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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 33712/98
DATE: .....

IN THE MATTER BETWEEN:

THE DEMOCRATIC PARTY	APPLICANT
AND	
THE MINISTER OF HOME AFFAIRS NO	FIRST RESPONDENT
THE ELECTORAL COMMISSION	SECOND RESPONDENT

JUDGMENT

NGOEPE, JP, VAN DER MERWE, J et VAN DER WESTHUIZEN, J

INTRODUCTION

In terms of the Notice of Motion dated 10 December 1998 the applicant seeks certain urgent relief as set out therein. The intended date of hearing was 19 January 1999. An answering affidavit was signed on 30 December 1998 and served and filed on 4 January 1999. On 21 January 1999, MYNHARDT, J postponed the application *sine die* and ordered the applicant to file a replying affidavit by no later than 16:00 on 28 January 1999. No order as to costs was made.

The replying affidavit was signed on 21 February 1999 and served and filed on 23 February. In the meantime, however, the honourable judge president was approached on 25 January 1999, apparently to constitute a full bench for the hearing of the application on 1, 2 and 3 February 1999. As a hearing on these dates was not possible, not even in the event of the parties agreeing that the matter be heard by a single judge, the honourable judge president directed that the matter be heard by a full bench on 3 March 1999.

In the meantime a related matter was heard in the Cape of Good Hope Provincial Division of the High Court of South Africa on 5, 8 and 9 February 1999 and judgment was delivered on 26 February 1999. That judgment is now to be considered on appeal by the Constitutional Court on 15 March 1999.

Argument in this matter was completed in the late afternoon of 5 March 1999. It is clear that, whatever the outcome of this matter, the parties intend approaching the Constitutional Court, and, if at all possible, also on 15 March.

The outcome of this, and the related matter, is of great national importance. It is our view that we cannot delay our judgment. We are acutely aware of the fact that the parties are entitled to a well considered and a well reasoned judgment. We are also acutely aware of the fact that, as this matter will also be placed before the Constitutional Court, we should give a detailed and reasoned judgment for that court to

consider. With regret we have to state that we unfortunately do not have sufficient time to do what we wanted to do. As we have come to a conclusion we believe is correct, we did the best we could under the circumstances.

At the outset the applicant sought a referral of certain identified issues for the hearing of oral evidence (as a matter of urgency) on a date to be determined by the court, being after 7 March 1999. The importance of the date 7 March 1999 being that, as presently advised, it is to be the last date for voter registration for the forthcoming elections on 2 June 1999. The earliest date for the hearing of such oral evidence (or consideration of further affidavits instead of such evidence) would have been some time during the week of 15 March, the date on which the hearing of the Constitutional Court is to take place.

The application for the referral was refused. We stated, however, that if, at the conclusion of the argument we were of the opinion that further evidence was needed, the application would be reconsidered. As we were satisfied that no further evidence or further affidavits was needed the application for referral was not reconsidered. During argument on the question of the referral for the hearing of oral evidence and in order to avoid such a referral, Mr Semenya, for the first respondent, indicated that for the purpose of resolving the matter on affidavits, he was prepared to accept the correctness of the contents of the Human Sciences Research Council's report (to which reference will be made later).

In terms of sections 1(a) and 46(1)(b) of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996) ("the constitution") a National Common Voters Roll is an imperative. For such a voters roll to serve its purpose, it should contain the names of all eligible voters in the country but only once.

The Independent Electoral Commission ("IEC") is responsible for the compilation of the voters roll. [See section 5(1)(d) of the Electoral Commission Act 51 of 1996.]

The honourable justice KRIEGLER, at the time the chair person of the IEC, filed an affidavit in this matter, referring therein to an affidavit he filed in the matter heard in the Cape of Good Hope Provincial Division of the High Court of South Africa, which was annexed to his affidavit as annexure "A". Although notice was given that application would be made by the first respondent to strike out certain allegations contained in the said annexure "A", the application was not proceeded with. In annexure "A", justice KRIEGLER deals with the means that should be adopted to ensure that all eligible voters' names appear once only on the voters roll, and the history of this matter, in the following way:

> 'To that end registration systems commonly require some reliable proof of enfranchisement such as a voter's card or national identity document.

Because of South Africa's chequered history and the balkanisation of many of its people, a number of different kinds of identity documents have come into existence over the years. Among them were identity documents issued to their "citizens" by the former TBVC countries. At the same time the South African government issued a variety of documents, including the "dompas" issued to Africans. From 1 July 1986, however, the South African government issued to all South Africans, irrespective of race, an identity document under the Identification Act, 1986. That document contains an identity number and a bar code, by means of which the holder can be directly linked to his or her entry on the National Population Register. So too can bearers of the "dompas" and of earlier South African documents. In the case of TBVC documents, however, no such correlation can be done.

'In its preliminary planning, therefore, the IEC considered requiring a barcoded identity document or an earlier South African identity document which could be so correlated with "the National Population Register as a qualifying requirement for the registration of voters. That, however, entailed a perpetuation of discrimination in that TBVC identity documents were mandatory for those South Africans who had earlier been consigned to "citizenship" of those territories. Consequently it was decided, in order to be non-discriminatory, to use the identity document issued to persons of all races after 1 July 1986 under the Identification Act, 1986.

During March, April and May 1998, however, the IEC received numerous reports of potential voters without barcoded identity documents. It also received representations signed by the leaders of the Democratic Party, the Freedom Front and the Inkatha Freedom Party protesting that the proposed insistence on the green barcoded identity document would disenfranchise many otherwise eligible voters. ... In view of the gravity of the reports and the protest, the IEC consulted the Department of Home Affairs, whose then Director-General had informed the ESC at the end of 1996 that an estimated 96% plus of the electorate was in possession of green barcoded identity documents and that his department was eliminating the backlog.

'In consultation with the Department of Home Affairs it was decided to engage the Human Sciences Research Council ("HSRC") as a matter of urgency to conduct a survey to establish the extent/demographic distribution of the shortfall. This was done because, firstly, the Director-General of Home Affairs could not ascertain an accurate estimate of the shortfall (giving an estimate of 10% of the electorate) and, secondly, the HSRC was perceived to be the most authoritative and reliable source of objective information of this kind. ...

The IEC and the Department of Home Affairs jointly

briefed the HSRC, jointly approved its methodology and jointly approved its basic questionnaire. When the two parts of the report were produced late in July and in the middle of August 1998 respectively, they were delivered to both the Department and the IEC. Without reference to the IEC and without notice to the HSRC, the Department subsequently challenged the reliability of the latter's research data and conclusions. It did so *inter alia* on the basis of estimated figures that had not been disclosed to either the IEC or the HSRC previously.

The IEC accepted the conclusions of the HSRC. It regarded these conclusions as the most reliable information available. The IEC, however, also decided that, even if 'the strictures on the HSRC report and conclusions expressed by the department of home affairs were of substance, prudence dictated abandonment of the barcoded identity document requirement. In this context I should explain that one of the significant conclusions of the HSRC report was that there were possibly millions of young first-time voters, especially in rural and under-developed areas, who did not have any kind of identity document. There was the ominous spectre of tens of thousands of black youths arriving at voting stations on election day and demanding to exercise their democratic right, but having to be turned away. This would be not only be a deprivation of their right to vote but would have grave implications for the safety, security and integrity of the process as a whole.

The IEC was not prepared to run those risks and accordingly recommended to Parliament that the requisite qualifying document should be all identity documents recognised under the (new) Identification Act, 1997. In short that meant any identity document issued by the South African government or by a TBVC country. The IEC accepted that the inclusion of TBVC identity documents among recognized qualifying documents meant that some aspirant voters would produce TBVC documents that could not be verified against the National Population Register. However, in the light of 'the HSRC report, the likely number of voters falling in that category would be trivial and their details could be verified by other means.

The IEC envisaged that the resources of the Department of Home Affairs be focussed on the problem area of the first time rural voters who had no identity documents at all. The IEC regarded it as unwise to diffuse the information campaign, resources and effort of the Department of Home Affairs by introducing a new category of persons who had to be supplied with identity documents in time for registration and voting. ...

In summary, the IEC's attitude was that, ideally, only barcoded identity documents should qualify. It became apparent to the IEC, however, that for the historical and practical reasons mentioned this ideal was probably

unattainable. Indeed, insistence on that document involved the risk of an unconstitutional impairment of the right of many to vote and could jeopardise the safety of the election process.

On the other hand, the Department of Home Affairs, the state agency most intimately involved in the issue of identity documents and the most reliable source on that score, had rejected the HSRC's findings, and the IEC was 'incapable of resolving the essential factual dispute between two ostensibly authoritative bodies. If the HSRC were correct, between 4,7 and 5,3 million eligible voters did not have the requisite qualifying documents as at the time of the survey. On the department's most sanguine estimate of its capacity to issue barcoded identity documents, namely 25 000 a day, some two hundred working days would have been required to meet the backlog. (However, over the months since the report the Department has consistently reported demand well below its production capacity.)

Lastly, in this context, I should draw attention to the fact that the HSRC report indicates a substantial degree of ignorance on the part of the general public regarding the need to obtain an identity document in order to qualify as a voter. The IEC regards this feature with disquiet but, as explained earlier, is financially unable to conduct voter education in order to inform the electorate, particularly first-time voters, of this fact. ...

The IEC, having received the report of the HSRC regarding the incidence and distribution of eligible voters not in possession of such documents, was of the view that the requirement should be relaxed. It made its view known to the Executive and to the Legislature. After debate, 'however, the legislature decided otherwise. The IEC thought that the legislature's decision was a mistake, and that the constitutionality thereof would be dependent upon whether the Department of Home Affairs could timeously provide sufficient numbers of voters with new identity documents (as the second respondent and others asserted it could). Accordingly, the IEC resolved to perform its duties in terms of the law as made by the Legislature. It has done so since. ...'

