definition of "*identity document*" in relation to the relevant legislation:

¹⁰ *The Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (Nm) at 362A-F (Full Bench); *S v Zuma and others* 1995 (2) SA 642 (CC) at para 15 and at pp 658-651B and 651E-H; *S v Makwanyane and another* 1995 (3) SA 391 (CC) at para 9 and at 403E-H; *S v Mhlungu and others* 1995 (3) SA 867 (CC) at para 8.

- 16.1 In terms of s 8 of the Identification Act, No 72 of 1986 ("the 1986 ID Act"), the Director-General shall issue an identity document in certain circumstances.
- 16.2 In terms of s 9 of the 1986 ID Act, a TIC is an identity document.
- 16.3 In terms of s 15 of the Identification Act, 68 of 1997 ("the 1997 ID Act"), application may be made for an identity card.
- 16.4 In terms of s 16 of the 1997 ID Act, a TIC is an identity card.
- 16.5 In terms of s 1 of the 1997 ID Act, an identity card is an identity document.
- 16.6 In terms of s 1(xii) of the Electoral Act an identity document means an identity document issued after 1 July 1986, or a TIC issued in terms of the 1997 ID Act.
- 16.7 It follows, therefore, that an identity document is equal to the following documents: an identity document in terms of

the 1986 ID Act; a TIC in terms of the 1986 ID Act; an identity card in terms of the 1997 ID Act; a TIC in terms of the 1997 ID Act and a TRC.

- 16.8 The TRC and TIC are not bar-coded. The lack of a bar-code in each of these documents does not remove the security features of these documents for the reason that the identity number in each of them is still correlated to the fingerprint classification of the owner of such document.

POLICY CHOICES

- 17 The following principles regarding the policy choices that are to be made by legislatures have been evolved through judgments both foreign and local.

- 17.1 The decision to hold, for instance, a referendum or not is a policy decision to be left entirely to governments and to legislatures. The following three propositions are also discussed in *Haig v Canada*.

¹¹ *Haig v Canada* 105 D.L.R. (4th) 577 at 612, 614, 616.

- 17.2 Courts are to be mindful of the legislator's representative functions.
- 17.3 In establishing whether policy or conduct by government is reasonable or not, the court is to look to realities and not to mere technicalities or formalities.
- 17.4 Anyone seeking to enforce a constitutional right must demonstrate reasonable compliance with the requirements of the statute.
- 17.5 It is within Parliament's plenary powers to prescribe a method of voting so long as the method allows for a free choice.

¹² *Irwin Toy Ltd v Quebec (Attorney-General)* (1989) 39 CRR 193 at 248].

¹³ *Cawley v Branchflower* (1884) 1 BCR (Pt.II) 35 (S.C.) at 37.

¹⁴ *Re Lincoln Election* (1876) 2 O.A.R. 316.

¹⁵ *Langer v Commonwealth of Australia and others* [1996] Vol 3 CLR at 317.

17.6 The right to vote is subject to reasonable restrictions such as age, mental capacity, residence and **registration**.

17.7 Courts will not strike down legislation so long as the administrative procedures do not constitute a practical denial of the right.

17.8 Courts are to be slow to interfere with rational decisions taken in good faith by the political organs whose responsibility it is to deal with such matters.

17.9 Decisions sometimes involve difficult choices which are best taken at political or functional levels.

17.10 Courts are to grant governments leeway where policy choices are

¹⁶ *Scott v Attorney-General British Columbia* 29 D.L.R. (4th) at 548.

¹⁷ *Scott (supra)*.

¹⁸ *Soobramoney v The Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

¹⁹ *Soobramoney (supra)*.

to be made.

17.11 The legislature is better placed than courts to balance possible policy inequalities under the law against other inequalities.

17.12 Courts should not lightly use the Bill of Rights to second-guess the legislative judgment.

17.13 Where the legislative choice is less than perfect, the court will not for that reason strike the legislation down simply because it (the court) can consider or devise a more perfect formula.

17.14 The role of the court is not to second-guess the wisdom of policy choices made by legislators.

²⁰ *Egan v Canada* (1995) 29 CRR (2d) 79 at 82.

²¹ *McKinney v University of Guelph* [1990] 3 S.C.R. 229; *Soobramoney (supra)* paras 29 & 31

²² *Egan v Canada (supra)*.

