CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 9/99

THE NEW NATIONAL PARTY OF SOUTH AFRICA — Applicant

versus

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

THE MINISTER OF HOME AFFAIRS — Second Respondent

THE MINISTER OF FINANCE — Third Respondent

THE CHAIRMAN OF THE ELECTORAL COMMISSION — Fourth Respondent

THE CHIEF ELECTORAL OFFICER — Fifth Respondent

Heard on : 15-16 March 1999

Decided on : 13 April 1999

JUDGMENT

YACOOB J:

Introduction

[1] The applicant, to whom I will refer as the appellant, applied for leave to appeal against the judgment of the full bench of the Cape of Good Hope High Court given on 26 February 1999. The appellant is a political party, the official opposition in the House of Assembly which is intent upon contesting the 1999 national and provincial elections. It

challenges the constitutionality of certain provisions of national legislation prescribing the documents which otherwise qualified voters must possess in order to register as voters and to vote. It also challenges certain actions of the first, second and third respondents ("the government") which were said to interfere with the independence and impartiality of the Electoral Commission[1] ("the Commission"). The fourth respondent is the Chairperson of the Commission and the fifth respondent is the Chief Electoral Officer of the Commission. The High Court dismissed the application with costs.

[2] After the delivery of the judgment, the attorneys for the appellant wrote to this Court seeking directions. The High Court application was concerned with issues which might have a bearing on the integrity and fairness of national and provincial elections for members of the National Assembly and provincial legislatures which, we are informed are to take place on 2 June 1999. The date for the elections has not yet formally been promulgated. The case accordingly was and remains of considerable public importance because a free, fair and credible election is both essential and fundamental to the continued deepening of the new South African democracy. The determination of the matters foreshadowed in the application was also of the utmost urgency.

[1] Established by section 181(1) of the Constitution, read with section 3 of the Electoral Commission Act 51 of 1996 ("the Commission Act").

[3] For these reasons the President of this Court responded on the same day and stated that, in view of the urgency of the matter, he was prepared, if the parties agreed, to direct that the requirements of Rule 18[2] of this Court be dispensed with, that the application for leave to appeal containing the grounds of appeal as well as heads of argument by the parties should be filed within specified shortened periods and that the application be set down for hearing on 15 and 16 March 1999. The directions also required the parties to address the merits of the appeal so that, if the application for leave to appeal were to be granted, the matter could be disposed of without a further hearing. The parties did so agree, the intended directions became a reality, and the matter was heard pursuant to them.

[4] The Democratic Party, which is also a political party that intends to contest the elections, brought a similar application in the Transvaal High Court seeking an order that the documentary requirements in issue in this case were unconstitutional. On 12 March 1999, the Transvaal High Court dismissed the application before it, with the result that the Democratic Party, too, sought directions in respect of an application for leave to appeal.

2 The rule makes provision for the procedure and time limits which must be complied with in respect of applications for leave to appeal to this Court.

The President of this Court replied in terms similar to those set out in the previous paragraph of this judgment. The parties in that case also reached an appropriate agreement with the result that the Democratic Party's application for leave to appeal was heard on 29 March 1999. We decided to defer our decision in this case until the hearing in the Democratic Party case was concluded. The judgment of Goldstone J in the Democratic Party case will be delivered immediately after judgment in this matter has been handed down.

Application for leave to appeal

[5] Leave to appeal to this Court will be granted if it is in the interests of justice to do so. The factors to be weighed are set out in the judgment of Chaskalson P in *Member of the Executive Council for Development, Planning and Local Government, Gauteng v Democratic Party and Others* where he stated as follows:

> "Relevant factors to be considered in such cases will, on [the] one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is bypassed."[3]

[3] 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[6] All the issues raised by the appeal are constitutional issues. They are not only of importance to the parties, but also of considerable public importance. The matter is one of the utmost urgency. It is possible to accommodate the matter on the Court roll. The public importance and interest in the matter are of such magnitude that it is manifestly in the interests of justice that any appeal be noted directly to this Court. The merits of the appeal have been fully argued and we have accordingly dealt with this matter as if leave to appeal had been granted.

[7] The attack on the constitutionality of the statutory provisions on the one hand and on the actions of the government on the other, turned out to be two distinct aspects of the case. This judgment deals only with the former.

Constitutionality of the statutory provisions

[8] The appellant impugned the provisions of section 1(xii)[4] and section 6(2)[5] read

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[4] Section 1(xii) provides:

> "'identity document' means an identity document issued after 1 July 1986, in terms of section 8 of the Identification Act, 1986 (Act No. 72 of 1986), or a temporary identity certificate issued in terms of the Identification Act, 1997 (Act No. 68 of 1997); (vii)"

[5] Section 6(2) provides:

> "For the purposes of the general registration of voters contemplated in section 14, an identity document includes a temporary certificate in a form which corresponds materially with a form prescribed by the Minister of Home Affairs by notice in the *Government Gazette* and issued by the Director-General of Home Affairs to a South African citizen from particulars contained in the population register and who has applied for an identity document."

with section 38(2)[6] of the Electoral Act[7] which, to the extent relevant to this application, prescribe that South African citizens otherwise entitled to vote may:

(a) Register as voters and have their names included in the common voters roll only if they are in possession of and produce an identity document ("the bar-coded ID") issued after 1 July 1986 in accordance with the provisions of the Identification Act 72 of 1986 ("the 1986 Act"), a temporary identity certificate ("a TIC") issued pursuant to the provisions of section 16 of the Identification Act 68 of 1997 ("the 1997 Act") or a temporary registration certificate ("a TRC") issued in terms of section 6(2) of the Electoral Act.

(b) Vote only if they are registered on the common voters roll and in possession of and produce the bar-coded ID or a TIC. The complaint was and is that these provisions infringe the right enshrined in section 19(3)(a) of the Constitution which provides:

> "Every adult citizen has the right -
> (a) to vote in elections for any legislative body established in terms

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6 Section 38(2) provides:

> "A voter is entitled to vote at a voting station-
> (a) on production of that voter's identity document to the presiding officer or a voting officer at the voting station; and
> (b) if that voter's name is in the certified segment of the voters' roll for the voting district concerned."

7 Act 73 of 1998.

of the Constitution, and to do so in secret . . . ”.

[9] The order sought in the notice of motion was for a declaration:

> “ . . . [T]hat the provisions of Section 1(vii) read with Sections 6(2) and 38(2) of the Electoral Act, No 73 of 1998 (‘*the Electoral Act*’) are inconsistent with the Constitution of the Republic of South Africa, . . . and therefore Invalid [sic] to the extent of its inconsistency as they exclude eligible voters included in the population register from voting in the 1999 elections.”

An order in such terms would enable all South African citizens who otherwise qualify, and whose names are on the population register, to register and vote irrespective of whether they were in possession of an identification document. It also means that no attack is directed at the exclusion of those South African citizens who would otherwise qualify to vote, but whose names are not on the population register. When this was put to appellant’s counsel, they applied to amend this part of the order and asked that it be substituted by the following order:

> “1. The definition of ‘identity document’ in Section 1 (xii) of the Electoral Act, No 73 of 1998, is declared unconstitutional and invalid to the extent that it excludes those documents recognised as identity documents under Section 8(3) of the Identification Act, No 72 of 1986.
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> 2. Section 6(2) of the Electoral Act, No 73 of 1998 is declared unconstitutional and invalid to the extent that it limits the issue of temporary registration certificates to those South African citizens whose particulars are contained in the population register and by failing to provide for the issue of temporary registration certificates to South African citizens whose particulars are not contained in the population register and who have applied for an identity

> document.
>
> 3. The invalidity of the provisions referred to are suspended pending appropriate amendments which have to be effected before . . .”

This application was opposed, but I have come to the conclusion that the respondent will suffer no prejudice if this aspect of the matter were to be disposed of on the broader basis contended for by the appellant.

Constitutional and statutory context of the right

[10] The aspects of the Electoral Act in issue regulate the way in which citizens must register and vote. The question which must be answered is whether these requirements constitute an infringement of the right to vote. This can only properly be done in the context of an analysis of the nature, ambit and importance of the right in question, the effect and importance of other related constitutional rights, the inter-relationship of all these rights, the importance of the need for an effective exercise of the right to vote and the degree of regulation required to facilitate the effective exercise of the right.

[11] The Constitution effectively confers the right to vote for legislative bodies at all levels of government only on those South African citizens who are 18 years or older.[8] It

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8 This is the effect of reading together the following constitutional provisions: section 19(3)(a); section 46(1); section 105(1) and section 157(5) of the Constitution, all of which will be discussed later in this judgment and are quoted in footnotes 11-13 below.

must be emphasised at this stage that the right to vote is not available to everyone in South Africa irrespective of age or citizenship. The importance of the right to vote is self-evident and can never be overstated. There is however no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.

[12] The Constitution takes an important step in the recognition of the importance of the right to exercise the vote by providing that all South African citizens have the right to free, fair and regular elections.[9] It is to be noted that all South African citizens irrespective of their age have a right to these elections. The right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these

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[9] Section 19(2) provides:

> "Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution."

deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.

[13] The Constitution recognises that it is necessary to regulate the exercise of the right to vote so as to give substantive content to the right. Section 1(d)[10] contemplates the existence of a national common voters roll. Sections 46(1)[11], 105(1)[12] and 157(5)[13] of the Constitution all make significant provisions relevant to the regulation of the exercise of the right to vote. Their effect is the following:

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[10] Section 1(d) provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> (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."

[11] Section 46(1) provides:

> "The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that-
>
> (a) is prescribed by national legislation;
> (b) is based on the national common voters roll;
> (c) provides for a minimum voting age of 18 years; and
> (d) results, in general, in proportional representation."

[12] Section 105(1) provides:

> "A provincial legislature consists of women and men elected as members in terms of an electoral system that-
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> (a) is prescribed by national legislation;
> (b) is based on that province's segment of the national common voters roll;
> (c) provides for a minimum voting age of 18 years; and
> (d) results, in general, in proportional representation."