The manner in which "the legislature decided otherwise" (in the words of justice KRIEGLER) was by promulgating the Electoral Act, 73 of 1998 ("the Electoral Act").

In its Notice of Motion the applicant asks for *inter alia* the following relief:

'2. Declaring that section 6 of the Electoral Act, 73 of 1998 ("the Electoral Act") read with the definition of "identity document" in section 1(xii) and section 38(1),(2) and (3) read with the definition of "voter" in section 1(xxv) thereof ("the challenged

provisions") are inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 ("the constitution") and invalid to the extent that they require adult South African citizens to be in 'possession of green bar-coded identity documents as a pre-requisite to voting in the national elections of
1999.

3. Ordering the first respondent to pay the costs of this application.'

OVERVIEW OF THE APPLICANT'S ARGUMENTS AND THE FIRST RESPONDENT'S RESPONSE THERETO

The applicant's case was argued before this court by Mr C Loxton, SC, assisted by Mr D Spitz. The first respondent was represented by Mr I Semenya, SC, assisted by Mr Naidoo. The second respondent was not represented.

It is the applicant's case that the challenged statutory provisions (section 6 of the Electoral Act, 73 1998) ("the Electoral Act") read with the definition of "identity document" in section 1(xii) and section 38(1),(2) and (3) read with the definition of "voter" in section 1(xxv) of the same Act, infringe sections 19(2) and 19(3)(a), section 9 and section 16(1) of the Constitution, and that the infringement is not reasonable and justifiable in terms of section 36 of the Constitution, rendering the challenged provisions unconstitutional and thus invalid.

Sections 19(2) and 19(3)(a) of the Constitution read as follows:

"(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the constitution.

(3) Every adult citizen has the right -
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and ..."

Section 16(1) states that everyone has the right to freedom of expression, including
(a) freedom of the press and other media,
(b) freedom to receive or impart information or ideas,
(c) freedom of artistically creativity, and
(d) academic freedom and freedom of scientific research.

Section 9 protects the right to equality, and is dealt with in detail below.

Section 36 deals with the limitation of rights and is discussed below.

The applicant also relies on sections 1, 2, 3(2), 7 and 237 of the Constitution. Section 1 states that the Republic of South Africa is one, sovereign democratic state founded on certain values, which include [in 1(d)] universal adult suffrage, a national common voters roll, regular elections and a multi party system of democratic government, to ensure accountability, responsiveness and openness.

Section 2 is the supremacy clause, which is discussed below.

Section 3(2) provides that all citizens are
(a) equally entitled to their rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship.

In terms of section 7(2) the state "must respect, protect, promote and fulfil the rights in the Bill of Rights".

Section 237 requires that "all constitutional obligations must be performed diligently and without delay".

The applicant especially argued that constitutional rights must be generously interpreted, with reference to *S v Zuma* 1995 2 SA 642 (CC) at 6508 to 651I, *S v Makwanyane* 1995 3 SA 391 (CC) and *S v Williams* 1995 3 SA 632 (CC).

The summarized version of the first respondent's reply to the applicant's case includes the argument that Parliament is the institution authorised by the Constitution to pass national legislation and that the Electoral Act governing the right to vote is indeed the national legislation authorised by section 46(1) of the Constitution. The requirement to register as a voter, as a precondition to voting, falls within the plenary powers of Parliament. The condition precedent to voting is a policy matter which falls within the exclusive competence of Parliament.

The first respondent furthermore argues that the requirement of a green barcoded identity document or a temporary identification certificate for voting insures that each and every eligible voter votes only once, and that the requirement of a green barcoded identity document insures that the eligible voters' names do not appear more than once on the voter's roll. The requirement of a green barcoded identity document furthermore guarantees that the outcome of the election is free and fair. The first respondent submits that a right to vote is not peremptory and that it is a constitutional right to vote, but also not to vote. No one who, because of his or her own conduct, fails to register and/or to vote, can place a constitutional complaint at the door of government. According to the first respondent, the applicant has failed to produce a single individual who has been refused to register by reason of the fact that he or she does not possess a green barcoded identity document.

The first respondent submits that the Department of Home Affairs has the capacity to produce such required green barcoded identity documents as are applied for and that there is no factual basis furnished by the applicant for the allegation that between 4,7 and 5,3 million persons without green barcoded identity documents intend to vote in the national elections of 1999. The first respondent furthermore

submitted that there is no factual basis furnished by the applicant to suggest that that number of persons have applied or would apply for green barcoded identity documents and why any of the 4,7 to 5,3 million persons have not availed themselves of the facility to register through temporary registration certificates.

The first respondent argued that until the voter's roll is closed, it is premature for the applicant to suggest that any person has been disenfranchised by government conduct.

During oral argument Mr Semenya, on behalf of the first respondent, submitted that there is a distinction between the limitation of a right, and the statutory prescription of the way in which a right should be exercised. According to him, the second is not a limitation. Therefore there is no need for it's justification in terms of section 36. He argued that section 19(3) states that every adult citizen has the right to vote. Therefore citizenship and a certain age are requirements inherently connected to the nature and scope of the right as such. This implies that Parliament has the duty and the competence to prescribe how a person's citizenship and age are to be proved. Therefore the requirement of a certain kind of identity document is so inherently linked to the right as such, that it cannot be regarded as a limitation, but simply as a prescription as to how to exercise the right. This argument is dealt with again below.

The applicant furthermore submits that the challenged statutory provisions amount to indirect discrimination, because of its disparate impact on certain categories of persons, and that the equality clause (section 9 of the Constitution) is therefore violated.

To this the first respondent's response is that there is no reference to any of the types of discrimination or differentiation contemplated in section 9 of the Constitution to be found in the challenged statutory provisions and that this point therefore must fail at the starting block.

Different interpretations of the relevant clauses of the Electoral Act, read with the Identification Act 72 of 1986 and the Identification Act 68 of 1997, were also put forward by the applicant and the first respondent. The same applies to different interpretations regarding the statistical and other factual information at hand. These aspects are dealt with below.

THE SUPREMACY OF THE CONSTITUTION AND THE (UN)CONSTITUTIONALITY OF LEGISLATION

As stated above, the applicant seeks a declaration that section 6 of the Electoral Act, read with certain other clauses, is unconstitutional and therefore invalid.

The Constitution is indeed the supreme law of the Republic and law or conduct which is inconsistent with the Constitution is invalid. This is stated in section 2 of the

Constitution.

A division of the High Court may make an order concerning the constitutional validity of an act of Parliament (or of course of certain parts of such an act), but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. (See section 172(2)(a) of the Constitution.) The Constitutional Court makes a final decision whether an act of Parliament is constitutional or unconstitutional and must confirm any order of invalidity made by a division of the High Court from or before that order has any force. (See section 167(5) of the Constitution.)

In *The Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC); 1995 (10) BCLR 9289 (CC) para 62, *inter alia,* the Constitutional Court acknowledged and explained some of the legal implications of constitutionalism:

> "The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitation imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication."

Not only is legislative power subject to the Constitution, but all executive acts must comply with the provisions of the Constitution and valid enabling legislation. The executive must indeed uphold, defend and respect the Constitution as the supreme law of the Republic. (See section 83(b) of the Constitution. Also see De Waal, Currie and Erasmus *The Bill of Rights Handbook* 1998 p 8.)

Legislation may be inconsistent with the Constitution and therefore invalid because of its meaning, purpose, or effect. The meaning of the challenged statutory provisions may be clear on the face of it, or may be determined by applying the ordinary rules of statutory interpretation. For example, a clause in the Electoral Act which requires citizens to be 25-years old to vote, would clearly be in conflict with the Constitution and therefore unconstitutional and invalid. But, legislation may also be invalidated by its unconstitutional purpose or effect. Therefore the purpose and effect of the challenged provisions have to be determined. The actual consequences of the legislation have to be taken into account. The impact produced by the operation and application of the legislation is relevant. (See eg. *R v Big M Drug Mart Ltd* (1985) 18 DLR [4th 321, (1985) 1 SCR 295], in Canada. Also see the discussion by *Trengove* in chapter 26 of Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman *Constitutional Law of South Africa* 1996, revision service 1998, on p 26-5, and the authority referred to.)

In order to determine the purpose and effect of an allegedly unconstitutional law, one may have to go beyond the conventional rules of statutory interpretation. Evidence

regarding the manner and effect of the application of the law could be relevant and therefore admissible. However, great caution is also called for with regard to the meaning, relevance and weight of contextual evidence. There must be a clear link between such evidence and the alleged unconstitutionality of the challenged statutory provisions.

This inquiry is one into the constitutional validity of the relevant clauses of the Electoral Act. It is not an inquiry into, and this court is therefore not called upon to make a finding on, the efficiency or competence of any government department, or the Independent Electoral Commission, or another institution, save in so far as this is directly related to the constitutionality or otherwise of the relevant statutory provisions, in view of their purpose and effect. A lack of capacity on the part of the relevant government departments may render the statutory provisions unconstitutional, but would not necessarily do so. This aspect is again dealt with below. This inquiry is also not one into the prudence of policy decisions by the Government, or the question whether the upcoming 1999 elections can be expected to be fair, free and otherwise successful or unsuccessful, because of the conduct of the IEC, the level of democratic awareness in South Africa, the success or otherwise of voter education and publicity campaigns, the enthusiasm or apathy of South African voters, or various other factors. All of these are relevant only in so far as the meaning thereof for the inquiry into the possibly unconstitutional purpose or effect of the challenged provisions is concerned. Evidence of confusion, incompetence or 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.