²³ *Egan v Canada (supra)*.

²⁴ *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*; *S v Makwanyane (supra)*.

17.15 Where choices have to be made between "differing reasonable policy options" the court will allow the government the deference due to legislators.

C: THE ISSUES

18 The applicant launched a factual challenge to the constitutionality of certain provisions of the Electoral Act. These factual challenges are set out in paragraphs 5.1 to 5.4 above.

19 It is respectfully submitted that -

19.1 the applicant has failed to establish the facts upon which its case is based; and

19.2 the court *a quo's* conclusion that this is so cannot be faulted. This conclusion is also set out below.

²⁵ *R v Chaulk* (1991) 1 CRR (2d) 1; *S v Makwanyane* (*supra*); *R v Oakes* [cited in *Fundamental Rights in the Constitution*] at 681.

D: GENERAL SUBMISSIONS

20 There are other grounds which effectively answer the applicant's constitutional complaint against the impugned provisions of the Electoral Act:

20.1 It is a criminal offence under the Electoral Act to induce a citizen to exercise or not to exercise his or her own right.

20.2 Once a citizen has made the election to exercise a right to vote, then the statutory requirements such as registration, the obtaining of a green bar-coded identity document, the age, *etc* are to be complied with.

20.3 The requirements such as age, residence and registration are reasonable requirements to ensure free and fair elections.

20.4 The right to vote is not an event but a process which comprises a number of requirements, including age,

residence and registration.

20.5 There is political consensus across the spectrum that the green bar-coded identity document offers a sound vehicle to reduce the incidence of fraud.

20.6 Adult citizens who are otherwise eligible to vote and who possess the green bar-coded identity document **but do not register** will not be entitled to vote.

20.7 The requirement for registration serves the constitutionally important goal of ensuring that the **adult** right to vote is fairly balanced against **every citizen's** right to a free and fair election.

21 DOCUMENTS - RE RIGHT TO VOTE

The legislative scheme for voting is as follows.

Category A:

- 21.1 Persons **who possess a green bar-coded identity document** require to produce this document for purposes of registration.

Category B:

Persons who are **without a green bar-coded identity document** and who wish to exercise their right to vote can -

- 21.2 obtain a temporary registration certificate which, on the face of it, would bear an identity number;
- 21.3 at the issue of a temporary registration certificate, the Department would receive from such a person an application for a green bar-coded identity document;
- 21.4 should the green bar-coded identity document not be available to the person who has registered through a temporary registration certificate, such person may be issued with a temporary identification certificate for the purpose of voting;

21.5 the Department requires 24 hours to issue a temporary registration certificate where, the details of the person are already on the population register.

Category C:

If a person **has no identity document** -

21.6 and such person's particulars are on the population register, then that person may be provided with a TRC;

21.7 and if such person's particulars are not on the population register, then that person would be required to complete an application form, providing his or her particulars, his or her finger-prints and photographs, whereupon such person's particulars are captured on computer and he or she is provisionally placed on the population register and provided with a TRC. This person then falls into a category equivalent to Category A above.

E: RESPONSE TO APPLICANT'S CONTENTIONS

22 22.1 Insofar as the applicant contends that between 4.7 and 5.3 million citizens are without a green bar-coded identity document, the first respondent submits that this is due to the own conduct of each and every one of these persons in not applying for one.

22.2 The applicant has not shown on the papers that any of the persons mentioned has applied for a green bar-coded identity document and was refused the document by any government official.

22.3 Insofar as the applicant seeks to suggest that the requirement of a green bar-coded identity document discriminates unfairly against rural persons as against urban persons, the first respondent submits that there is no evidence that the language of the Electoral Act makes this distinction.

- 22.4 Insofar as the applicant seeks to suggest that the requirement of a green bar-coded identity document discriminates against persons between the age of 17 and 21, the first respondent submits that there is no evidence that the language of the Electoral Act makes this distinction.
- 22.5 It is observed that the category of persons who are between the age of 17 and 21 cannot, in any event, obtain an identity document other than the green bar-coded identity document issued under the 1986 Act.
- 22.6 Insofar as the applicant seeks to suggest that the requirement of a green bar-coded identity document discriminates unfairly against persons of a particular conscience, belief or political persuasion, first respondent submits that there is no evidence in the language of the Electoral Act that this category of persons is excluded from obtaining green bar-coded identity documents.
- 22.7 Insofar as the applicant seeks to suggest that the requirement of a green bar-coded identity document unfairly discriminates against persons of a particular social origin or

supporters of minority parties, the first respondent submits that the language of the Electoral Act does not make such a distinction.