[13] Section 157(5) provides:

> "A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll."

(a) National, provincial and municipal elections must be held in terms of an electoral system which must be prescribed by national legislation.

(b) The electoral system must, in general, result in proportional representation.

(c) Elections for the national assembly must be based on the national common voters roll.

(d) Elections for provincial legislatures and municipal councils must be based on the province's segment and the municipality's segment of the national common voters roll respectively.

The existence of, and the proper functioning of a voters roll, is therefore a constitutional requirement integral both to the elections mandated by the Constitution and to the right to vote in any of them.

[14] The right to vote contemplated by section 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. The details of the system are left to Parliament. The national legislation which prescribes the electoral system is the Electoral Act. It repeats the requirements for voting as being South African citizenship, a minimum age of 18 years, and enrolment on the national common

voters roll.[14] These are requirements set by the Constitution for the exercise of the franchise.

[15] The requirement that only those persons whose names appear on the national voters roll may vote, renders the requirement that South African citizens must register before they can exercise their vote, a constitutional imperative. It is a constitutional requirement of the right to vote, and not a limitation of the right.

[16] The process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair. The creation of a Commission to manage the elections is a further essential though, not sufficient ingredient in this process. In order to understand the enormity of the problem, one has just to picture the spectre of millions of South Africans arriving at registration points or voting stations armed with all manner of evidence that they are entitled to register or to vote, only to have the registration or electoral officer sift through this evidence in order to determine whether or not each of such persons is entitled to register or to vote. It is to avoid this difficulty that the Electoral Act makes detailed provisions concerning registration, voting and related matters including the way in which voters are to identify themselves in order to register on the

[14] Section 1(xxv) of the Electoral Act.

common voters roll and to vote.

[17] The detailed provisions of the Electoral Act serve the important purpose of ensuring that those who qualify for the vote can register as voters, that the names of these persons are placed on a national common voters roll, and that each such person exercises the right to vote only once. Some form of easy and reliable identification is necessary to facilitate this process. It is in this context that the statutory provision for the production of certain identity documents must be located. The absence of such a provision could render the exercise of the right to vote nugatory and have grave implications for the fairness of the elections. The legislature is therefore obliged to make such provision.

The nature of the enquiry

[18] The appellant did not dispute that proof of identity and citizenship for registration, and proof of enrolment on the voters roll for voting, are necessary components of the electoral system contemplated by the Constitution. What was disputed was whether the Electoral Act could prescribe that the only means for such proof was a bar-coded ID or TRC for registering and a bar-coded ID or TIC for voting. The submissions on behalf of the appellant were advanced at two levels. In the first place, it was contended that the relevant provisions on their face and evaluated in relation to the constitutional right to vote infringe this right. The question of the facial inconsistency of the impugned provisions

with the right to vote and the right to free and fair elections as encapsulated in the Constitution must be addressed both in relation to the rationality of the provision and to whether it infringes the right. Although it was specifically mentioned in response to questions by a member of the Court that the appellant relied on facial inconsistency, no substantial argument was advanced in support of such a contention. Secondly, the argument was that the consequences of the documentary requirements constituted a denial of the right to vote to millions of South African citizens who were not in possession of the bar-coded ID. Many of these persons (millions of people), so it was argued, would not be able to vote for a variety of inter-related reasons. The submissions were that the Department of Home Affairs ("the department"), charged with the responsibility of issuing these documents, did not have the capacity to produce them timeously, that the cost of acquiring the documents constituted a real impediment and that potential voters were not aware, or had not been made sufficiently aware, of the documentary requirements to enable them to apply for the documents in time. It was contended in this context that South African citizens who were in possession of identity documents issued pursuant to legislation which was operative before the 1986 Act came into force ought to have been allowed to use them.

[19] It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to

be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.

[20] A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution. The onus is once again on the party who alleges an infringement of the right to establish it. The contention in this appeal is that the impugned provisions of the Electoral Act constitute a denial of the right to vote to a substantial number of South African citizens. Any scheme designed to facilitate the exercise of this right carries with it the possibility that some people will not comply with its provisions. But that does not make the scheme unconstitutional. The decisive question which arises for consideration in this case is the following: when can it legitimately be said that a legislative measure designed to enable people to vote in fact results in a denial of that right? What a party alleging that an Act of Parliament has infringed the right to vote is required to establish in order to succeed will emerge in the

process of answering this question.

[21] The exercise to be carried out by a court entails an evaluation of the consequences of a statutory provision in the process of its implementation which occurs at some time in the future. It is necessary, at the outset of the enquiry, to determine the nature of the consequence that is impermissible. The consequence that will be impermissible in the present case can best be determined by focussing on the question as to what Parliament must achieve. Parliament must ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote. More cannot be expected of Parliament. It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so.

[22] It is necessary to determine the circumstances that are to be taken into account in deciding whether the impugned provisions infringe the right to vote. There are two possibilities. A court can make an evaluation in the light of the circumstances pertaining at the time the provisions were enacted, or those which exist at some later date when the constitutionality of the provisions are challenged. This Court has adopted an objective approach to the issue of the constitutionality of statutory provisions.[15] A pre-existing law becomes invalid to the extent of its inconsistency with the Constitution, the moment the

15 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 25-30.

Constitution comes into force. It is irrelevant that this Court may declare it to be inconsistent only several years later. Similarly, a statutory provision which is passed after the Constitution comes into operation is invalid to the extent of its inconsistency with the Constitution, the moment the provision is enacted. This is so regardless of the fact that its invalidity is only attacked, or the concrete circumstances that form the basis of the attack only become apparent, long after its enactment. Consistent with this objective approach to statutory invalidity, the circumstances which become apparent at the time when the validity of the provision is considered by a court are not necessarily irrelevant to the question of its consequential invalidity. However, a statute cannot have limping validity, valid one day, invalid the next, depending upon changing circumstances. Its validity must ordinarily be determined as at the date it was passed. Nevertheless, the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right. In assessing the validity of such a complaint, it becomes necessary to determine whether the proximate cause of the infringement of the right is the statutory provision itself, or whether the infringement of the right has been precipitated by some other cause, such as the failure of a governmental agency to fulfill its responsibilities. If it is established that the proximate cause of the infringement, in the light of the circumstances, lies in the statutory provision under consideration, that provision infringes the right. This is not a departure from the objective approach to unconstitutionality. It is merely a recognition of the fact that a constitutional

defect in a statutory provision is not always readily apparent at the time of its enactment, but may only emerge later when a concrete case presents itself for adjudication.

[23] It is necessary to apply an objective test in deciding whether the Act of Parliament, which makes provision for the electoral scheme challenged in the present case, is valid. Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right. Any scheme which is not sufficiently flexible to be reasonably capable of achieving the goal of ensuring that people who want to vote will be able to do so if they act reasonably in pursuit of the right, has the potential of infringing the right. That potential becomes apparent only when a concrete case is brought before a court. The appellant bears the onus of establishing that the machinery or process provided for is not reasonably capable of achieving that purpose. As pointed out in the previous paragraph, it might well happen that the right may be infringed or threatened because a governmental agency does not perform efficiently in the implementation of the statute. This will not mean that the statute is invalid. The remedy for this lies elsewhere. The appellant must fail if it does

not establish that the right is infringed by the impugned provisions in the manner described earlier. This Court held in *August and Another v The Electoral Commission and Others*[16] that all prisoners would have been effectively disenfranchised without constitutional or statutory authority by the system of voting and registration which had been put into place by the Commission. This case is different, however, because the alleged disenfranchisement is said to arise from the terms of the statute and not from the acts or omissions of the agency charged with implementing the statute.

[16] Case number CCT 8/99; as yet unreported judgment of this Court delivered on 1 April 1999.

[24] O'Regan J in her dissenting judgment measures the importance of the purpose of the statutory provision in relation to its effect, and asks the question whether the electoral scheme is reasonable. She goes on to conclude that the scheme is not reasonable, and for that reason, to hold that the relevant provisions of the Electoral Act are inconsistent with the Constitution. In my view this is not the correct approach to the problem. Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.[17] It was within the power of Parliament to determine what scheme should be adopted for the election. If the legislation defining the scheme is rational, the Act of Parliament cannot be challenged on the grounds of "unreasonableness". Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution, and it is only as part of this section 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of enquiry that the question of reasonableness has to be considered. The

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17 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 56-7.

first question to be decided, therefore, is whether the scheme prescribed by the Electoral Act is rational.

Rationality of the statutory provisions

[25] It is, in my view, convenient to determine whether the impugned provisions are rationally related to a legitimate governmental purpose in two stages. The first part of the enquiry is whether a facial analysis of the provisions in issue, in relation to the Constitution, has been shown to lack rationality; the second is whether these provisions can be said to be arbitrary or capricious in the light of certain circumstances existing as at the date of the adoption of the statute.

[26] An examination of the 1986 Act shows that the requirement of the bar-coded ID as the principal method of identification is, on the face of it, rationally connected to the legitimate governmental purpose of enabling the effective exercise of the vote. The document contains the photograph of the holder, the holder's name and particulars from which the age of the person to whom it was issued can be readily established.[18] The bar-code on the document facilitates quick, easy and reliable verification of the fact that the name of the person has been entered on the population register. In addition, it is much easier for officers charged with the verification of the necessary particulars at the point of

[18] See section 8(2) of the Identification Act 72 of 1986.

registration and voting to perform this task if they are to do so consistently by reference to a single type of identity document. Recognition of a multiplicity of documents for this purpose could be potentially confusing, give rise to error and slow down the process.

[27] Finally, there is the advantage of the bar-coded ID arising out of the fact that it is a prerequisite to the issue of this document that fingerprints are recorded on the population register. The issue of most other identity documents, apart from the reference books, is not subject to this prerequisite. Although this advantage is not specifically elaborated on in the papers, the importance of the document having a recent photograph of the person concerned and sets of his/her fingerprints was emphasised by Mr Mokoena in his answering affidavit. Mr Mokoena also stated that there was consensus across all political formations that bar-coded IDs were the most satisfactory document to prevent electoral fraud. It is significant in this regard that the Electoral Act authorises electoral officers to take the fingerprints of potential voters[19] so that they can satisfy themselves of the identity of the person to whom it was issued. The only conceivable reason for the conferment of this power is to enable its utilisation to set in motion a process for the resolution of disputes or doubts concerning the identity of a would be voter, should the occasion arise. Furthermore, the knowledge of the possibility that fingerprint comparisons could be resorted to if there is a dispute or doubt, would have an inhibiting effect on a person intending to use someone else's bar-coded ID for the purposes of voting.