Lastly, section 39(2) of the Constitution has to be kept in mind. When interpreting any legislation, the court must promote spirit, purport and objects of the Bill of Rights.

LIMITATION OF THE RIGHT TO VOTE AND THE RIGHT TO FREE AND FAIR ELECTIONS

At the core of this application is the right of every adult citizen to vote in elections, and to do so in secret. [Section 19(3)(a).] Closely related to this right, is indeed the right of every citizen to free, fair and regular elections. [Section 19(3).] The heading of section 19 is "Political rights". The applicant is probably correct in arguing that if adult citizens are denied the right to vote, everyone could be denied the right to fair and free elections, including those who have the right to vote, and non-citizens. The right to free and fair elections would of course also 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.

In view of the constitutional jurisprudence thus far established in South Africa, as well as in comparable jurisdictions with similar provisions or concepts regarding

the limitation of rights, 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 of the scope of this right, and 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. As stated above, Mr Semenya argued on behalf of the first respondent that the requirements of adulthood and citizenship necessarily imply that these have to be proved, and that statutory prescriptions regarding this proof amount to mere regulation of the exercise of the right to vote, and not to a limitation of the right. However, different options are open to the legislature regarding such proof. What the legislature may require in this regard could range from something which is very easy to comply with, to much more stringent measures. All of these could not be left simply to the discretion of the legislature and thus be beyond constitutional scrutiny.

It was also argued on behalf of the first respondent that section 46(1) of the constitution requires an electoral system that

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

Therefore prescriptions in national legislation regarding the requirement of registration, for example, ought not to be viewed as a limitation of the right to vote, it was argued.

It is, of course, correct that not only the Bill of Rights (chapter 2), but the entire Constitution is the supreme law of the land and that clauses in other chapters of the Constitution cannot be subjected to the limitation clause of the Bill of Rights. Again, however, scope is left for the legislature to make various prescriptions to meet the requirements in section 46 and elsewhere in the Constitution, in national legislation. Such legislation has to conform with, and can be tested against, all relevant clauses of the Constitution, and in so far as the notion of limitation of rights may be involved, also of course section 36.

With regard to the submission that statutory regulation of the exercise of the right to vote, rather than a limitation of the right, is at stake here, a brief moment of attention could be spared for the contents of section 22. In terms of this clause, every citizen has the right to choose their trade, occupation or profession freely. It is then stated in the second sentence of this clause that the practice of a trade, occupation, or profession may be regulated by the law. The question wether the regulation by law of the practice of a trade, occupation or profession may be beyond constitutional scrutiny as far as the limitation clause is concerned, in view of the fact that this phrase is expressly included in the wording of section 22, is not directly relevant here. (Regulation by law of the *practice* of a trade, occupation or profession may of course impact on rights other than the right to freely choose a trade, occupation or profession, for example the right to freedom of movement and residence. It

is certainly arguable that such regulation would still have to meet the conditions of section 36.) But no such wording appears in the clauses dealing with other rights, and in particular the rights to vote, and to free and fair elections.

If it is then accepted that all statutory prescriptions regarding the time and place where one can vote, voter-registration, identification and other security related issues are to be dealt with as limitations of the right to vote, at least in principle, the contents of section 36 are indeed relevant.

Section 36 states as follows:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
"(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Within the confines of this judgment a detailed analysis of the concept of limitation and the contents of section 36 is not possible. It is trite that rights are not absolute. They can be limited by law. Historical and comparative studies indicate that there may be different ways to deal with the limitation of rights as far as written constitutions are concerned. These include -

(a) to have no written provisions regarding the limitation of rights and to leave the interpretation and limitation of rights to the courts;

(b) to have specific limitations included in the written formulation and description of rights,

(c) to have a general limitation clause; and

(d) a mixture of more than one of the above.

In South Africa the drafters of the interim Constitution of 1993, as well as of the final Constitution of 1996, opted for a general limitation clause, but also decided to include a number of specific limitations, or internal modifiers (which could sometimes also be viewed as descriptions of the scope of the right). The limitation clause of the interim Constitution, section 33, resembled article 1 of the Canadian Charter of Rights and Freedoms, and also included a phrase regarding the essential content of the right, which resembled

aspects of the Constitution of the Federal Republic of Germany. Section 33 also set different standards for the limitation of different categories of specific rights;

The limitation clause of the final constitution, section 36, is somewhat simpler, at least on the face of it, and incorporates aspects of the jurisprudence of the Constitutional Court regarding the interpretation of section 33 of the interim Constitution. The bifurcated approach to standards set for limitation was abandoned, as also the phrase referring to the essential content of the right. The requirement of the necessity of the limitation, of section 33, was omitted from section 36. The test revolves around reasonableness and justifiability.

Conventional wisdom has it that a two stage enquiry has to take place. 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. The law could either expressly, or effectively, impede the exercise of the right. At the so called second stage the party seeking to uphold the restriction is required to demonstrate that the infringement, impediment, or limitation, is reasonable and justifiable. This approach has been recognised and followed by the Constitutional Court. [See, eg, *S v Zuma and Others* 1995 2 SA 642 (CC); 1995 (1) SACR 658 (CC); 1995 (4) BCLR 401 (CC); *S v Makwanyane and Another* 1995 3 SA 391 (CC) 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC) at 707D-E and *Ferreira v Levine NO and Others* 1996 1 SA 984 (CC); 1996 (1) BCLR 1 (CC) at 26H-27A]) This approach has also been criticised as too sterile, formal or academic. (See eg Woolman in Chaskalson and others, *Constitutional Law of South Africa*, p12-19, with reference to SACHS, J in the *Ferreira*- case and in *Coetzee v Government of the Republic of South Africa and Others; Matiso v Commanding Officer, Port Elizabeth Prison and Others* 1995 4 SA 631 (CC) and by ACKERMAN,J in the *Ferreira*-case and in *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC); 1996 (4) BCLR 449 (CC)].

The fact that it is generally accepted that at the second stage of enquiry the party seeking to uphold the restriction or limitation is required to demonstrate that the limitation is justifiable, sometimes results in confusion. Is this really a burden of proof that "shifts" from the applicant to the respondent between the first and the second stage of the enquiry? Very often no real burden of proof will be at stake at all. A government does not have to produce factual evidence to show that laws prohibiting murder and rape are reasonable and justifiable, even if these activities could be notionally regarded as a form of expression. However, when it is the impact or effects of a statutory limitation which are at stake, and if there is a dispute on the correctness, interpretation or value of factual information, it may be correct to talk of a burden of proof and therefore a required standard of proof. The expressed language of the limitation

clause does not dictate the appropriate standard of proof, but jurisprudential arguments seem to support the use of the civil standard of proof on a balance of probabilities. [See Woolman in Chaskalson and others *Constitutional Law of South Africa* p 12-27 with reference to *Kahla v Minister of Safety and Security* 1994 4 SA 218 (W), 1994 (2) BCLR 89(W) at 97 and other cases.]

In this case it hardly needs to be argued that, on the assumption that a requirement to register in order to be included in a common national voters roll, and to prove one's identity before one 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. What is at stake, is whether the requirement that voters should be in possession of a specific identification document (the green barcoded identification document) can be justified. The overall question is whether this requirement or limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the factors mentioned in (a) to (e) of section 36(1). These specific factors have to be analysed and applied one by one, but also have to be taken into account collectively, together with any other relevant factors, in order to determine whether the limitation is reasonable and justifiable.

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, which lies at the heart of a democracy founded on, amongst other things, universal adult suffrage, regular elections and a multi-party system of democratic government. These values are mentioned in section 1 of the Constitution. Section 1 enjoys a special status in the Constitution. As far as constitutional amendments are concerned, section 1 [together with section 74(1)] enjoys the highest degree of protection. It may only be amended by a bill passed by the National Assembly, with a supporting vote of at least 75% of its members, and by the National Council of Provinces (NCOP) with a supporting vote of at least six provinces. The Bill of Rights (chapter 2), may be amended by a bill passed by the national assembly with the supporting vote of at least two thirds of its members and by the NCOP, with the supporting vote of at least six provinces. This is also the case regarding amendments relating to a matter that affects the NCOP, or altering provincial boundaries, powers, functions or institutions. Any other provision of the constitution may be amended by a bill passed by the National Assembly with the supporting vote of at least two thirds of its members. [See section 74(1)-(3).]

However, in this case the fundamental nature of the right, and its importance, necessarily also applies to the factor mentioned in (b), namely **the importance of the purpose of the limitation.** This is not a situation where competing rights have to be weighed and balanced against each other and

where arguments about the importance of rights, and a possible hierarchy of rights, are relevant. Such would be the case when, for example, freedom of expression is limited in the interest of dignity, privacy, or security. The purpose of the limitation relates to the same right or rights, namely the right to vote and the right to free and fair elections. Therefore, whatever can be said about the paramount importance of the right in issue, also applies to the purpose of the limitation. The purpose of the limitation is to ensure or at least enhance free and fair elections. This is apparent from the affidavit by the honourable justice KRIEGLER, referred to above. Justice KRIEGLER states that voter registration systems commonly require some reliable proof of enfranchisement, such as a voters card or a national identity document. South Africans have a variety of identity documents, namely the green barcoded identity document, the green identity document without a bar code, the blue identity document, the identity documents issued to "citizens" of the former TBVC countries and the "dompas" issued to Africans. To accept all these documents for voter registration and voting purposes, is clearly not an ideal situation. Therefore, in its preliminary planning, the IEC considered requiring a barcoded identity document or an earlier South African identity document which could be correlated with the national population register as a qualifying 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 barcoded identity document.