22.8 If it is contended that the impact of the legislation is to have this discriminatory effect, it is submitted that -

22.8.1 the persons "excluded" can escape the constraint by applying for a green bar-coded identity document;

22.8.2 there are persons of the "race, rural, age, particular political belief or persuasion or particular social origin or supportive of minority parties" who are already in possession of the green bar-coded identity document.

22.9 The argument that certain categories of persons would expend more effort to obtain the document, and the argument that an inconvenience amounts to an infringement or a threat to infringe a constitutional right are both, it is respectfully submitted, untenable.

F: ADMINISTRATIVE CAPACITY

23 Insofar as the applicant seeks to suggest that the first respondent needs to demonstrate its capacity to produce between 4.7 and 5.3 million identity documents before the 1999 elections, first respondent submits -

23.1 that the first respondent does not have such an onus;

23.2 that the duty in law on the first respondent is to issue identity documents to only those who have applied for them;

23.3 that there is no basis to expect that 4.7 to 5.3 million people will apply for the identity document;

23.4 that even if 4.7 to 5.3 million people were to apply for identity documents, it is not demonstrated that any of them would wish to register as a voter;

23.5 that there is no explanation offered as to why any one of the

alleged 4.7 to 5.3 million people have not used temporary registration certificates to register;

23.6 that until such time the voters' roll is closed, it cannot be argued in law that any person who is otherwise eligible to vote and who obtains registration either by virtue of a green bar-coded identity document or a temporary registration certificate would be disenfranchised. On this score the application is premature.

G: THE EQUALITY CLAUSE

24 24.1 It is clear from paragraph 4 of the founding affidavit that the applicant's challenge to the Electoral Act is also premised on the right to equality as enshrined in the Constitution. It is respectfully submitted that this challenge falls to the ground for the reason that a bald allegation of unequal treatment devoid of any factual basis therefor cannot avail the Applicant.

24.2 It is furthermore respectfully submitted that the analysis below also demonstrates that the impugned provisions are able to pass constitutional muster when tested against the

requirements of the Constitution.

24.3 The first enquiry is whether the legislation sought to be impugned evinces any discrimination or differentiation. In the present case there is no reference to any of the types of discrimination or differentiation contemplated in s 9 to be found in the legislation under attack. We submit that the argument then must fall to the ground at the starting block.

24.4 Following its decisions in *President of the RSA v Hugo* and *Prinsloo v Van der Linde*, in *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) the Constitutional Court through Goldstone J [at 324H-325E] formulated the stages of enquiry in a case involving the fundamental right to equality. The stages of this enquiry have been referred to by the Full Court. They need not be repeated for present purposes.

It is, however, respectfully submitted that even when tested on the basis of the two-stage enquiry analysis, the

²⁶ 1997 (4) SA 1 CC; *eg* 22G-23A.

²⁷ 1997 (3) SA 1012 CC.

legislation under attack passes constitutional muster.

24.5 It is respectfully submitted that the court *a quo* correctly interpreted the meaning and object of the equality clause.

24.6 The conclusion of the court *a quo* is also supported by numerous judgments of this Court.

H: THE LIMITATION CLAUSE - SECTION 36

25 25.1 It is respectfully submitted that none of the rights protected in the constitution is absolute. All those rights are subject to limitation provided there is compliance with section 36 of the Constitution.

25.2 On this score it is respectfully submitted that the

²⁸ Judgment p 55, 3rd para, cited below at FN49.

²⁹ *Brink v Kitshoff NO* 1996 (6) *BCLR* 752 (CC); *Fraser v The Children's Court, Pretoria North* 1997 (2) SA 261 (CC) at 272A and *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at 1024F-H and 1026C-F.

observations by Ackermann J in *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC) at 822 D are worthy of note.

25.3 It ought to be appreciated that a complaint for unconstitutionality may be the following:

25.3.1 That a law or conduct infringes or threatens to infringe a fundamental right; or

25.3.2 that a law constitutes a limitation of a fundamental right.