[19] Section 38(4) of the Electoral Act.

Effect of the relevant circumstances

[28] The facial analysis demonstrates that the statutory provisions asserting the disputed documentary requirements are rationally related to the legitimate governmental purpose of ensuring the effective exercise of the right to vote. I will now examine whether the disputed measures can be said to be arbitrary or capricious in the light of the circumstances which, according to the appellant, were relevant.

[29] The appellant relied on two reports of the Human Sciences Research Council ("the HSRC") of surveys conducted during the period mid-June to the latter half of July 1998 and the report of a survey by Markinor released in November 1998. These surveys were concerned with the number of people in possession of various types of identity documents or not in possession of any identity documents at all, as the case may be. The question as to whether and to what extent the results of these surveys can properly be regarded as circumstances relevant for evaluation for rationality of the legislative purpose is a difficult one, but I am, for the purposes of this judgment, prepared to assume that they are, subject to the qualifications in this paragraph. There are no material differences in the results of these surveys. The results of surveys cannot, of course, be accepted as accurate to the last detail but they can be accepted as being a reasonable guide to what some of the relevant circumstances were at the time the Act was passed. Various surveys and estimates referred

to in the papers have put the eligible voting South African population at between 23.6 and 25.9 million people. The difference in these estimates is not material and I think it will be safe to use an eligible voting population figure of 25 million people for the purpose of setting out and highlighting relevant findings of these reports and their implications. The regional survey conducted by the HSRC is used as a point of departure.

[30] The results indicate that:

(a) About 20 million people (approximately 80 percent) of the estimated South African voting population were already in possession of bar-coded IDs at the time of the survey.

(b) It follows that about 5 million people who were eligible to vote did not have bar-coded IDs.

(c) Approximately half of these five million people (10 percent of the total voting population) had no identity document at all, while the other half possessed identity documents issued in terms of old legislation or by one of the TBVC[20] states.

(d) The names of all the two and a half million people who have some form of

20 This refers to the former homelands, namely: Transkei, Bophuthatswana, Venda and Ciskei.

identity document other than the bar-coded ID will have been included on the population register save for about one hundred and fifty thousand people (estimated 0,6 percent of the estimated total voting population) who, according to the survey, are in possession of identity documents issued by the TBVC states.

[31] Although the appellant relied on the circumstances which emerged from these surveys wholly in support of the contention that the statutory provision constituted a denial of the vote, this Court is not relieved of the obligation to test the rationality of the provisions in the light of these circumstances. There can be nothing irrational, arbitrary or capricious about the bar-coded ID serving as the main identification instrument which will show at a glance the citizenship and the age of the holder. According to the survey, approximately 80 percent of South Africans had this document.

[32] About two and a half million people had no identity document at all at the time of the surveys. Once it is accepted, however, that the bar-coded ID is appropriate as the main identification document for the purpose of registration and voting and that some reliable form of identification is indispensable, it follows, that it is futile to require people in this category to acquire some other form of identity document instead of the bar-coded ID. Those who have no identification documents have been obliged to apply for them and have not done so. Indeed, the 1986 Act obliged all persons over the age of sixteen years to

apply for the bar-coded ID on pain of criminal sanction.[21] It follows that it is also rational that the bar-coded ID should be the main identification document for this category as well.

[33] The next question to be answered is whether it is arbitrary not to provide that the two and a half million people who have other identity documents be allowed to use them as alternative methods of identification for purposes of registration and voting. Some of the factors which establish the rationality of the requirement of the bar-coded ID as the method of identification have been discussed. It has been mentioned that it is easier and less confusing for officers charged with the task of verification to do so consistently by reference to a single type of identity document than by reference to a multiplicity of them. The people who are in possession of other forms of identification could have one of seven different identity documents: a blue identity document issued in terms of pre-1986 South African legislation, a green one also issued in terms of this legislation, reference books issued in terms of old South African law and one of four identity documents issued by each of the TBVC states in terms of their legislation.

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[21] Section 8 and section 18 of the 1986 Act read with Government Gazette No 10360, Regulation Gazette R1558 dated 25 July 1986.

[34] It is true that the 1986 Act has been repealed, that the validity of the bar-coded ID and all identity documents issued in terms of previous legislation have nonetheless been preserved,[22] and that all identity documents are to be replaced by an identity card issued pursuant to the 1997 Act at some time in the future. The implication of all of this is that those who are in possession of forms of valid identification other than the bar-coded ID are compelled to obtain the bar-coded ID for the purpose of registration and voting. The argument is that those in this category are being unfairly treated, more particularly because they will soon be required to obtain identity cards in terms of the 1997 Act. There is no evidence of precisely when the new scheme will be introduced nor of the details of the scheme by which more than twenty two million identity documents are to be replaced with identity cards.

[35] There are three essential differences between the bar-coded ID and other forms of identity documents. The first is the presence of the bar-code while the second is that, unlike in the case of the bar-coded ID, other forms of identification (except for the few reference books which are still in existence) do not require the fingerprints of the holder to be recorded in the population register. The advantages of a bar-code and the fingerprints have been traversed. The third difference is that other forms of identification contended

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[22] Section 25 of the 1997 Act read with section 8(3) of the 1986 Act.

for have a common feature: they constitute a powerful symbol and reminder of a shameful past characterised by racial discrimination, oppression and exploitation, untold misery and suffering and the denial to the majority of South African citizens not merely of their right to vote but also of their essential humanity. This is a factor of considerable significance. These documents were issued on a racial basis, and reflect the race of the person to whom they were issued. They constituted a pillar on which racialism could be effectively structured. For many in our country the use of these documents for electoral purposes would be highly embarrassing if not positively offensive.

[36] On the other hand, the documentary requirements pose no real disadvantage to most people in this category concerning registration and voting. The evidence is that, except for the small number in possession of identity documents issued by the TBVC states, their names are already on the population register with the result that TRCs can be issued to them within 24 hours. Furthermore, there is no evidence that the cost and inconvenience mentioned in argument is a real factor. The affidavits filed in the application did not raise the issue that the costs attendant upon the acquisition of the required documents represented an undue burden. It appears, however, that some agreement was reached between counsel as to the costs of acquiring these documents. Because the matter was not dealt with on the papers, there is nothing on record indicating whether there should be arrangements in place to accommodate those who are too poor to afford to pay for the photographs which must be tendered as part of the application for the bar-coded ID and the

TRC. The application does not seek to make out the case that the impugned provisions discriminate against people on the ground of their poverty. No finding can therefore be made on this aspect. It follows that the provisions in issue are neither arbitrary nor capricious even if regard is had to the suggested circumstances.

Denial of the right to vote

[37] The facial analysis reveals nothing that suggests any denial of the right to vote. The argument on this leg of the enquiry was advanced largely on the basis that the legislative provision in issue would have the effect of depriving millions of people of the right to vote because the department did not have the capacity to issue the relevant documents to all persons entitled to vote within the limited time available. The evidence was also largely directed at supporting such a contention and, to this end, was focussed on the inability of the department to meet the anticipated demand on the basis of its performance both before and after the passage of the legislation. However, the issue we have to determine is not whether the department or other organs of state have performed their functions in a manner which has resulted in a denial of the vote to a substantial number of South Africans, but whether the measure itself constitutes such denial and is on that account an infringement of the right to vote. To establish this, the appellant must show that the machinery, mechanism or process provided for by the Electoral Act is not reasonably capable of ensuring that those who want to vote and who take reasonable steps in pursuit

of the right, are able to exercise it.

[38] The appellant's counsel conceded that there could be no constitutional complaint if the Electoral Act imposing the relevant requirements had been in force for a period of more than 4 years. The arguments relating to the absence of knowledge and opportunity and the incapacity of the department to issue the relevant documents were really founded on the criticism that the Electoral Act which set out these requirements was promulgated as late as 16 October 1998. This criticism is not devoid of substance and is cause for concern. There can be no doubt that the Electoral Act should have been promulgated much earlier than it was, more particularly because the elections had to be held before 25 July 1999. This is the first time that registration and the compilation of a national common voters roll are necessary and the shortness of time could make compliance with the constitutional imperatives of an election, the registration of voters, and the compilation of an accurate voters roll, difficult.

[39] The crucial question to be answered here is whether it has been established that the time was so short that the scheme prescribed by the Act for registration and voting was not reasonably capable of achieving its purpose of ensuring that those who wanted to vote and who acted reasonably in pursuit of that purpose would have been able to do so. It is contended, on the basis of the finding of the HSRC to the effect that more than 60 percent of respondents in the survey did not know that the bar-coded ID was a registration and

voting requirement, that there was an insufficient campaign by the department to make people aware that they needed the bar-coded ID to vote. It was further submitted that the consequence of this was that the lack of knowledge and absence of a campaign taken together denied many people their right to register and to vote. Such contentions however relate to the implementation of the scheme rather than to the constitutionality of the Act, and in particular to whether the scheme was able to achieve the stated purpose.

[40] The evidence shows that about 80 percent of potential voters were already in possession of bar-coded IDs by July last year, that there had been publicity of the fact that an identity document was required for registration and voting from about April last year and that there was a more pointed campaign concerning the bar-coded ID requirement since about September last year. There is no evidence of any current survey indicating the state of knowledge of the electorate. The Act was promulgated nine months before elections had to be held so that the relevant circumstance prevailing as at the promulgation of the Act was that people who wanted to vote and took reasonable steps to do so would have had six months within which to apply for the necessary documents.[23] Furthermore, any person who seriously intended to vote could reasonably have been expected to make

[23] Section 14(2) of the Electoral Act empowers the Commission to determine the date upon which registration is to close. The scheme of the Act demonstrates that some time must elapse between the date of the closure of registration and the election. The Commission closed registration on 15 March 1999. This implies that the Commission considers it reasonable to allow about three months, between the date of the closure of

the necessary enquiries concerning the documentary requirements for registration.