As appears from justice KRIEGLER'S affidavit, following a joint request by the first and second respondents, the HSRC caused two surveys to be conducted. Those surveys sought to investigate the extent to which eligible voters were in possession of South African identity documents. The first report entitled "Report 1: National Survey" was published on 30 July 1998 ("the national survey"). The second entitled "Report 2: Regional survey" was published on 13 August 1998 ("the regional survey").

The results of the national survey are set out in the executive summary as follows:

"- One in 10 (10,6%) potentially eligible voters do not have any form of ID whatsoever. This translates into between 2,5 million and 2,8 million people. About three-quarters of these people are first-time voters who fall in the age group 17 to 21 years.

- Of those individuals who do possess a valid South African ID. 84,4% had a green barcoded ID, 5.0% a green ID not barcoded and 3,4% had green ID's of which the type was unknown to them. A further 5,0% had a blue ID while 0,8% of the respondents had an ID issued by the former TBVC states. Less than 1% of the respondents had only a reference book or another form of ID.

- Taken together the results suggest that between 5,3 million and 5,9 million people do not have a green barcoded ID.

- The absence of an ID was most pronounced among individuals living in rural areas.

- Almost a quarter of those respondents without any form of ID or an ID other than a green barcoded one, reported that they had applied for a new ID.

"- Of those individuals who did apply for a new ID. Almost 38% had been waiting for more than 12 weeks while an additional 25% reported that they had been waiting for more than 20 weeks.

- Almost 60% of the respondents were unaware of the fact that they need to have a barcoded ID to vote in the 1999 election.

- More than three quarters of the respondents were positive about their participation in the 1999 election while another 17% were undecided at the time of the survey."

On the basis of these results, the National survey reached the following conclusion:

> "The results of this study suggest that it would be unrealistic to attempt to issue green barcoded ID's in time for the forthcoming election. The magnitude of the problem does not make this feasible. It would make much better sense to accept the older ID's as a valid form of identification and direct resources towards ensuring that those individuals who do not have any ID obtain their ID's in time for the 1999 election. In addition, if one wants to maintain computerised control, one would have to replace "that small number of ID's issued by the former TBVC States which are not recorded with the Department of Home Affairs, with new green barcoded ID's."

The Regional Survey reached substantially similar results on the basis of a significantly larger sample. In addition, it reached certain important conclusions on the basis of a regional analysis. The results of the Regional Survey are recorded in the Executive Summary as follows:

> "The Independent Electoral Commission and the Department of Home Affairs requested the Human Sciences Research Council to conduct an urgent study into identity documents (IDs). The study had to determine the extent to which potential voters are in possession of the various south African IDs.
>
> The research brief called for a countrywide quantitative survey involving face-to-face interviews with a representative sample of respondents. The HSRC

contracted the services of a consortium of two survey houses to assist with the survey.

This report, which is the second and final report, contains the results of a countrywide sample of 891 enumerator areas (EAs). In total 9 859 households were visited in the sampled EAs and 23 577 individuals aged 17 years and older "were interviewed.

The major findings of the study are as follows:

- One in ten (9,4%) potentially eligible voters do not have any form if ID whatsoever. This translates into between 2,2 million and 2,4 million people.

- More than two-thirds of those who do not have any form of ID are first-time voters who fall in the age group 17 to 21 years. This requires that this group of individuals should be specifically targeted.

- Of those individuals who do possess a valid South African ID, 86,2 % had a green barcoded ID. 4,4 percent a green ID not barcoded and 3,4 % had green IDs of which the type was unknown to them. A further 4,7 % had blue Ids, while 0,7 % of the respondents had an ID issued by the former TBVC states. Less than 1 % ((0,5%) of the respondents had only a reference book or another form of ID.

- Taken together, the results suggest that between 4,7 million and 5,3 million people do not have a green barcoded ID.

"- The absence of an ID was most pronounced among individuals living in rural areas.

- The regions where the absence of an ID is most pronounced (in absolute numbers) are Umtata and Pietersburg followed by Pretoria, Pietermaritzburg, East London/Bisho and Durban.

- One in five of those respondents without any form of ID, or with an ID other than a green barcoded one, reported that they had applied for a new ID.

- Of those individuals who did apply for a new ID, almost 32 % had been waiting for more than 12 weeks while 21 % reported that they had been waiting for more than twenty weeks.

- Almost 60 % of the respondents were unaware of the fact that they might need to have a barcoded ID to vote in the 1999 election. Distinct regional variations were recorded in the level of awareness.

- More than three-quarters of the respondents were positive about their participation in the 1999 election while another 16 % were undecided at the

time of the survey.

> "The results of this study suggest that it would be difficult to attempt to issue green barcoded ID's to all those who not have one in time for the 1999 election. An alternative is to accept the older ID's as a valid form of identification, and to direct resources towards ensuring that those individuals who do not have any ID obtain one in time."

In the application reference was made to other surveys that were also conducted. We need not deal in detail therewith. On the statistical evidence supplied by the applicant it appears that at the time of the surveys between 4,7 million and 5,3 million eligible voters were without the requisite green barcoded identification document to vote in the forthcoming election. 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.

In summary the HSRC's Regional and final report found that one in ten, (9,4%) potentially eligible voters do not have any form of identity document whatsoever. This translates into between 2,2 million and 2,4 million people. The report also found that of those individuals who do possess a valid South African identity document 86,2% had a green barcoded identity document, 4,4% a green identity document not barcoded and 3,4% green identity documents of which the type was unknown to them. A further 4,7% had blue identity documents, 0,7% of the respondents had identity documents issued by one of the former TBVC states. Less than 1% of the respondents had only a reference book another form of identity document.

The vast majority of South Africans with identity documents therefore had green barcoded identity documents. The IEC furthermore accepted that the inclusion of TBVC documents among the recognised qualifying documents meant that some aspirant voters would produce TBVC documents that could not be verified against the national population register. It was only after receiving numerous reports of potential voters without green barcoded identity documents, the IEC started having second thoughts. The HSRC was then briefed and accepting the conclusions of the HSRC the view of the IEC was that, ideally, only green barcoded identity documents should qualify, but that because of historical and practical reasons this ideal was probably not attainable. It then made its view that the requirement should be relaxed known to the executive and to the legislature.

In the heads of argument submitted on behalf of the first respondent it is submitted that the requirement of a green barcoded identity document ensures that each and every eligible voter votes only once and that eligible voters do not occur more than once on the voters roll.

In his answering affidavit the Director-General of the Department of Home Affairs submits that the particulars which

are recorded in the green barcoded document provide the most reliable form of identification of a person to whom it has been issued. He states that this is so in order to ensure that important state policy functions such as welfare grants in the form of pension etc. are not undermined by misfortunes such as fraud or theft. According to him, this most reliable form of identification also has an important socio-economic function in that financial institutions, such as banks, often approach the department for the verification of information which they seek to utilise on behalf of their clients, life insurers approach the department with the view to verify such information, and other state functionaries such as the office of the Receiver of Revenue and the Unemployment Insurance Fund approach the department for similar verification.

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.

The crux of the matter therefore seems to lie in the factors mentioned in section 36(1)(c), (d) and (e) namely the **nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.**

An investigation into the **nature and extent of the limitation** obviously relates to the whole issue of the capacity of the Department of Home Affairs to issue the required number of identity documents, and how difficult, or perhaps impossible it may be for voters to obtain the required identity documents.

As also appears from what is stated above, the first respondent has all along disputed the correctness of the results of surveys and has all along maintained that it has the capacity to issue the required documents in time for the election. It was only during argument that the first respondent felt safe enough to concede through its counsel that the HSRC's figures are correct.

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.

Though the departure point be the figures provided by the HSRC, the final figures for which the first respondent had to cater for were variable. In the HSRC's final report it is stated that a surprisingly high percentage of people without barcoded identity documents (between 80% and 90%) indicated that they intended applying for the necessary document. The HSRC added:

> "However, it should be added that intentions do not necessarily translate into action. Factors that may prevent people from actually carrying out their intention

to obtain a new document may include the pressures of the daily routine, a perception that the applicant will have to wait in a queue for a whole day just to complete an application form, and the impression that it is no longer that urgent to obtain a barcoded ID."

The first respondent stated that it had contingency plans in place to increase its capacity to process and issue identity documents if the demand necessitated such a step. This was apparently not necessary.

When this matter was called, an affidavit by Mr David Mamabolo was handed up. He is the Director: Identity Documents of the first respondent. In this affidavit he states that from 1 September 1998 (some two weeks before the promulgation of the Electoral Act) to date of the affidavit (1 March 1999) the first respondent has received 2 217 178 applications for new barcoded ID documents of which 1 886 393 have been processed and finalised. Simple arithmetic shows that the unprocessed applications can easily be processed well before the election date. It is unknown how many applications would have been received between 1 and 7 March 1999 but there is no indication that the first respondent would not be able to process all new applications on time.

What then are the reasons for so few people out of the projected 4,7 to 5,3 million applying for new green barcoded identity documents?

We do not think it is for us to speculate on those reasons unless such a reason or reasons can impact on the constitutionality of the challenged provisions. Non of the reasons mentioned by the HSRC can impact on such constitutionality. Other reasons such as tardiness, apathy, disillusionment, etc. were mentioned by the court in the Cape of Good Hope Provincial Division. There may still be a host of other reasons. None, however, can impact on the constitutionality of the challenged provisions. If an eligible voter exercises his right <u>not</u> 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 disfranchised by the provisions of the Electoral Act.