The example cited in para 25.3.1 above (as *in casu*) the "infringement" or "threat to infringe" derives out of a capacity of the Department to produce the requisite document. Therefore, if applicant is unable to prove lack of capacity or the Department demonstrates the capacity, the complaint falls.

In the example cited in paragraph 35.3.2 above, the

limitation of a fundamental right (if established by the applicant) can still stand provided the requirements of s 36 are met.

25.4 It is submitted that the applicant's case fails for want of satisfying the example set out in paragraph 25.3.1, that is has failed to prove an infringement or a threat to infringe (capacity).

25.5 In contrast to the above submission, the case does not present an instance where the fundamental rights of all persons (law of general application) are limited and where the law stands to be struck down unless justified under s 36.

25.6 It is tenuous to argue that the requirement of an identity document constitutes a limitation of a right where most persons who have the document do not have their voting right limited thereby, or those whose rights are limited, so to speak, can apply for the document and escape the limitation.

This demonstrates that applicant is incorrect to categorise the requirement of a green bar-coded identity document as a limitation of a constitutional right to vote.

It is only in the alternative and only in the event the above Honourable Court finds that the requirement of a green bar-coded identity document is a limitation that the first respondent agrees that the findings of the court *a quo* are correct regarding s 36 justification.

I: APPROACH OF THE COURT OF APPEAL

26 26.1 The applicant cannot succeed unless it is able to show a misdirection by the court *a quo*.

26.2 The principles which should guide a court of appeal in regard to matters of fact were laid down by the Appellate Division in the leading case of *R v Dhlumayo*. Only the relevant principles are addressed below with reference to

³⁰ 1948 (2) SA 677 (A).

this matter.

- 26.3 The principles are, in the main, matters of common sense and are flexible and are not to hamper the court of appeal in doing justice in the case before it.
- 26.4 It is respectfully submitted in a matter of this nature the court of appeal may be in as good a position as the court of first instance to assess the issues of fact as they are on the pleadings.
- 26.5 Where there has been no misdirection on fact by the Full Court, the presumption is that its conclusion is correct. The court of appeal will only reverse it where it is convinced that it is wrong.
- 26.6 In such a case, if a court of appeal is merely left in doubt as to the correctness of the conclusion, it will uphold the decision.
- 26.7 A court of appeal should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. It

does not follow that because something has not been mentioned it has not been considered.

26.8 Where the court of appeal is constrained to decide the case purely on the record, the question of onus is all-important.

26.9 In order to succeed, the appellant has to satisfy a court of appeal that there has been "*some miscarriage of justice or violation of some principle of law or procedure*".

26.10 It is respectfully submitted that tested against these principles there exists no cogent reason for any interference with the judgment of the Full Court.

26.11 The court of appeal that does not properly apply the guidelines set out in *Dhlumayo's* case would not be committing an error of law. It would, at most, be guilty of dealing with the appeal on facts in an unsatisfactory manner.

³¹ Herbstein & Van Winsen "*The Civil Practice of the Supreme Court of South Africa*" (4 ed) Juta and Co Ltd, 1997 pp 916-918.

Attorney-General, Transvaal v Kader 1991 (4) SA 727 (A) at 740B-C.

J: FINDINGS OF THE COURT A QUO

27 For convenience the relevant findings of fact and conclusions of law of the court *a quo* are set out below uncluttered by commentary. At the hearing, submissions will be made with these findings as a back-drop to such submissions.

Findings of fact:

27.1 "In this case it hardly needs to be argued that, on the assumption that the requirement to register in order to be included in a common national voters' roll, and to prove one's identity before he is allowed to vote, is to be regarded as a limitation of the right to vote, such limitation is indeed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

27.2 "Therefore, in its preliminary planning, the IEC considered requiring a green bar-coded identity document or an earlier South African identity document which could be correlated with the national population register as a qualifying

³² Judgment p 29, 2nd para.

requirement for the registration of voters. Because this would entail a perpetuation of discrimination against former "*citizens*" of the TBVC states, it was decided by the IEC to use the identity document issued to persons of all races after 1 July 1986, under the Identification Act of 1986, namely the green bar-coded identity document."

27.3 "The HSRC was not requested to investigate the extent to which the first respondent will be able to issue the required documents in time before the election."