[41] A prevailing circumstance of some importance is that all people who had a genuine desire to vote would have had to cast their ballot in favour of one or other political party. It must be borne in mind that the responsibility of ensuring that people know of the requirements for voting is not only that of the government. Indispensable to any democratic process is that political parties will ensure that their potential supporters are aware of the prerequisites of voting and comply with them. It was also reasonable to expect that the Commission would perform its functions effectively and that it was likely to take reasonable steps to ensure that documentary requirements as well as the need for registration would be publicised before and during the period of registration. Finally, it would have been apparent in October 1998 that people who wanted to vote and went to register would probably have been informed of the documentary requirements by registration officials. It may also be mentioned that, as it happens, a period of at least 9 days was set aside for registration at more than 14 000 registration points, consisting of 3 separate periods of 3 days each, interspersed over a period of 3 months. Following that, the Commission deemed it appropriate to close general registration. It must have been satisfied that it was appropriate to do so. In these circumstances it has not been established that the time was so limited that the machinery established by the Act was not reasonably

registration and the elections, for the purpose of finalising the roll.

capable of enabling those who wished to register to do so.

[42] It remains to consider the capacity argument. The essence of this contention has always been that the department is building up a backlog in relation to the processing and issuing of bar-coded IDs, and that the history of it's performance shows that, if all those who had not yet applied for bar-coded IDs applied for them by the date on which it was anticipated that registration would close, the department would be inundated with applications and unable to cope. It was contended on behalf of the respondents that the assumption that all people who are entitled to register and vote and who do not have bar-coded IDs would want to do so was unfounded. In any event, the department gave the assurance that it did have the capacity to cope even if this were to happen and gave details of the contingency arrangements which had been made to satisfy an unprecedented demand for bar-coded IDs at the last minute.

[43] The circumstances which existed at the time that the Act was adopted which have a bearing on the issue as to whether the department would probably have the capacity to issue TRCs and identity documents to all people who wanted to vote, are the following:

(a) The HSRC expressed doubt about the capacity of the department to issue the necessary documents to all those who would require them on the basis of the substantial numbers who did not have such documents and survey results

which indicated that, as at July 1998, there were considerable delays in the issuing of bar-coded IDs experienced by a large proportion of people who applied for them.

(b) In the light of this report the Commission expressed reservations about the department's capacity to meet the demand for bar-coded IDs.

(c) The department assured the national assembly that it did have the necessary capacity and if necessary, would increase its capacity to meet the demand.

(d) The HSRC and the Commission had not made any investigation into the ability and commitment of the department to increase its capacity in order to ensure that people who wanted to vote were able to obtain the necessary documents timeously.

(e) Subsequent to the HSRC report and the Commission's reaction to it, a decision was taken to allow registration to proceed on the basis of TRCs which meant that bar-coded IDs would not be required for the purpose of registration.

(f) Holders of blue IDs could therefore get registration documents within twenty four hours.

(g) Adequate time was available for TRCs to be procured before registration would close.

In the circumstances, the machinery provided by the Act was reasonably capable of achieving the purpose of registration for a common voters roll. Bar-coded IDs would be needed only for those who registered on TRCs. When registration closed it would be known how many such IDs had to be issued before the date of the election. If it transpired that the department would not be able to provide bar-coded IDs timeously to those who needed them, appropriate arrangements could be made at that stage. It was always within the power of Parliament to amend the Act if it transpired that the department's assurances were not correct, or that it was necessary to do so for any other purpose. In this regard, Parliament could derive comfort from the fact that the elections were to be facilitated, managed and controlled by the Commission[24] which was independent and impartial, and had a continuing duty to satisfy itself that the elections would be free and fair. The Commission would be under a duty to report to Parliament if prospective voters were in fact unable to register or if it appeared that they would be unable to vote because of the department's failure or inability to implement its assurances. No such report has been made.

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24 Section 5 of the Electoral Commission Act.

[44] It follows that the dispute about whether the department has been performing efficiently in issuing the required documentation and whether it presently has the capacity to issue these documents to all those who require them is, strictly speaking, irrelevant to the determination of the constitutionality of the impugned provisions. The possible consequences of the adoption of the statutory measure by Parliament existing on the date of the adoption are limitless: some people may have found the documentary requirements too burdensome; some may not have wanted to register at all; other people may have applied for their documentation and not have received them on time; the department's capacity may have turned out to be utterly insufficient and nothing may have been done to remedy that. But, as has been indicated, this relates to the question of implementation, not to that of constitutionality. The mere possibility of people not being able to register does not begin to carry the day. The only relevant enquiry is concerned with the probable consequences of the statutory provision. On the evidence before this Court, there is no probability that potential voters who really wanted to register would not have been able to do so.

[45] The appellant contended that the department has in fact failed to meet its assurance, and that this failure is evidence on which it can rely to show that it was probable at the time the Act was passed, that this would happen. It is not clear to me whether the evidence tendered is relevant to the question whether the provisions of the Act constituted a denial

of the right to vote. But even if such evidence were relevant, it does not establish the necessary facts. The particulars on which this broad contention was based changed periodically because the department was continuously receiving, processing and issuing bar-coded IDs. This meant that the contention had to be adjusted to suit the new circumstances but it was always based on three propositions: the department's statistics were unreliable; the department was inefficient and was continuously building a backlog; there was no reason to believe the assurances of the department that it could cope with the issue of the required bar-coded IDs. The High Court rejected these contentions holding that, on the statistics then available, there was insufficient reason to assume, on a speculative basis, that there would be a huge number of applications with which the department would not be able to cope and that there was an insufficient basis upon which the assurances given by the department could be gainsaid. I agree with this conclusion.

[46] This does not mean however, that the only remaining alternative to declaring the legislation unconstitutional, is that the freeness and fairness of the election must be determined after the election is held. If the Commission did not allow sufficient time for registration, had too few registration points, or acted in any other way that was tantamount to a denial of the vote, any aggrieved party could apply for an appropriate mandamus against the Commission. This indeed happened in *August*[25] in which this Court was asked to, and did issue orders, aimed at the reasonable facilitation of voting by prisoners. If, on

[25] See footnote 16.

the other hand, the department conducted itself in a way which materially prejudiced the right to vote, any aggrieved party could similarly have engaged a court in pursuit of an appropriate order. This is because the right to vote and the corresponding duty of all relevant organs of state to facilitate the exercise of that right are continuous rights and obligations respectively.

[47] Finally, it should be mentioned that the available statistics point away from the conclusion that the imposition of the contested documentary requirements have resulted in a denial of the right to vote to millions of South African citizens. According to the results of the HSRC survey, twenty million people already had bar-coded IDs as at the end of July 1998. Despite the dispute as to the reliability of the statistics provided by the department, it can safely be accepted that at least two and a half million people have been issued with bar-coded IDs since the date of the HSRC survey. Yet only about seventeen million people have registered. This means that the reasons why people have not registered are probably complex and varied and at best for the appellant, not determinable at this stage. A contention that those who are otherwise qualified to register would not do so because of the disputed documentation requirement is accordingly of no substance.

[48] Before this Court, the appellant advanced an argument based on what was alleged to be a breach of sections 9(1) and 9(2) of the Constitution. However, it is clear from what has been said in this judgment that although the documentary requirements in issue may be

said to differentiate between different categories of people, there is a rational connection between the measure and the legitimate governmental purpose of facilitating the effective exercise of the important right to vote. No discrimination or unfairness has been established.[26]

[49] The attack on the constitutionality of these provisions fails.

[50] I have read the judgment of Langa DP concerning the challenge to the constitutionality of certain actions of the government which were said to interfere with the independence and impartiality of the Commission and agree that for the reasons set out in that judgment, no order should be made concerning this aspect of the matter.

[51] The appeal fails. The question of costs must be determined. The High Court awarded costs to the respondents. There is no valid reason for us to disturb the exercise of a discretion by that Court. But this Court is not obliged to award the respondents their costs consequent upon the failure of the appeal. Although the appellant has effectively lost, it raised important matters which needed to be finally determined in the public interest. In particular, some of the matters raised by the appellant concerning the infringement of the independence of the Commission raised important matters of public concern. Furthermore, the government cannot be said to have contributed to the

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26 I agree with the more detailed analysis of Goldstone J in the Democratic Party case, which is referred to in paragraph 4 of this judgment concerning the infringement of the right to equality.

administrative and financial independence of the Commission with any particular rigour, vigour or urgency. In the circumstances there will be no order of costs in the appeal.

Order

[52] The appeal is dismissed with no order as to costs.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J and Sachs J concur in the judgment of Yacoob J.

LANGA DP:

The independence of the Commission

[53] I have read the judgment of Yacoob J and agree, for the reasons he has set out, with his conclusions and with the order proposed by him. It is however necessary for me to deal with a further matter which was raised by the appellant with regard to the constitutionality of the conduct of the government in its dealings with the Commission.

[54] In its founding affidavit the appellant contended that the independence of the Commission had not been respected by the government and that as a result, the Commission was unable to exercise its powers and perform its duties under the Electoral Commission Act. Two complaints were made in this regard. Firstly, that the government's refusal to accept the advice of the Commission that bar-coded IDs should not be the only identification documents acceptable for the purposes of registering and voting, had resulted in a delay in the passing of the Electoral Act, and in the introduction of an electoral system which was unfair. Secondly, that inadequate funding had been provided to the Commission as a result of which it had been unable to appoint the necessary officials to attend to the registration of voters, and this had led to such functions being taken over by the government.