As far as the **relation between the limitation and its purpose** is concerned, analyses of the alleged facts regarding whether a green barcoded identity document will in fact achieve free and fair elections by eliminating fraud, etc. is necessary. But this requirement cannot be viewed in absolutely exact black and white terms. The question is not whether a green barcoded 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. Therefore we do not regard the applicant's

argument that the first respondent's argument is incoherent as being fatal. The applicant argues that if the green barcoded identity document is the only or best way to eliminate fraud and achieve a free and fair election, why then does the first respondent also accept other documents such as the 1986 temporary identity certificate? 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, namely the green barcoded ID. Furthermore, although the number of people allegedly in possession of TBVC identity documents or the old "dompas" may be vary small, the acceptance of some of these documents does leave a door open for irregular activities. Of course this possibility has to be weighed against the harm which may be done by requiring a green barcoded identity document, in view of the significant numbers of people who may not have this document, but this is to some extent a policy decision. The court is not called on to second guess or interfere with policy decisions made by the government of the day. It may be a tough choice between some possible fraud, on the one hand, or some possible disenfranchisement on the other. The legislatureis 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, became the legislation may be unconstitutional because of its purpose. This is not the case here, though

As far as **less restrictive means to achieve the purpose** are concerned, an important point is that the wording of section 36(1)(e) does not suggest that the legislature must always utilise the least restrictive way to achieve the purpose, and that limiting a right will be unconstitutional if any less restrictive ways to achieve the purpose are available. The correct interpretation of (e) is that if a variety of measures are available to the legislature to achieve the purpose, the legislature has to choose from a range of reasonable possibilities and could not simply opt for the most restrictive measure, that seems to be available, or for a very restrictive one. Even in Canada, where the least drastic means criterian is used, meaning that the law must impair the right no more than is necessary to accomplish the objective, a "margin of appreciation" is recognized. It is rerely self-evident that a law limiteing a right does so by the least drastic means. An imaginative judge would always be able to come up with something less drastic or less restrictive. Court this have to pay some degree of deference to legislative choices. (See Hogg *Constitutional Law of Canada* 3rd ed 1992 p867, 878-879, also with reference to the US Supreme Court case of *Illinois Elections Bd v Socialis Workers' Party* (1979) 440 US 173.)

In summary the following can be stated as to the application of the provisions of section 36 to the statutory requirement of green barcoded identity documents: The right to vote and the right to free and fair elections are without doubt important rights at the heart of the kind of democracy wich the Constitution as a whole and section 1 in particular states South Africa to be. Therefore any limitation of this right, or

these rights, has to be clearly reasonable and justifiable. However, the purpose of the limitation in this case is also to achieve, or to contribute to the achievement of free and fair elections. Therefore the purpose is just as important as the right itself. It is eminently reasonable to require that potential voters register and to require reliable proof of identity, to eliminate a range of possible malpractices that could occur in elections. The fact that South Africans, for historical reasons, seem to be in possession of at least eight different kinds of identity documents (green barcoded identity documents, green identity documents without bar codes, blue identity documents, the identity documents of four different TBVC states, the old "dompas") does not present a satisfactory picture. 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. This is especially the case in view of the fact that a significant number of people are not in possession of any identity documents and therefore have to apply for identity documents anyway. They would not be assisted by the fact that other identity documents could be used for the purposes of registration and voting, except indirectly in the sense that resources regarding the issuing of identity documents could be focussed on them, rather than on people who already have identity documents. There is clearly a relation between the limitation and its purpose. The problematic question is whether it is possible to issue the required identity documents to all those who are not in possession of such documents in order to enable them to vote and therefore not to disenfranchise them. An enquiry into the nature and extent of the limitation is thus related to the capacity of the Department of Home Affairs to enable people to acquire the relevant identity documents. 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 identity documents with those documents, in time to participate in the election, or at least to furnish such documents to all those who apply for them. The fact that some confusion, misunderstandings, a lack of enthusiasm on the part of members of the public, and even perhaps on the part of some officials in the service of the department, may have resulted in difficulties to furnish all those who are not in possession of the required documents with such document, does not mean that the nature and extent of the limitation is such that it cannot be regarded as reasonable and justifiable. In particular, the fact that a significant number of adult South African citizens neglect to apply for green barcoded identity documents, or for that matter to register, or to vote, because of a lack of interest, apathy, or unwillingness to undergo a reasonable measure of inconvenience to obtain the documents, could not affect the constitutionality of the relevant statutory requirements. Even if the requirement of green barcoded identity documents is not the only way to 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 section 36.

FREEDOM OF EXPRESSION

The applicant also relies on the right to freedom of expression. It is believed that an analyses of this right, and its possible limitation, will not lead to a substantially different outcome than the above. Therefore this aspect is not investigated here.

EQUALITY AND INDIRECT DISCRIMINATION

The applicant also submits that the challenged statutory provisions constitute unfair discrimination in violation of section 9(3) of the Constitution.

According to the applicant, the HSRC and Opinion 1999 surveys put it beyond doubt that the challenged statutory provisions, although apparently neutral, constitute indirect discrimination against particular vulnerable groups on the grounds of age, residence, race, belief, conscience or political affiliation. The applicant submits that the challenged provisions have a disparate impact on certain categories of people. This indirect discrimination is unfair, in the submission of the applicant. In its founding affidavit the applicant provides further information as to the alleged indirect discrimination.

According to the surveys on which the applicant relies, a greater proportion of adults South African citizens who are not in possession of green barcoded identity documents reside in rural areas, than in urban areas. According to these statistics 6,5% or 919 000 eligible voters residing in urban areas are without green barcoded identity documents while 13,8% or 1 306 000 eligible voters residing in rural areas were at the time of the surveys without such identity documents.

According to the applicant, the statistics furthermore indicate that the requirement discriminates indirectly on the basis of age, because 38,6% or 1 549 000 eligible voters in the age category of 17 to 21 years, did not at the time, have the green barcoded identity documents whereas 6,2% or 300 000 eligible voters in the age group of 22 to 29 years lacked the required documentation.

The applicant also tenders factual information to the effect that significantly more African, or black, South Africans (82%) possess the correct documents than South Africans of Indian origin (71%), Coloured people (67%), or Whites (65%). This seems to be the result of the fact that many more black people than white people have over the past four years applied for and obtained new identity documents, especially because of their obsolete apartheid era documents.

As far as belief, conscience, or party political affiliation is concerned, the applicant refers to information to the effect that 82% of likely ANC voters and 84% of likely IFP voters have the required documents, whereas 73% of PAC voters, 72% of UDM voters, 71% of NNP voters, and 65% of DP

voters have these documents.

The applicant submits that young people in South Africa constitute a particularly vulnerable group in society. The vast majority of them have been disadvantaged as a result of inferior education, limited opportunity and apartheid-based policies. In disenfranchising or threatening to disenfranchise a proportionally large number of young people in South Africa, the challenged statutory provisions reinforce existing patterns of inequality.

With regard to residence, and particularly the difference between rural and urban South Africans, the applicant submits in similar vein that a relatively disempowered group in both economic and political terms are further discriminated against because of the impact of the challenged statutory provisions.

Regarding the alleged disparate or disproportionate impact upon different racial groups, the applicant submits that although white South Africans may in general not constitute an economically disadvantaged group, they do, for as long as race remains a relevant factor in voting patterns in South Africa,constitute a potentially vulnerable group in terms of access to political power and that the challenged statutory provisions therefore indirectly discriminate against them.

Because the challenged provisions discriminate indirectly against minority parties, and in particular against the applicant, its members and supporters, the provisions constitute unfair and indirect discrimination on a basis of belief, conscience, or political affiliation, in the submission of the applicant. Even though members and supporters of the applicant and other minority parties were not economically disadvantaged, they are vulnerable given their lack of access to political power. The relevant provisions therefore distort the democratic process and serve to entrench the existing distribution of political power in a manner that is inconsistent with the constitutional commitments to free and fair electoral processes.

Section 9 indeed protects the right to equality. Section 9(3) states as follows:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including 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) states:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the "discrimination is fair."

In *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at para 54 GOLDSTONE, J again outlined the stages of inquiry which become necessary when an attack is made on a provision in

reliance on the equality clause. The first question is whether the relevant statutory provision differentiates between people or categories of people. The next question is whether the differentiation amounts to unfair discrimination. This requires a two stage analysis. Firstly, does the differentiation amount to "discrimination"? Secondly, if the differentiation amounts to discrimination, does it amounts to "unfair" discrimination? If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there is no violation of the equality clause. If the discrimination is found to be unfair, then a determination has to be made as to wether the challenged provision can be justified under the limitation clause, in other words whether it is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.

As far as indirect discrimination is concerned, the constitutional court held in *Pretoria City Council v Walker* 1998 2 SA 363 (CC) that the consequences of conduct rather than its form, the impact of the discrimination, rather than the intention, are important. Indirect discrimination, or disparate impact discrimination, is widely recognised in other democracies.

In the case at hand it seems quite possible that the challenged statutory provisions may impact differently on different categories or classes of people. Whether this differentiation indeed amounts to unfair discrimination, is another question, though.

Residence and political affiliation, are not expressly mentioned in section 9(3) as grounds on which the state may not discriminate. Political affiliation may perhaps be included under belief or conscience, but not necessarily. Belief and conscience appear to be related to a person's innermost convictions, whereas political *affiliation* seems to relate to factors such as one's membership or association with a particular political organisation or grouping, rather than one's beliefs or convictions. One's political affiliation may of course result from, or be otherwise related to one's convictions, but this is not necessarily the case.

The "list" of "forbidden grounds" in section 9(3) is not a closed one. The question, which is not a uniquely South African one, is how to determine which additional grounds could be recognised by a court of law as grounds on which discrimination may not take place. This takes us to the question why the grounds that are explicitly recognised in the Constitution have received such recognition in the first place, and whether there is any commonality amongst them.

In *Harksen v Lane NO and Others* 1998 1 SA 300, at para 50 on p 322, GOLDSTONE, J states as follows:

> "What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalise, and often oppress persons who have had, or who have been

> associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they are related to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features."

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.