27.4 "The report also found that of all those individuals who do possess a valid South African identity document, 86.2% had a green bar-coded identity document."

27.5 "The vast majority of South Africans with identity documents therefore had green bar-coded identity documents."

³³ Judgment p 32, 1st para.

³⁴ Judgment p 38, 2nd para.

³⁵ Judgment p 38, 3rd para.

³⁶ Judgment p 39, 2nd para.

27.6 "Therefore, in so far as the purpose of the limitation is related to the ideal of free and fair elections, the purpose is as important as the right. There is no evidence before this Court that the requirement in the challenged provisions has any other purpose, especially a purpose that would be unconstitutional, such as disenfranchisement of or discrimination against some voters."

27.7 "Can the first respondent's contention that it all along had the capacity to issue the required documents in time be gainsaid? We think not."

27.8 "Simple arithmetic shows that the unprocessed applications can easily be processed well before the election date."

27.9 "In our view, the fact that exceptions are being allowed, on a controlled basis, to enable more people to vote, does not necessarily detract from the merits of the main requirement,

³⁷ Judgment p 40, 2nd para.

³⁸ Judgment p 41, 4th para.

³⁹ Judgment p 42, 4th para.

namely the green bar-coded identity document."

27.10 "The Court is not called on to second-guess or interfere with policy decisions made by the Government of the day. ... The legislature is to make this choice. Of course, if the negative consequences on the one side far outweigh the other, to such a degree that the purpose of the decision becomes questionable, a court may have to interfere, (because) the legislation may be unconstitutional because of its purpose. This is not the case here, though.

27.11 Therefore it is reasonable for the legislature to choose one form of identification as far as the elections are concerned. Following from this, it is perfectly reasonable to opt for a document which the vast majority (approximately 86.2%) seem to have ... there is clearly a relation between the limitation and its purpose. ... As already pointed out, on the factual evidence available to this Court, it would appear that the Department does in fact have the capacity to furnish all adult citizens who are not in possession of the required

⁴⁰ Judgment p 44, 1st para.

⁴¹ Judgment p 45, 1st para.

identity document would those documents, in time to participate in the election, or at least to furnish such documents to all those who apply for them."

27.12 "The point is that no person, or category of persons, has been excluded from acquiring green bar-coded identity documents, either directly or indirectly, by or because of the challenged statutory provisions."

27.13 "No insurmountable or unduly harsh obstacles seem to be in the way of certain categories or classes of people, more or less so than with regard to others, especially with reference to the grounds mentioned in s 9(3). Therefore, a challenged statutory provision cannot be found to discriminate unfairly, directly or indirectly, within the meaning of s 9(3). It is not necessary to proceed to the provisions of the limitation clause, with regard to the discrimination argument."

Conclusions of law:

⁴² Judgment p 47, 1st para.

⁴³ Judgment p 55, 3rd para.

27.14 " Evidence of confusion, incompetence of laxity amongst government officials, or for that matter the general public and specifically potential voters, does not necessarily render the relevant clauses of the Electoral Act unconstitutional."

27.15 "The right to free and fair elections would of course be violated if persons who are not bearers of the right to vote, are in fact permitted to vote, or if voters are permitted to vote more than once."

27.16 "... it is our view that the requirement of adulthood and citizenship are to be regarded as part of the description of the right to vote, or the scope of this right."

27.17 "... that additional statutory requirements regarding registration and proof of identity are to be dealt with as limitations of the right to vote, at least notionally."

⁴⁴ Judgment p 21, 1st para.

⁴⁵ Judgment p 22, 2nd para.

⁴⁶ Judgment p 22, 3rd para.

⁴⁷ Judgment p 22, 3rd para.

27.18 "Firstly, an applicant is required to demonstrate that their ability to exercise a right has been infringed; in other words, that the law in question actually impedes or limits the exercise of the protected right, in this case the right to vote and the right to free and fair elections."

27.19 "As far as **the nature of the right** is concerned, it speaks for itself that "the right to vote is an important and fundamental first generation or civil and political right, ..."

27.20 "The purpose of the limitation is to ensure or at least to enhance free and fair elections."

27.21 "If an eligible voter exercises his right not to vote by failing to apply for the necessary documentation, an applicant cannot be heard to say that he or she, and possibly thousands like him or her, were disenfranchised by the provisions of the

⁴⁸ Judgment p 27, 3rd para.