[55] The order sought by the appellant in respect of these contentions was set out in paragraph 3 of the notice of motion in the following terms:

> "3. Declaring the following conduct of First, Second and Third Respondents insofar as it infringes the independence and/or impartiality of Fourth and/of [sic] Fifth Respondent to be inconsistent with the Constitution read with the Electoral Act and the Electoral Commission Act 51 of 1996 (*"Electoral Commission Act"*), and therefore invalid to the extent of its inconsistency therewith:
>
> 3.1 The financial constraints placed upon Fourth and/or Fifth Respondent;
>
> 3.2 The usurpation of, alternatively interference with, alternatively deprivation of Fourth and/or Fifth Respondent's powers, duties and functions set out in Sections 5 and 12 of the Electoral Commission Act and Sections 4, 5 and 14 of the Electoral Act read

with sections 181 and 190 of the Constitution.

3.3 The withholding of bar-coded identity documents issued by Second Respondent's department at Second Respondent's offices throughout the country without delivery thereof to those having applied therefor, alternatively, without proper notification thereof to those applicants."

[56] The allegations made by the appellant in its founding affidavit in support of the relief claimed by it in prayer 3 of the notice of motion were as follows:

(a) The financial constraints imposed upon the Commission arose out of inadequate funding. As a result of this inadequate funding it was and is not possible for the Commission to perform its functions under the Constitution and the Electoral Commission Act.

(b) Because of the inadequate funding referred to in paragraph (a) above, the Commission was unable to employ the staff needed, in particular for registration, and as a result that task was taken over by the government and directed out of the office of the Deputy President.

(c) The government caused the Electoral Act to be passed notwithstanding the fact that the Commission was of the opinion that this legislation might well lead to the disenfranchisement of voters.

(d) A substantial number of bar-coded IDs which had been issued to applicants were retained by the Department of Home Affairs ("the department") in its offices, instead of being delivered to the applicants concerned.

[57] These claims were dismissed by the High Court which held that " . . . the applicant has made out no case whatever for any of the relief claimed by it. The application must hence fail."

[58] In support of its contention that the provisions of the Electoral Act requiring bar-coded IDs for registering and voting infringed the independence of the Commission, the appellant referred to the findings of the HSRC and Markinor reports, both of which are dealt with fully in the judgment of Yacoob J. As appears from the judgment of Yacoob J, the proposal that a bar-coded ID be required for registering and voting originated in the recommendation of the Commission. The Commission subsequently expressed concern as to the capacity of the department to provide bar-coded IDs to those prospective voters who did not yet have such a document, but who were otherwise qualified to vote, and who wished to register and vote in the election. This led to the commissioning of the HSRC report. After such report had been received, the Commission recommended that the requirement that a bar-coded ID be the only identification document acceptable for registration and voting, be amended, and that provision be made for other suitable identification documents to be used for such purposes. As appears from the judgment of

Yacoob J, Parliament did not accept this recommendation.

[59] Parliament's decision to retain the provision requiring bar-coded IDs for voting cannot be said to infringe the independence or impartiality of the Commission. The competence to pass the Electoral Act vested in Parliament and not in the Commission. This has been accepted by the Commission. In his affidavit on behalf of the Commission, its Chairperson dealt with the issues which had been raised in the HSRC report and by the appellant concerning the use of bar-coded IDs. He expressed concern as to the capacity of the department to meet the demand which would be made for such documents by those who did not have them. He went on to say:

> "On the other hand, the founding affidavit errs . . . in averring that the rejection of the IEC's proposal with regard to barcoded identity documents constituted an interference by first, second and third respondents with the administrative independence of the IEC. 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. Nothing in that sequence of events was in any way an interference with the independence of the IEC."

[60] The Commission is under a duty to satisfy itself that the elections are free and fair, and to report to Parliament if they are not or are likely not to be. As Yacoob J points out in

his judgment, that is a continuing obligation. If it transpires that as a result of the legislative framework, the elections will not be free and fair, the Commission must say so, and there is no reason to believe that it will not do so. As Yacoob J shows in his judgment, however, it has not been established that insufficient time was allowed in the circumstances which existed when the Electoral Act was passed, for all who wished to register and vote to apply for the bar-coded IDs that were required for such purpose; nor has it been established that those who have applied for bar-coded IDs and have registered on the strength of such application, will not receive such documents in time to vote, or be provided with temporary identification certificates which can be used for such purposes.

[61] Once the attack on the validity of the Electoral Act fails, the contention that the independence of the Commission was infringed by the requirements of that Act, must also fail. The Commission's responsibility is to manage the elections in accordance with the provisions of the Act. There is nothing in the provisions of the Act which detract from the independence of the Commission.

[62] The issue relating to the funding of the Commission is set out in somewhat general terms in the founding affidavit in which a comparison is made between the funding made available to the Commission for the first democratic elections, and the funding available to the Commission for the current elections. It was contended that less money had been made available for the current elections, yet a great deal more work was required of the Commission in the light of the constitutional requirement that a national voters roll be

compiled.

[63] The question of the funding made available to the Commission is dealt with fully in the affidavit of the Chairperson of the Commission. His affidavit shows that the Commission has always been allocated less money than it asked for and which, in its estimation, it required for the performance of its functions. There were extensive negotiations concerning the money which the Commission would require for the 1998/99 financial year. The Commission was of the view that it could not fulfill its responsibilities with an amount of less than R965 million. The Department of Finance would not accept this figure. On 4 March 1998 (the financial year runs from 1 April to 31 March) it indicated that approval would be given for the following amounts in respect of the Commission's budget: 1998/9 R500 million; 1999/2000 R300 million; 2000/1 R200 million. It also indicated that these amounts would be reviewed on a periodic basis, and on the strength of this, and in the belief that adequate funding would indeed be made available if it was required, the Commission continued to perform its duties. In October 1998 the Commission was advised by the department that an additional amount of R100 million would be made available during the 1998/9 financial year. The Commission took the view that it could not conduct the registration of voters on the limited budget of R600 million for that financial year, which was more than R300 million less than it required.

[64] It appears from the affidavit of the Chairperson of the Commission that a process of

discussions and correspondence between the Commission and the government was then entered into which culminated in a meeting with the government chaired by the Deputy President and attended by the Acting Minister of Home Affairs and the Deputy Minister of Home Affairs. A solution to the problem was reached at this meeting, which was described by the chairperson of the Commission as follows:

> "Through the good offices of the Deputy President a solution to the impasse was formulated. In substance it amounted to this. Instead of the IEC continuing with the recruitment, training and deployment of remunerated registration officers, the government service would from its ranks and at its own cost make available the approximately 72 500 registration officers needed for the first phase of the voter registration process scheduled to take place at the end of November 1998. A sub-committee consisting of representatives of the Deputy President's office, the Department of Home Affairs and the IEC was appointed to implement the decision."

[65] The affidavit reveals that as a result of this arrangement some ten million voters were registered during the first registration drive which took place at the end of November in the five northern provinces and at the beginning of December in the remaining four provinces. Although problems were experienced during the course of registration, and the solution devised at the meeting between the Commission and representatives of the government was not considered by the Commission to be ideal, the Commission was of the opinion that at the time of the lodging of its affidavit it could not be said that the arrangement would not be satisfactory. In his affidavit the Chairperson of the Commission said:

> "I can say at this stage, however, that if sufficient staff is engaged in good time for the IEC to

> attain [the improvement which would ensue from the employment and training of key personnel] the second phase of voter registration will probably prove successful. However, should it transpire during that phase at the end January 1999 that the IEC cannot attain and maintain operational control over government servants seconded to it as registration staff, it will not hesitate to inform government and the public accordingly. The IEC will not permit the use of government servants should this impair its ability manifestly to perform its constitutional mandate impartially. In this regard I wish to draw attention to the provisions of section 14(4) of the Electoral Commission Act which empower the IEC "if it deems it necessary [to] publish a report on the likelihood or otherwise that it will be able to ensure that any pending election will be free and fair."

[66] The affidavit of the Chairperson of the Commission was attested to on 7 January 1999. Since then there have been two further registration drives. There is nothing in the papers to suggest that the Commission was not able to maintain operational control over the public servants seconded to the Commission for the purpose of conducting the registration, nor that this arrangement interfered with its constitutional mandate to perform its duties impartially.

[67] According to the Chairperson's affidavit, the cost of the registration process was a material cause of the difference between the Department of Finance and the Commission concerning the amount of money that would be required during the 1998/9 financial year. That was addressed by the arrangement whereby members of the public service would be seconded to the Commission without cost to it for the purposes of conducting the registration. No evidence was placed before the High Court, or this Court, to show that in the light of the arrangement made for the registration of voters, the Commission has

insufficient funds to carry out its mandate. What is significant is that the Commission does not make that contention itself, and did not approach the High Court, or seek to intervene in the proceedings before this Court, to claim such relief.

[68] On the information before it, the High Court correctly held that the appellant had failed to establish the allegation that insufficient funds had been made available to the Commission to enable it to perform its functions and duties under the Electoral Act and the Electoral Commission Act.

[69] The last complaint made in the High Court relating to the alleged infringement of the independence of the Commission, was that certain bar-coded IDs issued by the department had not been delivered to the applicants. This complaint related to the capacity of the department to provide bar-coded IDs to the persons who had applied for them, and has no bearing on the independence of the Commission. In this Court, the appellant relied on the allegations concerning the inability of the department to issue the bar-coded IDs in support of its contentions relating to the capacity of the department, but correctly did not contend that this infringed the independence or impartiality of the Commission.

[70] It follows that the appellant failed to establish any of the grounds on which it had relied in its founding affidavit for the relief claimed in paragraph 3 of its notice of motion. During the course of argument in this Court, however, the appellant sought to amend

prayer 3 of its notice of motion so as to claim a declaration of rights in respect of specific aspects of the government's conduct which had not been raised pertinently in its founding affidavit or in the notice of motion as originally framed.