In Canada it is argued, on the authority of several cases in the supreme court, that discrimination in terms of section 15 of the Charter of Rights and Freedom may be based either on the grounds listed in section 15, or on grounds analogous to those listed. Analogous grounds are said to be grounds that are similar to the listed grounds. The grounds listed are argued to be all immutable personal characteristics of individuals, which cannot be changed by the choice of the individual. Whether this is entirely correct with regard to the Canadian situation, is not relevant here. (See Hogg *Constitutional Law of Canada* 3rd ed 1992.) But it could not apply to South Africa in the same way. The grounds mentioned in our section 9(3) include for example marital status, which cannot be said to be an immutable personal characteristic, which cannot be changed.

Two aspects could be extracted from the above mentioned statement by GOLDSTONE, J in *Harksen v Lane*. The one is that the listed grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. The other is that there is a certain historical dimension that is of particular relevance in South Africa. What the grounds have in common, is that they have been used or misused in the past to categorise, marginalise and oppress. Therefore the Constitution explicitly recognises those grounds which have been used in such a way, but nevertheless leaves the door open to in future give recognition to "new" grounds, which may emerge, or which may be viewed with a new understanding, as a society develops.

Patterns of discrimination which may or may not have occurred, based on residence and on political affiliation, were well known at the time when the Constitution was drafted. Yet, these grounds were not included in the formulation of section 9(3). It is clear that on the basis of residence discrimination, or differentiation, often occurs as far as government policies and services and especially a wide range of administrative procedures are concerned. Rural people who live far away from administrative and executive centres, often experience a much larger degree of marginalisation or

inconvenience than the residents of cities where government offices are concentrated. To some extent, this may be inevitable, although it is to be hoped that the government will always attempt to provide services to all residents on an equal basis, as far as possible. 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 section 9(3).

The more important question is whether the alleged disparate impact amounts to unfair discrimination based on age, race, belief or conscience, within the meaning of section 9(3).

There seem to be historical and systemic reasons why a higher percentage of persons in some categories are in possession of green barcoded identity documents, than in others. With regard to race, for example, there may well have been less incentive for white South Africans to apply for new identity documents in recent years, than for black South Africans. Many people in the last mentioned category had identity documents of so called "independent states" which were never really recognised, or had to carry the humiliating "dompas" for many years, and were in many respects not recognised as South African citizens. Therefore they could be expected to be more enthusiastic about new identity documents, issued to all South Africans regardless race, than white people who have identity documents previously acquired, who may even have been privileged because of those documents, and who do not necessarily appreciate the need to inconvenience themselves to obtain new ones.

It may also be more difficult, or easier, for some people to obtain new identity documents than for others, depending on a range of socio-economic and related factors, such as transport, health, free time, etc. The degree of "hardship" involved in applying for identity documents may vary. Whether any "undue hardship" is imposed on anyone, because of race or another section 9(3) ground, is a different question, though.

The point is that no person, or class or category of persons, have been excluded from acquiring green barcoded identity documents, either directly nor indirectly, by or because of the challenged statutory provisions. Even if the capacity of the department to issue the documents is limited, this hindrance would affect people across the board, regardless their race, age, or beliefs. Whereas it could perhaps be argued that especially young people would be negatively affected by the requirement, it is also possible that old people may find it significantly more inconvenient and difficult to physically do whatever is required to obtain the documents. That a larger percentage of people in one category have to apply for the documents, than in another, does not constitute unfair discrimination. 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 section 9(3).

It is not easy to define discrimination. But it could perhaps be argued that discrimination is often morally and constitutionally wrong when it happens on the basis of something which one cannot change, or ought not to be forced to change, or in a way that one can do nothing about, or ought not to be forced to do something about; in other words when one cannot escape the negative consequences of the discrimination at all, without sacrificing something which is inherently and closely linked to one's dignity as a human being. This seems to be clear from the nature of the grounds recognised in our and other constitutions. One cannot change one's race to get a job, one ought not to be forced to change one's marital status, and even if one could change one's religious beliefs, one ought not to be forced to do so.

Two simple examples of indirect discrimination may illustrate the difference between what is normally regarded as indirect discrimination, and what the applicant seeks to establish here. If the requirements of a job include that applicants must have passed mathematics in matric, and the reality is that the vast majority of members of a particular race group do not qualify because maths courses were never offered at matric level in the schools which they were allowed to attend, such applicants could never have changed their race, and furthermore cannot overnight pass matric maths, to get the job. If the rules of a school stipulate that only school uniforms may be worn, and that such uniforms do not include any headgear, the members of a particular religion, who wear hats or scarfs, are indirectly discriminated against. They cannot be expected to change their religious beliefs, even if this were possible, and they cannot be expected to abandon the rules or practices of their religion, in order to oblige with school rules, if the school could reasonably accommodate their beliefs and practices.

This element of some degree of inevitable or unavoidable hardship is absent where proportionally more people from one category have to apply for a certain document, than from another category, but where the opportunity to apply for and acquire the document is equally open and available to every applicant. No person, or group, is expected to do something which is impossible, or unreasonably difficult. They just have to apply for certain documents. Therefore the challenged statutory provisions cannot be found to discriminate unfairly, directly or indirectly, within the meaning of section 9(3). It is not necessary to proceed to the provisions of the limitation clause, with regard to the discrimination argument.

OTHER CONSTITUTIONAL PROVISIONS

As mentioned above, the applicant also relied on sections 7(2) and section 237 of the Constitution, at least as far as their argument regarding the structure of the constitutional analysis is concerned.

Section 7(2) states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Section 237 states that all constitutional obligations must be performed diligently and without delay.

The last mentioned clause does not seem to have a direct bearing on the question whether the challenged statutory provisions violate the rights referred to and are thus constitutionally invalid, except that it is one of several clauses in the Constitution which contribute to establishing a framework of constitutionalism. Whether this clause could mean something when an attempt is made to legally prompt officials of the Department or other members of the executive into action if they seem not to fulfil their constitutional obligations diligently and without delay, is another question.

To some extent the same may apply as far as section 7(2) is concerned. The state, including its officials, is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights, including the right to vote and the right to free and fair elections. Should such officials fail to do so, they may be in breach of a constitutional duty.

The applicant seeks an order that the challenged statutory provisions are unconstitutional and invalid. Although section 38 of the Constitution allows for "appropriate relief" the possibility of another order was not strongly argued for by the applicant.

Should it be argued that the state is obliged to respect, protect, promote and fulfil the right to vote and the right to free and fair elections, also in or by its legislation, part of the answer would again be that the purpose of the challenged statutory provisions is in fact to further the right to vote and the right to free and fair elections, as was argued above with regard to the limitation clause.

In view of the aforegoing we are satisfied that the application cannot succeed.

In the event of the application not succeeding the first respondent asked for an order that the applicant pay the costs of the application. The applicant in turn, relying on judgments by the Constitutional Court, asked that no order as to costs be made. The judgments relied on by the applicant are *Ex parte Gauteng Provincial legislature*: *in re dispute concerning constitutionality of certain provisions of school education bill* 1995, 1996 3 SA 1655 (CC) at para 36; *Sanderson v Attorney-General Eastern Cape* 1998 2 SA 38 (CC); *OVS Staatsondersteunende skole v Premier* 1998 3 SA 692 (CC) and *African National Congress v Minister of Local Government* 1998 3 SA 1 (CC).

We agree with the applicant's submission on the question of costs.

The application is dismissed. No order as to costs is made.

B M NGOEPE
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

W J VAN DER MERWE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT8/99

In the matter between:

AUGUST, ARNOLD KEITH	First Applicant
MABUTHO, VERONICA PEARL SIBONGILE	Second Applicant

and

THE ELECTORAL COMMISSION	First Respondent
THE CHAIRPERSON OF THE ELECTORAL COMMISSION	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Fourth Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

INTRODUCTION

1

1.1 In this appeal the Applicants are seeking an order declaring that:

1.1.1 they, as incarcerated prisoners, are entitled to register as voters on the common voters roll and to vote in the forthcoming elections;

1.1.2 the Electoral Commission make all necessary arrangements to facilitate the above because they, despite being incarcerated prisoners, comply with the requirements of the Electoral Act, 73 of 1998;

1.2 They further seek an order declaring s 71(b) and s 8(2)(e) of the Electoral Act and Regulations 2(1)(a) and 11 made in pursuance of the Electoral Act to be invalid to the extent that they preclude the registration of prisoners on the common voters roll.

1.3 The appeal is motivated by the submission that:

1.3.1 there exists a constitutional right to vote in terms of s 19(3)(a) of the Constitution;

1.3.2 their not being able to register and vote, impugnes the right to equality before the law and protection before the law in terms of s 9(1) of the Constitution;,

1.3.3 by not being allowed to register and vote, prisoners are

unfairly discriminated against in violation of s 9(3) of the Constitution. Such a denial to be able to register and vote infringes s 10 of the Constitution which guarantees human dignity.

1.4 It is further submitted that the limitation placed on prisoners by not allowing them to register or to vote is not an acceptable limitation falling under s 36(1) of the Constitution which allows limitations which, in essence, are reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom.

2 The First and Second Respondents (hereinafter referred to as "the Respondents") contend that insofar as prayers 3, 4, 6 and 7 are concerned, they are not obliged to make special arrangements different from those that are made for the general body of voters to enable the Applicants and the prisoners to register as voters and to vote and therefore oppose the declarations sought.

THE CONSTITUTIONAL RIGHT TO EQUALITY

3 It is clear from paragraph 16 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. We submit that this point is a bald challenge and it should fall to the ground, as it is devoid of any factual basis from the Applicants. The analysis below also demonstrates that the impugned provisions are able to pass constitutional muster, when tested against the requirements of the Constitution.