⁴⁹ Judgment p 30, 2nd para.

⁵⁰ Judgment p 31, 2nd para.

Electoral Act."

27.22 "The question is not whether a green bar-coded identity document will definitely achieve an absolutely free and fair election, and neither is the question whether this document is the only document that will achieve this purpose or, for that matter, whether it will clearly achieve it better or to a larger degree than any other document. The question, as far as we are concerned, is whether this requirement will, generally, and reasonably, contribute substantially to the achievement of the purpose, namely free and fair elections."

27.23 " ... a lack of interest, apathy or unwillingness to undergo a reasonable measure of inconvenience to obtain the document, could not affect the constitutionality of the relevant statutory requirements. Even if the requirement of a green bar-coded identity document is not the way to

⁵¹ Judgment p 43, 3rd para.

achieve the purpose of a free and fair election, and less restrictive measures may perhaps be available to achieve the purpose to a similar degree, the requirement is not rendered unconstitutional in terms of s 36."

27.24 "The learned Judge proceeds to state that what the equality clause (of the Interim Constitution) seeks to prevent is the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history."

27.25 "It is therefore doubtful whether residence, at this point, warrants recognition as a forbidden ground of discrimination, in this situation. There is also no compelling reason, at this stage, to recognize political affiliation, in addition to the grounds already mentioned in s 9(3)."

⁵² Judgment p 48, 1st para.

⁵³ Judgment p 55, 3rd para.

⁵⁴ Judgment p 57, 1st para.

27.26 "It is therefore doubtful whether residence, at this point, warrants recognition as a forbidden ground of discrimination, in this situation. There is also no compelling reason, at this stage, to recognize political affiliation, in addition to the grounds already mentioned in s 9(3)."

It is respectfully submitted that the applicant has not shown any misdirection by the court a quo to warrant interference by a court of appeal.

K: LEAVE TO APPEAL

28 It is respectfully submitted that the criteria to be weighed up in deciding whether special leave to appeal should be granted or not should apply in the applicant's application for leave to appeal to this Court together with the criteria set out in rule 18(e) of the Constitutional Court rules. These

⁵⁵ Judgment p 58, para.

⁵⁶ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A).

criteria are:

28.1 the existence of a reasonable prospect of success on appeal;

" There is a reasonable prospect that the Constitutional Court will reverse or materially alter the decision given by the Full Court concerned if permission to bring the appeal is given."

28.2 There is indeed a constitutional issue to be decided. That the constitutional issue is one of substance on which a ruling of the Constitutional Court is desirable. This is akin to the requirement that something additional to a reasonable prospect of success on appeal has to be shown by the applicant for special leave to appeal. The following have been found to constitute special circumstances:

(a) Where the appeal raises a substantial point of law.

⁵⁷ *Van Heerden v Crownwright & others* 1985 (2) SA 342 (T) at 343C-D.

⁵⁸ Rule 18(e) of the Constitutional Court Rules.

⁵⁹ Rule 18(e) of the Constitutional Court Rules.

(b) Where the matter, though depending mainly on factual issues, is of very great importance to the parties, or of great public importance.

(c) Where the matter turns mainly on factual issues and lacks the qualities referred to in (a) and (b) above but the prospects of success are so strong that the refusal of leave to appeal will probably result in a manifest denial of justice.

28.3 It is respectfully submitted that it is in the public interest that there should be no delay in the constitutional imperative of regular, free and fair elections. Any leave to appeal granted to the applicant may jeopardise that constitutional imperative.

28.4 It is submitted that the applicant has failed to show any misdirection, on the findings of fact and law by the court *a quo*, to warrant the interference by a court of appeal.

28.5 It is submitted that the applicant has not shown factual averments which render it undesirable that a costs order

should not be made against it in the event it is unsuccessful.

28.6 The applicant has not shown factual circumstances which make it undesirable that costs be ordered against it in the event of the appeal not succeeding.

/ ...

It is submitted that the application for leave to appeal ought to be dismissed, and if leave is granted, the appeal be dismissed with costs, such costs to include costs consequent upon the engagement of two counsel.

I A M SEMENYA SC

MICHAEL NAIDOO

First Respondent's Counsel

**CHAMBERS
JOHANNESBURG**
25 March 1999