Application to amend

[71] In support of the amendment, the appellant relied on evidence contained in an affidavit which had been filed in the High Court proceedings by the former Chairperson of the Commission, and on the affidavit of the third respondent which had been lodged in reply to that affidavit. By way of such amendment the appellant sought an order declaring that:

> "3.1 The Minister of Home Affairs is not responsible and politically accountable for the Electoral Commission;
>
> 333.2 The Electoral Commission is not a line function activity of the Department of Home Affairs;
>
> 3.3 The Department of Home Affairs is not responsible for the conduct of elections;
>
> 3.4 It is not the Department of Home Affairs' responsibility to obtain a budget from the Electoral Commission, nor to evaluate its budget;
>
> 3.5 The Electoral Commission is entitled to its own vote in Appropriation Acts;
>
> 3.6 The Electoral Commission's Chief Electoral Officer is an accounting officer for purposes of the Exchequer Act, No 66 of 1975, and as such accountable to Parliament, not to the Director General of Home Affairs;
>
> 3.7 The determination of the Electoral Commission's budget must directly involve the Commission and it must be given adequate opportunity to stake its own fiscal claim;
>
> 3.8 The Electoral Commission cannot be included in the list of public entities for

purposes of the Reporting by Public Entities Act, No 93 of 1992;

3.9 Treasury Instruction K5 cannot be made applicable to the Electoral Commission;

3.10 Insufficient funds have been budgeted for the Electoral Commission to execute its statutory duties, particularly in respect of voter education, the registration of voters, the compilation of the voters' roll and the holding of elections;

3.11 Past acts, conduct and omissions by the First to Third Respondents inconsistent with the orders made in terms of paragraphs 3.1 to 3.10 to [sic] have been unlawful and in breach of one or more or the following statutory provisions

(a) Sections 181(2), 181(3), 181(4) and 181(5) of the Constitution of the Republic of South Africa, No 108 of 1996;

(b) Sections 5(1)(a), 5(1)(b), 5(1)(c), 5(1)(d), 5(1)(e), 5(1)(j), 5(1)(k), 5(1), 5(2)(a), 12(2)(b) of the Electoral Commission Act, No 51 of 1996; and

(c) Sections 4, 5 and 14 of the Electoral Act, No 73 of 1998;"

[72] The application for amendment was opposed by the first three respondents. In the proceedings before the High Court the fourth and fifth respondent had been represented by counsel. They abided the decision of the Court, and did not seek any relief themselves. Consistently with this, the fourth and fifth respondents did not appeal against the decision of the High Court, and were not represented by counsel in the proceedings before this Court.

[73] In its argument on this aspect of the case, the appellant placed considerable reliance on the affidavit of the Chairperson of the Commission, and that of the third respondent which had been filed in direct response to the affidavit of the Commission's Chairperson. In order to arrive at a decision on the application to amend, consideration will have to be given to the averments made in these affidavits. Before doing so, however, it will be

appropriate to set out the constitutional framework relevant to the Commission as an institution and its relationship with other organs of state.

The constitutional framework

[74] The Commission is one of the state institutions provided for in chapter 9 of the Constitution and whose function under section 181(1) is to "strengthen constitutional democracy in the Republic". Under section 181(2) its independence is entrenched and as an institution, is made subject only to " the Constitution and the law". For its part, it is required to be impartial and to "exercise [its] powers and perform [its] functions without fear, favour or prejudice." Section 181(3) prescribes positive obligations on other organs of state who must, " . . . through legislative and other measures, . . . assist and protect [it] to ensure [its] independence, impartiality, dignity and effectiveness . . ."

Section 181(4) specifically prohibits any "person or organ of the state" from interfering with its functioning. Section 181(5) provides that:

> "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

[75] Although Constitutional Principle ("CP") VIII enacted in schedule 4 of the interim Constitution provided amongst other things for regular elections, there was no CP which required the establishment of an independent body to administer them. Nevertheless, in

the First Certification Judgment,[1] this Court commented as follows on the independence of the Commission as provided for in the constitutional text it was dealing with:

> " . . . NT 181(2) provides that the Electoral Commission shall be independent and that its powers and functions shall be performed impartially. Presumably Parliament will in its wisdom ensure that the legislation establishing the Electoral Commission guarantees its manifest independence and impartiality. Such legislation is, of course, justiciable."

1 *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 178.

[76] The Electoral Commission Act[2] does guarantee the Commission's manifest independence. Section 3[3] mirrors the provisions of section 181(2) of the Constitution and section 4[4] likewise corresponds in material respects with section 181(1) of the Constitution. Section 190(1)(a) and (b) of the Constitution describe two of the main functions of the Commission as being to manage the elections at all three legislative levels, that is, national, provincial and municipal and to ensure that those elections are free and fair. Section 5(1) of the Commission Act details the functions of the Commission, the first being to "manage any election". It is quite apparent, however, when regard is had to the other functions listed in section 5(1)(b) to (p)[5] that this role was never intended to be a

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2 Act 51 of 1996.

3 Section 3(1) provides that the Commission -

" . . . is independent and subject only to the Constitution and the law."

4 Section 4 provides that -

"[t]he objects of the Commission are to strengthen constitutional democracy and promote democratic electoral processes."

5 Section 5(1)(b) to (p) provides:

" (1) The functions of the Commission include to-

(a) . . .
(b) ensure that any election is free and fair;
(c) promote conditions conducive to free and fair elections;
(d) promote knowledge of sound and democratic electoral processes;
(e) compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters;
(f) compile and maintain a register of parties;
(g) establish and maintain liaison and co-operation with parties;
(h) undertake and promote research into electoral matters;
(i) develop and promote the development of electoral expertise and technology in all spheres of government;
(j) continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith;
(k) promote voter education;
(l) promote co-operation with and between persons, institutions, governments and administrations for the achievement of its objects;
(m) demarcate wards in the local sphere of government or to cause them to be

merely supervisory or monitoring one. The functions relate to an active, involved and detailed management obligation over a wide terrain. The Commission must, among other things, "ensure that any election is free and fair"[6] and "promote conditions conducive to free and fair elections".[7] In addition, it must also "continuously review electoral legislation and proposed electoral legislation, and . . . make recommendations in connection therewith".[8] The Commission also has the power to "appoint appropriate public administrations in any sphere of government to conduct elections when necessary".[9]

[77] The Chief Electoral Officer appointed by the Commission under section 12(1) of the Electoral Commission Act is designated by section 12(2)(b) as "the accounting officer of the Commission for the purposes of the Exchequer Act, 1975 (Act No. 66 of 1975)". It is this officer's responsibility to "cause the necessary accounting and other related records to be kept." The conditions of service, remuneration and other benefits of all the

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demarcated;

(n) declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections;

(o) adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature; and

(p) appoint appropriate public administrations in any sphere of government to conduct elections when necessary."

6 Section 5(1)(b).

7 Section 5(1)(c).

8 Section 5(1)(j).

9 Section 5(1)(p).

administrative staff of the Commission are to be prescribed by the Commission.[10] The Commission's necessary expenditure is to be defrayed out of money appropriated by Parliament for that purpose or received by the Commission from any other source[11] and its records are to be audited by the Auditor-General.[12] Comprehensive reporting duties are imposed on the Commission[13] and in particular it is required annually to submit to Parliament, amongst other things, an audited statement on income and expenditure and a report in regard to its functions, activities and affairs in respect of such financial year.

[78] The establishment of the Commission and the other institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of

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10 Section 12(5).

11 Section 13(1).

12 Section 13(3).

13 Section 14.

the new constitutionalism and their advent inevitably has important implications for other organs of state who must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on those organs of state to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness. If this means that old legislative and policy arrangements, public administration practices and budgetary conventions must be adjusted to be brought in line with the new constitutional prescripts, so be it. It is therefore against this background that the conduct complained of has to be examined.

[79] The complaints by the appellant bear on the relationship between the Commission and the government, in particular the department. The issue is whether the conduct of the government has been demonstrated to have impinged on the affairs of the Commission in a manner which affected its independence in the carrying out of its functions, or whether such conduct constitutes a threat to do so. The averments contained in the affidavit of the Chairperson of the Commission formed the backbone of the appellant's submissions in this respect. The affidavit sets out a number of concerns and makes the point that there has not been universal and unstinting support for the Commission's perception of its status, role and function. Indeed, the correspondence reveals the differing perceptions with regard to how the Commission fits into the scheme of things. I turn now to deal with three broad areas in which the dispute manifested itself, that is, the different perceptions with regard to the responsibility for the elections, the system of financial accounting and problems in

relation to the engagement of the staff of the Commission.

Responsibility for elections

[80] It is clear that the department perceived itself as bearing responsibility and political accountability for the Commission. Nor was it alone in this perception. The correspondence indicates that as early as 29 July 1997, the Director-General of the Department of State Expenditure wrote to Mr Mokoena, the Director-General of the department, in these terms:

> "As your Department is responsible for coordinating and managing the election, it is accepted that transfer payments to the new IEC and the control thereof will be done through your Department in accordance with the Financial Handbook."

[81] When the Chairperson of the Commission became aware of discussions and arrangements which pertained to and involved the Commission being made between the two Directors-General, behind the Commission's back as it were, he placed his objection on record in a letter to the Director-General of the department dated 7 October 1997, and posed eight questions on the basis of which he sought a meeting with the Director-General. It will suffice to quote the first four questions only:

> "1. By virtue of what authority did you hold discussions with the Department of State Expenditure 'regarding the responsibility of the Department of Home Affairs towards the Electoral Commission.'
>
> 2. What was seen to be the source, content and scope of such 'responsibility'?

> 3. By virtue of what authority was the 'agreement' reached that the Commission 'should be a line function of the Department of Home Affairs and what was that envisaged to entail?
> 4. Accepting, for the purpose of argument, that there is indeed a basis in law for such conduct, why was the Commission not afforded the elementary courtesy of being consulted about the matters referred to in paragraphs 1 to 3 above?"

[82] The Director-General of the department conveyed his attitude, with regard to the status of the Commission, succinctly in his letter to the Chairperson of the Commission dated 8 October 1997 in which he stated that:

> "When the Electoral Commission Act, 1996, was passed through and adopted by Parliament, the Minister of Home Affairs was in no way relinquished of his responsibility to be politically accountable for the new Commission, and neither could the Department escape the responsibility to have on its annual budget the budget of the Commission as an item."