4 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 categories of discrimination or differentiation contemplated in s 9 to be found in the legislation under attack. The objection then must fall to the ground at the starting block.

5 We, however, proceed to deal with the issue of equality, although there is no concession that there is any discrimination or differentiation in the challenged legislation.

6 Equality is a core value of the Constitution. The preamble to the Constitution articulates the idea of a democratic and open society in which every citizen is equally protected by law. Equality is emphasised in Chapter 1 of the Constitution, which contains its founding provisions.

Section 7(1) affirms the democratic values of human dignity, equality and freedom. Section 36(1) details that limitations of fundamental rights are allowed only when they are justifiable in an open and democratic society based on human dignity, equality and freedom. In terms of s 39(1)(a) of the Constitution, the courts are enjoined to promote the values that underline open and democratic society based on human dignity, equality and freedom when construing the Bill of Rights.

7 The Constitutional Court has on numerous occasions emphasised the fundamental importance of equality.

See President of RSA v Hugo 1997 (4) SA 1 (CC) at 22G-23A;

Also: Shabalala v Attorney-General, Transvaal & Another 1996 (1) SA 725 (CC) at 740E - F (per Mahomed DP as he then was).

8 In President of RSA v Hugo 1997 (4) SA 1 (CC), Goldstone J stated that:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect,

regardless of their membership of particular groups."

9 In Fraser v The Children's Court, Pretoria North 1997 (2) SA 261 CC, the Constitutional Court noted:

> "There can be no doubt that the guarantee of the equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised" (at 272A per Mahomed D P as he then was).

10 In Brink v Kitshoff NO, the Constitutional Court (per O'Regan J) identified the purposes underlying the guarantee of equality and non-discrimination (in the interim Constitution) in the following way:

> *"(40) As in the other national constitutions, section 8 is the product of our own particular history. Perhaps more than any other of the provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black*

people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as "white", which constituted nearly 90% of the landmarks of South Africa. Senior jobs and access to established schools and universities were denied to them. Civic amenities, including transport systems, public parks, libraries and many shops, were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.

41 Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed in our social fabric. In drafting s 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. For this reason, s 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination.

42 Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair. It builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to address the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of such an aid and, in particular, sub-sections (2), (3) and (4)."

11 Section 9(1) guarantees equality before the law and equal protection and benefit of the law. S 9(3) prohibits unfair discrimination by the State. This distinction was also reflected in ss 8(1) and (2) of the Interim Constitution and was considered by the Constitutional Court in Prinsloo v Van der Linde 1997 (3) SA 101 (2) CC at 1024F - H. The Court held that s 8(1) of the Interim Constitution required that the State should act rationally when making laws which differentiate between people:

"It should not regulate in an arbitrary manner or manifest naked

preferences that serve to legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premise of the constitutional state" (per Ackerman O'Regan and Sacks JJ).

12 Section 9(3) however, grants protection additional to that of s 9(1). It prohibits "unfair discrimination". In Prinsloo at 1026 C - F, the Constitutional Court considered the meaning of "unfair discrimination":

"Given the history of this country, we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period in our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth, as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinitive worth. In short they were denied their inherent dignity. ... In our view, unfair discrimination ... principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."

13 In Hugo (*supra*), the factors which render discrimination unfair in the sense intended by s 8(2) of the Interim Constitution (s 9(3) of the Constitution) were examined:

> *"The more vulnerable the group adversely affected by the discrimination, the more likely that discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination, the more likely it will be held to be unfair"* (per O'Regan J at 49C-D).

14 Following its decision in Hugo & Prinsloo, in Harksen v Lane NO & 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 in the following terms:

> *"It may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance of s 8 of the Interim Constitution. They are:*
>
> *(a) Does the provision differentiate between equal*

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.*

(b)(i) *Firstly does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious*

manner.

(b)(ii) *If the differentiation 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 others in his or her situation.*

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(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 (s 33 of the Interim Constitution)."*

15 We submit that no case has been made out to the effect that the alleged discrimination is unfair and consequently the question of whether such a violation constitutes a permissible limitation of the right enshrined in s 9 within the meaning ascribed thereto in s 36 of the Constitution does not arise.

15.1 There is in fact no unequal treatment of anyone in terms of the impugned legislation, not even potential voters.

15.2 The object of the equality clause is clearly as set out in the passages above. The Applicants' reliance on equality clause is, in the circumstances, misplaced.

THE LIMITATION CLAUSE : SECTION 36

16 We submit that none of the Applicants' rights have been violated in terms of the Constitution and as such we nonetheless deal with the limitation aspect or limitation clause without such concession

having been made. If it is the Applicants' submission that even if the legislation is put through, that rigour of the terms enunciated by the Harksten case (*supra)*, the legislation passes the master.

17 It is respectfully submitted that none of the rights protected in the Constitution are absolute. All those rights are subject to limitation, provided there is compliance with s 36 of the Constitution.

18 On this basis, it is respectfully submitted that the following observations by Ackerman J in De Lange v Smuts NO & Others 1998 (3) SA 785 CC at 822D are worthy of note.

> *"Although s 36(1) differs in various aspects from s 33 of the Interim Constitution, its application still involves a process, described in S v Makwanyane & Others 1995 (6) BCLR 665 (CC) par 104 as the weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests. (87) In Makwanyane the relevant considerations in the balancing process were stated to include: the nature of the right that is limited, and its*

importance to an open and democratic society based on freedom and equality, the purpose for which the right is limited and the importance of that purpose to start a society. The extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

19 We respectfully submit that the relevant considerations in the balancing process are now expressly stated in s 36(1) of the Constitution to include those itemised in paragraphs (a) to (e) thereof. In our view, this does not in any material respect alter the approach expounded in Makwanyane, save that paragraph (e) requires that account be taken in each limitation evaluation of less restrictive means to achieve the limitation.

20 In dealing with the limitation clause in s 31(1) of the Interim Constitution, Chaskalson P formulated the following general approach in S v Makwanyane *supra,* para 104.

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality. The purpose for which the right is limited and the importance of that purpose to such a society, the extent of the limitations,

its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process, regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian judge has said:

> *"The role of the court is not to second-guess the wisdom of policy choices made by legislatures."*

21 It is our respectful submission that the constitutional assembly followed a similar approach and included the above-listed factors in s 36(1) of the Constitution.

22 We submit that in accordance with s 36(1) the Electoral Commission does have a law of general application limiting rights in the Bill of Rights to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.

23 It is submitted that we do have a law of general application in that law referred to in s 36(1) comprises both statutes (and common law) the former including delegated legislation.

See Du Plessis v De Klerk 1996 Vol 5 VCLR 658 (CC) par 44 per Kentridge AJ and par 136 per Kriegler J.

24 The Electoral Act, 73 of 1998 and the regulations issued in pursuance of the Electoral Act constitute laws of general application in terms of s 36(1) of the Constitution. The regulations issued in pursuance of the Electoral Act constitute law (delegated legislation) and they are accessible to the public (they were promulgated in the Government Gazette).

See President of the Republic of South Africa v Hugo 1997 6 BCLR 708 (CC) paras 96-104 per Mokgoro J.

25 The requirement that rights (in the Bill of Rights) may only be limited "in terms of" law of general application also means that legislatures may confer a discretion to limit rights on administrative

bodies. Without such discretion, effective government would be impossible.

> Rautenbach "Introduction to the Bill of Rights" in Bill of Rights Compendium (issue 2) par 1A45.

26 It is submitted that the regulations issued by the IEC pursuant to the Electoral Act 1988 are delegated legislation exercising such conferred powers and that such delegated legislation by implication limited the rights of prisoners to register and to vote. The IEC used its conferred discretion and made no provisions in the regulations for prisoners to register to vote.

27 Section 100 of Act 73 of 1998 (The Electoral Act) expressly states that the IEC must make regulations regarding any matters that must be prescribed in terms of the Act. The IEC may (after necessary consultation) make regulations regarding any matter that may be prescribed in terms of the Act or that it considers necessary or expedient in order to achieve the objects of the Act. Such regulations must be published in the Government Gazette. This is precisely what has happened.

INTERNATIONAL AND FOREIGN LAW

CANADA

28 Section 1 of the Canadian Charter of Human Rights provides that the charter rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The words "prescribed by law" make clear that an act that is not legally authorised can never be justified under s 1, no matter how reasonable or demonstrably justified it may be. Charter violations that take place on the initiative of a police officer, acting without clear legal authority, are outside the protection of s 1.

See R v Herbert (1990) 2 S.C.R. 151205.
See also: Hogg "Constitutional Law of Canada" 3rd edition (1992) par 35.7.

"A law that confers a discretion on a board or official to act in derogation of charter right will satisfy the prescribed by-law requirement if the discretion is constrained by legal standards.

See Hogg (*supra)* para 35.7(b).

See also Ontario Film and Video Appreciation Society (1984) 45 O.R. (2)(D) 80 (C).A.

29 The Canadian Elections Act 1985 in sec 14(4) declared that every person undergoing punishment as an inmate in any penal institution for the commission of an offence was not qualified to vote.

30 The question immediately arose as to whether it was reasonable in a free and democratic society to deprive prisoners of their voting rights and caused some debate in Canada?

31 In **Reynolds v AG British Columbia** (1982) 143 DLR (3d) 365 (BCSA) the British Columbia Court of Appeal confirmed a decision of the provincial Supreme Court to the effect that prisoners on probation should have the right to vote. The court however stated that to deprive an inmate in a penal institution of the exercise of the right to vote constituted a justifiable limit under section 1 of the Charter of Rights and Freedoms.

32 This section 1 guarantees the rights and freedoms set out in the

Charter subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society - similar to our own limitation clause sec 36(1).

33 In **Re Jolivet and Barker and R** (1983 7CCC (3d) 431 (BCSC) two inmates challenged the validity of section 14(4)(e) of the Canada Elections Act. This section deprives penitentiary inmates of the exercise of voting rights. Mr Justice Taylor held that voting rights could be restricted; the requirements of order and discipline prevent the exercise by the inmate of an enlightened democratic choice, the negation of the right to vote may be justified in this case. Restrictive conditions entailed by imprisonment result in the impossibility for inmates to exercise their rights in a judicious manner.

UNITED STATES OF AMERICA

34 In **Richardson v Ramirez** 418 US 24 (1974) the US Supreme Court upheld state power to disenfranchise convicted felons. The majority saw such disenfranchisement as a sanction for crime.

35 In **Otsake v Hite** 64 Cal 2d 596 (1966) 603 it was held that a state (California) has a legitimate purpose in excluding convicted prisoners from voting. In **State Ex rel Barrett v Sartorius** 351 Mo 1237 (1943) 1241 the Missouri Supreme Court upheld disenfranchisement provisions relating to prisoners by referring to moral standards. Similarly in **Green v Board of Elections** 389 US 1048 (1968) it was held that if a man "breaks the laws he has authorised his agent to make for his own governance" he has abandoned the right to participate "in further administering the compact."

36 Many states deny the vote to felons, even ones who have served their sentence and finished their parole. It was this type of disenfranchisement the court upheld in **Richardson v Ramirez** supra.

See: Emmanuel Constitutional Law (10ed, 1992) 352.

Also: Vieira Civil Rights (1978) 133; and

Congressional Quarterly's Guide to the US Supreme Court (1979) Ed Witt 485.

UNITED KINGDOM

37 In **Raymond v Honey (1983) AC 1 (HL) Lord Wilberforce held:**

> "*Secondly under English law a convicted prisoner in spite of his imprisonment retains all civil rights which are not taken away expressly or by necessary implication: see* ***R v Board of Visitors of Hull Prison, Ex p St Germain (1979) QB 425, 455 and Solosky v The Queen (1979) 105 DLR (ed) 745, 760 per Dickson J."*** (Italics supplied).

38 By section 4(1) of the Representation of the People Act 1949, "a convicted person during the time that he shall be detained in a penal institution in pursuance of his sentence shall be legally incapable of voting at any parliamentary or local government election." The definition of convicted person extends to include those found guilty at courts martial, but does not include those dealt with by way of committal for contempt.

39 Until 1981, the fact that a person was serving a term of imprisonment did not generally prevent him from standing for election to Parliament. Indeed it was the successful candidature of an Irish prisoner in a parliamentary by-election which led to the enactment of the Representation of the People Act 1981. By section 1 of that Act, a sentence of imprisonment of one year or more in the United Kingdom or the Republic of Ireland disqualifies a person from membership of the House of Commons during the course of that sentence. Both the nomination for election and the election itself would be void in law, and if a sitting member of the House of Commons were to be sentenced to a term of imprisonment of one year or more, his seat would automatically fall vacant.

BELGIUM

40 The Belgian Constitution is also based on the principle of one man, one vote.

Certain conditions however, have to be met and grounds of exclusion are set out. Serious criminal offences are one of the

grounds of exclusion (secs 47 and 53(1) of the Constitution).

IRELAND

41 In Ireland the Electoral Act 1923 sec 51(2) disqualifies prisoners from being eligible for membership of the house of representatives - the Dail Eireann. a prisoner is a person sentenced to imprisonment with hard labour for any period exceeding six months, or to penal servitude for any term.

Casey Constitutional Law of Ireland (1987) 101

42 Section 16.1.2 of the Irish Constitution subjects the right to vote to two qualifications. These are that the person is not disqualified by law, and that he or she "complies with the provisions of the law relating to the election of members of Dail Eireann".

By virtue of Sec. 16.1.2 thus a prisoner is disqualified to vote.

Casey op cit 92.

GERMANY

43 In conformity with the democratic principle of sec 20(2) of the Basic Law, sec 382 of the German Constitution prescribes that members of the Bundestag be chosen in "general, direct, free, equal and secret elections". Sec 28(1) applies the same requirements to the Länder.

44 There is a denial of voting rights to persons convicted of certain crimes against the state according to *Currie The Constitution of the Federal Republic of Germany* (1994) 105 n 12.

AUSTRALIA

45 In Australia a person otherwise qualified to vote for the *federal parliament* (Commonwealth Parliament) will be disqualified from voting if he has been convicted and is under sentence for an offence that is punishable by imprisonment for five years or longer. This is laid down by sec 93(8)(b) of the Commonwealth Electoral Act 1918.

46 Regarding state parliaments the position is as follows: If certain qualifications are met a person may vote (qualifications are age, nationality, residence). In each state a person who meets these basic requirements may nevertheless be denied the right to vote if he falls foul of certain disqualifications. Eg a person who is serving a sentence of imprisonment following conviction will be disqualified in Tasmania regardless of the length of the sentence; in Queensland if the sentence is at least of one year (the same applies to New South Wales and Western Australia) and in Victoria if the offence is punishable by imprisonment for five years or longer. The only state in Australia to extend the franchise to prisoners is South Australia.

OTHER RELEVANT STATUTORY PROVISIONS

47 Section 16 of the Electoral Act, 1993 (Act 202 of 1993) excluded the following prisoners from entitlement to vote, namely persons who are detained in a prison after being convicted and sentenced without the option of a fine in respect of any of the following offences irrespective of any other sentence in respect of any

offence not mentioned hereunder which is served concurrently with the firstmentioned sentence:

47.1 murder, robbery with aggravating circumstances and rape; or

47.2 any attempt to commit any offence referred to in sub-paragraph 1.

48 The present Electoral Act, as well as the Constitution, does not have a similar provision. However, in terms of Section 47(1)(e), 106(1)(e) and 158(1)(c) of the Constitution, a person is disqualified from becoming a member of the national or a provincial legislature or from a municipality if he or she is convicted of an offence and sentenced to more than twelve (12) months imprisonment without the option of a fine, either in the Republic or outside of the Republic if the conduct constituting the offence would have been an offence in the Republic but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined or until the time when an appeal has expired. A disqualification under this paragraph ends five (5) years after the

sentence has been completed.

49 In view of the fact the convicted prisoners entitlement to register and to vote is not taken away or restricted by any law, the Commission was placed in an invidious position with regard to the invoking of section 33(1)(b) of the Act in respect of prisoners.

ORDINARILY RESIDENT

50 Section 7(1) of the Electoral Act, 1998, provides that a person applying for registration as a voter must do so only for the voting district in which that person is ordinarily resident.

51 Section 33 of the Act provides for special votes and the Commission must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in which the person is registered as a voter due to that persons:

51.1 physical infirmity or disability or pregnancy;

51.2 absence from the Republic of South Africa on

government service or membership of the household of the person so absent; or

51.3 absence from that voting district while serving as an officer in the district concerned or while on duty as a member of the security services in connection with the election.

52 The Act only provides for these three categories of persons who are entitled to special votes. Section 7(2) of the Act provides that in relation to persons who are absent from the Republic of South Africa on government service or a member of his or her household, the head office in the Republic of South Africa of that person is regarded as an ordinary place of residence of such person on government service.

53 Section 33(1)(b), however, gives a discretionary power to the Commission to provide for other categories of persons who may apply for special votes.

54 The Commission has not made any regulations as envisaged in Section 33 of the Electoral Act, 1998. Consequently, the current

categories of persons entitled to special votes as provided for by the Electoral Act and not in terms of any regulations made under the Act.

55 The expression of "ordinarily resident" was defined in the previous Electoral Act, 1993 (Act 202 of 1993), as follows: "*Ordinarily resident in relation to any person, means the home or place where he or she normally lives or to which he or she returns regularly after any period of temporary absence*."

56 The Electoral Act does not have any definition of "*ordinarily resident*".

57 We respectfully submit that the ordinary meaning of the words "ordinarily resident" be given effect to the word "ordinary" mean "regular, normal, customary, commonplace or usual". On the other hand, the meaning of the word "resident" is defined as "a permanent inhabitant of a town or neighbourhood." "Reside" means "have one's home, dwell permanently". "Residence" means the place where a person resides.

See: **The Concise Oxford Dictionary, 9th Ed. 1995**.

58 We submit, respectfully, therefore that the ordinary meaning of the words as set out above be given effect to and further that in giving effect to same the inescapable conclusion to be arrived at is that a prison cannot be said to be a place where prisoners are ordinarily resident.

LOGISTICAL IMPEDIMENTS

59 We respectfully submit that:

59.1 should it be required of the First and the Second Respondents to establish registration stations within the prison and other places of detention the registration process will be impeded as it would then be incumbent on the First and the Second Respondent to provide mechanisms or additional man-power in order to determine the actual places of ordinary residence of prisoners;

59.2 it is almost impossible to determine a prisoner's correct

voting district, because the country is divided into 14 000 voting districts and no address register exists on the basis on which the Respondents could determine in which voting district does a particular prisoner fall; and

59.3 the logistical operation of allowing an ever changing population of more than 140 000 prisons to be registered and placed in the correct voting district whereof, in all probability, would be beyond the financial and logistical means of the Respondents.

CONCLUSION

60 It is submitted that:

60.1 the restrictions placed on prisoners, in South Africa to vote by the IEC in not making provisions for such persons to register to vote, are reasonable and justifiable in an open and democratic society; and

60.2 that same has been done in terms of "law of general

application" as demanded by se 36(1) of the Constitution.

DATED at JOHANNESBURG on this the 16th day of MARCH 1999.

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N. J. MOTATA

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L. G. NKOSI-THOMAS