This elicited a swift response. On 9 October 1997 the Chairperson of the Commission wrote:

> ". . . the idea that you espouse that your Minister is 'politically accountable for the new Commission' is a relic of a regime we have emphatically abandoned in favour of an electoral system of manifest independence, impartiality and legality, envisaged in the Constitutional Principles, enshrined in Chapter 9 of the Constitution and fleshed out in Act 51 of 1996. The Minister is the designated conduit for communications between the EC and Cabinet or Parliament, but that is a far cry from regarding him - and therefore according to your approach, yourself - as 'responsible' or 'politically accountable' for it."

[83] What emerges clearly is that the department and the Department of State Expenditure regarded themselves, at least at the level of the Directors-General, as competent and entitled to make decisions and agreements involving the Commission.

There is no doubt that the decisions and agreements might potentially hold serious financial implications for the functioning of the Commission. The agreement between the two Directors-General was in fact acknowledged in a letter, dated 11 September 1997, by the Minister of Finance to the second respondent. The two departments, through their respective Directors-General, clearly regarded the Commission as "a line function" of the department. The Director-General of the department in fact informed Mr Du Plessis, the deputy Chief Electoral Officer of the Commission, by letter dated 7 October 1997, that the Department of State Expenditure will only deal with the budget of the Commission through the department and not directly with the Commission. This, he pointed out, was in keeping with what he referred to as "the lines of communication." Equally clearly, the Chairperson of the Commission of the Commission challenged the perception held by the department at every turn.

[84] The conduct of the Department of State Expenditure has been consistent with the view that although Parliament specifically votes a financial allocation to the Commission, it is the accounting officer of the department, and not that of the Commission, who must do the evaluation of the budget and that the budgetary allocation to the Commission must be routed through the department and not directly to the Commission.

[85] The following occurrence illustrates the different perceptions of precisely what the independence of the Commission entails. At the time when the Commission was in the

process of asserting its financial and administrative independence, the department and the Department of Finance submitted to Cabinet a proposed amendment to the Electoral Commission Act. The effect of the amendment was to curtail the Commission's financial, administrative and political independence. Cabinet approved the proposed amendment and it was placed on the parliamentary order paper. Up to that stage, and notwithstanding the fact that the proposed change would severely affect the powers, functions and duties of the Commission, the two departments had not seen fit to consult with or even to inform the Commission about the proposed amendment. In the light of the fact that the provisions of section 5(1)(j) of the Electoral Commission Act entrust the Commission with the responsibility to "continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith", this conduct by the two departments constitutes a serious slight to the dignity and integrity of the Commission.

The system of financial accounting

[86] Prayers 3.6, 3.8 and 3.9 all relate to the dispute about the nature of expenditure controls appropriate to the Commission. The Chairperson of the Commission makes it clear in his affidavit that the Commission's attitude is that it has its own accounting officer, that it is accountable to Parliament for its expenditure and that the accounts of the Commission are subject to audit by the Auditor-General. The government's view, expressed through the third respondent, is that the Commission's attitude is wrong in that it

is not consistent with the degree of expenditure controls perceived to be necessary. Third respondent is of the view that the funds allocated by Parliament to the Commission fell within the budget of the department; the Commission must therefore account to the department in terms of Treasury Instruction K5, issued under section 39 of the Exchequer Act, 66 of 1975.

[87] Treasury Instruction K5 provides:

> "K5 Transfer Payments
>
> K5.1 The rendering of financial assistance (including payments of grants-in-aid and contributions) to institutions, boards, committees or other public bodies or persons shall be subject to and conditional upon such beneficiaries submitting, within six months after closing of their respective financial years, the following to the accounting officer of the responsible State department:
>
> (a) The financial statements referred to in section 6(2);
>
> (b) a director's report referred to in section 7; and
>
> (c) an auditor's report contemplated in section 12,
>
> laid down by the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992) and any other relative information or statements which the accounting officer may require, according to the circumstances.
>
> K5.2 An accounting officer may stipulate conditions which he regards as desirable in respect of any payment to be made but this should include a confirmation by the chief executive officer of the relevant beneficiary that internal auditing is applied, *mutatis mutandis,* within such institution, board, committee or body as contemplated in section 8 of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992).
>
> K5.3 Only the Treasury may grant approval for aforementioned documentation not to be submitted or an internal audit not to be conducted as contemplated in Section 8 of the said Act.
>
> K5.4 Prior to rendering financial assistance during any year, accounting officers should satisfy themselves by means of evaluating aforementioned documentation and information that:

(a) The conditions in respect of the previous year's assistance have been complied with by the beneficiary institutions, boards, committees, bodies or persons;

(b) the necessity for continued assistance still exists;

(c) the financial aid is still meritorious; and

(d) the set objectives were attained

and furnish a certificate to this effect, to be submitted to the Treasury."

[88] In his affidavit, third respondent acknowledged the need for the Commission to be independent but stated:

> "it escapes my understanding to see how this process would exclude fiscal constraints, including the application of Treasury Instruction K5, or, for that matter, the accounting responsibilities of the Director General responsible for the vote passed under that Department."

It is clear that the language of Instruction K5 is inappropriate when applied to an institution such as the Commission. It speaks of an "accounting officer of the responsible State department". The understanding of the third respondent seems to be that the department concerned must be the Department of Home Affairs. On the face of it, this would appear to be in conflict with the Electoral Commission Act which designates the Chief Electoral Officer of the Commission as its accounting officer for the purposes of the Exchequer Act.[14] The Commission is furthermore not a "department" as the word is used in Instruction K5.

[14] Section 12(2)(b) of the Electoral Commission Act.

[89] The application of Instruction K5, unadapted to a new institution such as the Commission, has the potential to undermine the independence of the Commission. While it is reasonable and necessary to require that the Commission should have an internal audit procedure and that it should be required to produce audited reports and financial statements at the end of the financial year, the essence of the problem is that Instruction K5 has been designed to cater for a situation in which a department makes funds available from its own budget to a public entity for the performance of certain functions. The arrangement is fundamentally inappropriate when applied to independent institutions such as the Commission. The accounting officer of the department is empowered and required to do two things which are by their nature invasive of the independence of the public entity. Firstly, the accounting officer can stipulate further conditions considered desirable and which must be fulfilled before any further money is paid to the public entity. Secondly, he or she is obliged to perform an evaluative role in relation to the public entity. The accounting officer can pay money over to the entity only if satisfied that its objectives have been achieved and that any relevant conditions which have been placed on the financial assistance have been complied with. If Instruction K5 were validly to be applied to the Commission, the accounting officer of the department could refuse to give the Commission money if, in his or her opinion, the work of the Commission did not contribute to a free and fair election or had failed to comply with a condition imposed upon it by the accounting officer. If this were so, the independence of the Commission would be clearly

undermined.

[90] In any event, the Commission refused to comply with the provisions of Instruction K5. Third respondent was, however, able to facilitate the payment of further money to the Commission despite the latter's refusal to comply with this instruction. Had third respondent not resolved the matter, it is difficult to see how a refusal to fund the Commission, because of its refusal to comply with Instruction K5, could be constitutionally justified. However, the fact that the money was made available does mean that the independence of the Commission remained intact.

[91] There has in the meantime been some effort to resolve the difficulty. The suggestion that the Commission should become a department in terms of the Public Service Act 103 of 1994 was made and found to be unacceptable. The latest effort by the Department of State Expenditure appears to be the suggestion that the Commission be listed as a public entity in terms of the Reporting by Public Entities Act 93 of 1992, but this suggestion appears, at first blush, to reintroduce the difficulties attendant upon Instruction K5. It is however clear from the affidavit of the Chairperson of the Commission that, as at about the end of January 1999, there was something of an impasse between the Commission and the third respondent in this regard.

Staffing of the Commission

[92] Another problem relates to the staffing of the Commission. Sections 12(4) and (5) of the Electoral Commission Act provide:

> "(4) The chief electoral officer shall in consultation with the Commission appoint such officers and employees of the Commission as he or she may consider necessary to enable the Commission to exercise its powers and to perform its duties and functions effectively.
> (5) The conditions of service, remuneration, allowances, subsidies and other benefits of the chief electoral officer, an acting chief electoral officer and the other administrative staff of the Commission shall be prescribed by the Commission."

Section 23 of the Act provides that the Commission may make those regulations necessary to achieve the objects of the Act. However, where the regulations will affect state expenditure, section 23(3) provides that the regulations must be made with the concurrence of the Minister of Finance.

[93] Once the members of the Commission were appointed in July 1997, immediate consideration was given to the question of employing staff for the Commission. Draft regulations in terms of section 23, to regulate the terms and conditions of staff were drawn up and a selection process to identify a suitable candidate for Chief Electoral Officer was undertaken. Thereafter, on 22 October 1997, the Chairperson of the Commission wrote to the third respondent annexing the relevant documentation and seeking approval of the draft regulations drawn up by the Commission in terms of section 23. In his letter he stated:

> "I have to emphasise to you the urgency of this matter and beg your co-operation towards

> achieving finalisation with the minimum of delay."

[94] By 8 January 1998, despite meetings held between the Commission and the third respondent, no written response had been received by the Commission from the third respondent. Accordingly, the Chairperson of the Commission wrote to him once again, in the following terms:

> "In the course of our two subsequent meetings, I attempted to impress upon you the need to get the top structure of the Commission in place with the minimum of delay and urged you to give consideration to the draft regulations. I also tried to convince you that delay would not only jeopardise the prospects of successful elections being held in 1999 but would increase their cost."

Still no reply was received from the third respondent. Finally the Commission went ahead and published the regulations without the written consent of the Minister and continued with the appointment of its staff.

[95] In his affidavit filed in this matter, the third respondent gives no explanation for his failure to respond to the letters of the Chairperson of the Commission, or why he failed to comply with the obligation imposed upon him by section 23 of the Electoral Commission Act. There can be no doubt that in this respect the failure of the third respondent did hamper the efficient functioning of the Commission in breach of section 181(3) of the Constitution. The fourth respondent does state in his affidavit, that this conduct did not materially impair the independence of the Commission. Nevertheless, the third respondent did not comply with the obligations imposed upon him by the Constitution in this regard.

A failure to comply with those obligations may seriously impair the functioning and effectiveness of those state institutions supporting constitutional democracy and cannot be condoned.

[96] In the light of the discussion in the preceding paragraphs on the three areas in which the dispute manifested itself, the question must be asked whether the existing legislative framework properly provides for the Commission as well as other independent institutions as envisaged in chapter 9 of the Constitution. Attempts to resolve the problem appear to have been in the context only of the existing framework, which has apparently not yet come to terms with the new constitutional imperatives. As between the Commission and the relevant organs of government, there has clearly been much discussion, debate and negotiation on this issue. What is clear is that if existing mechanisms are not appropriate, new ones must be fashioned in a manner which does not impinge the independence of the Commission. No member of the executive or administration should have the power to stop transfers of money to any independent constitutional body without the existence of appropriate safeguards for the independence of that institution.

[97] It is to be expected, as between the government and/or Parliament and any independent constitutional institution, that there will be areas of tension concerning the reasonableness of any amount of money required by a particular institution to enable it to fulfil its functions effectively. It is however incumbent upon the parties to make every

effort to resolve that tension and to reach agreement by negotiation in good faith. This would no doubt entail considerable meaningful discussion, exchange of relevant information, a genuine attempt by each party to understand the needs and constraints of the other and the mutual desire to reach a reasonable conclusion. The Commission itself would, in any event, approach a court for relief if it was considered that such a course was in its best interest. It may be that the absence of sufficient evidence is a direct result of the fact that the Commission has not applied for a direct order. It may finally be mentioned that the paucity of evidence before this Court is such that it is not even possible to determine the standard by which a decision as to whether the Commission has been sufficiently funded must be made.

[98] In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its

budgetary requirements before Parliament or its relevant committees.

[99] The second factor, "administrative independence", implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness". The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary.

[100] It follows from what I have said that the department, the Department of State Expenditure and the Minister of Finance have failed to appreciate the true import of the requirements of the Constitution and the Electoral Commission Act which provide that the Commission be independent and subject only to the Constitution and the law, that it has the responsibility for managing elections, that it is accountable to the National Assembly and not the executive, and that all other organs of state must assist and protect it to ensure its independence and effectiveness.

[101] This, however, was not the case made by the appellant when it launched its application. The appellant has failed to establish the allegations on which the application

was founded. The main issue concerning the constitutionality of the provisions of the Electoral Act fails for the reasons given by Yacoob J. The other allegations that the Commission has been unable to perform its constitutional and statutory duties, and that its functions have been usurped by the government, have also not been established.

[102] The question which has to be decided is whether in such circumstances the application for amendment should be granted in order to provide a foundation for the declaration which the appellant now asks this Court to make.

[103] Counsel for the appellant contends that section 172(1)(a) of the Constitution requires this Court to make a declaration in the terms set out in the notice of amendment, and that the application for the amendment of the notice of motion should accordingly be granted. Section 172(1)(a) provides:

> "When deciding a constitutional matter within its power, a court -
> must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency . . . "

The submission made by counsel for the appellant was that the conduct of the department, the Department of State Expenditure and the third respondent as reflected in the affidavits was inconsistent with the constitutional obligation to "assist and protect [the Commission and] ensure [its] independence, impartiality, dignity and effectiveness".[15]

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[15] Section 181(3).

[104] I will assume that if the Commission had sought a declaration in the terms set out in the notice of amendment a court would have been obliged by the provisions of section 172(1)(a) to grant it such relief. But the Commission has not sought such relief. It has made it clear that the conduct of the department, Department of State Expenditure and the third respondent did not, in the result, infringe its independence. Rather than resorting to litigation, the Commission resisted the conduct to which it took objection, and asserted its independence and impartiality. It sought no relief in the proceedings before the High Court, and did not appeal against the decision of that Court dismissing the claim made in paragraph 3 of the notice of motion.

[105] It is not necessary in the present case to decide whether section 172(1)(a) deprives a court of the discretion it ordinarily has to decide whether a case is a proper one in which to make a declaration of rights.[16] Whatever the position may be where such relief is claimed, I am satisfied that the section should not be construed as requiring a court to make an order that conduct referred to in proceedings before it is inconsistent with the Constitution, where such relief is not claimed.

[106] In the present case no such claim is made by the Commission. The appellant's claim in so far as it is based on the Bill of Rights has failed. The claim for a declaration of

[16] *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996(12) BCLR 1599 CC paras 15-7.

rights which it now seeks by virtue of the notice of amendment, is based on sections 181 and 190 of the Constitution and the provisions of the Electoral Commission Act. The extended rights of standing under section 38 of the Constitution[17] do not apply to a claim for such relief. Whilst the court should be willing in a proper case to relax the ordinary rules of standing when dealing with constitutional matters, this is not a case which calls for such relaxation. The independence of the Commission has not, in the result, been infringed and there is no reason to believe that the Commission will fail to take appropriate action to protect its interests, should it be necessary for it to do so. It is not ignorant of its rights nor is it unable to assert them.

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[17] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[107] The Commission is well able to protect its own interests and to determine the best way of doing so. It has chosen to deal with the relevant issues by asserting its independence and entering into negotiations with the ministries concerned rather than resorting to litigation. The issues raised in the notice of amendment relate to past conduct which in the result did not impair the independence of the Commission. In the circumstances this is not a case in which the appellant should be allowed to amend its notice of motion on appeal to obtain relief which the Commission has deliberately chosen not to claim. The application to amend the notice of motion must accordingly be refused.

Chaskalson P, Ackermann J, Goldstone J, Madala J, Mokgoro J, Sachs J and Yacoob J concur in the judgment of Langa DP.

O'REGAN J:

[108] I cannot agree with Yacoob J that in enacting section 1 (xii) read with sections 6(2) and 38(2) of the Electoral Act, 73 of 1998 (the Electoral Act) at the time and in the

circumstances that it did, Parliament acted constitutionally. To that extent, therefore, I dissent from both his judgment and the order the Court makes.

Legislative framework

[109] The dispute between the parties arose from the decision by Parliament to provide that only certain types of identity documents would be adequate for registration and voting in the forthcoming election. Section 1(xii) of the Electoral Act defines "identity document" as:

> "an identity document issued after 1 July 1986, in terms of section 8 of the Identification Act, 1986 (Act No. 72 of 1986), or a temporary identity certificate issued in terms of the Identification Act, 1997 (Act No. 68 of 1997);"

Section 6 provides that, in order to register, a South African citizen must be in possession either of an identity document (as defined in section 1(xii)) or a document issued in terms of section 6(2) which provides that:

> "For the purposes of the general registration of voters contemplated in section 14, an identity document includes a temporary certificate in a form which corresponds materially with a form prescribed by the Minister of Home Affairs by notice in the *Government Gazette* and issued by the Director-General of Home Affairs to a South African citizen from particulars contained in the population register and who has applied for an identity document."

I shall refer to documents issued in terms of section 6(2) as "temporary registration

certificates".[1] Temporary registration certificates may be used for registration but not for voting as section 38(2) of the Electoral Act makes plain.

> "A voter is entitled to vote at a voting station -
> (a) on production of that voter's identity document to the presiding officer or a voting officer at the voting station; and
> (b) if that voter's name is in the certified segment of the voters' roll for the voting district concerned."

[110] The cumulative effect of these provisions is the following. In order to register as a voter on the national common voters' roll, three documents suffice: a temporary registration certificate, an identity document issued in terms of section 8 of the Identification Act, 72 of 1986 (the 1986 Identification Act) and a temporary identification certificate issued in terms of section 16 of the Identification Act, 68 of 1997 (the 1997 Identification Act). In order to vote, however, only two documents will be adequate, an identity document issued in terms of section 8 of the 1986 Identification Act and a temporary identification certificate issued in terms section 16 of the 1997 Identification Act.

[1] An application form for a temporary registration certificate as contemplated by section 6(2) read with section 14 of the Electoral Act was provided for in R1419 published in *Government Gazette* Regulation Gazette 6338 of 30 October 1998.

[111] The 1986 Identification Act was repealed by the 1997 Identification Act which came into force on 1 August 1998. The 1997 Act contemplates a completely new system of identification based on identity cards. As this system has not yet been introduced by government, a transitional provision in the 1997 Identification Act empowers the Director-General of Home Affairs (the Director-General) to continue issuing identity documents in accordance with the 1986 Act until a date to be determined by the Minister.[2] There can be no doubt, however, in the light of the enactment of the 1997 legislation and the repeal of the 1986 Act, that government intends replacing all identity documents currently held by South Africans with an identity card system.

[112] Until that date, however, the Director-General may continue issuing identity documents in accordance with the 1986 Act. Section 8 of that Act governs the procedure for issuing identity documents. A person over the age of 16 years must apply for an identity document in the manner prescribed.[3] Such an identity document contains a photograph of the holder, as well as his or her identity number, in numerical and bar-coded form, full names, place and date of birth, as well as stating whether or not the holder

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2 Section 25(1) of the Act provides that:

> "Notwithstanding the repeal of the laws referred to in section 24 the Direction-General shall continue to issue identity documents in accordance with those laws until a date determined by the Minister by notice in the Gazette."

3 The obligation to apply for an identity document within three months of reaching the age of 16 years is imposed by section 7, read with section 18, of R1558 published in *Government Gazette* Regulation Gazette dated 25 July 1986. A breach of this obligation constitutes a criminal offence.

is a South African citizen. The documents issued in terms of section 8 are what was referred to during argument, as the green bar-coded identification document (bar-coded IDs).

[113] All new identity documents issued at present are therefore bar-coded IDs. When people, whose particulars are included in the population register, apply for a bar-coded ID, they may also apply for a temporary identity certificate. During argument, we were informed that a person's particulars will only have been included in the population register if notice of birth has been given or a previous application has been made for an identity document. It follows that people applying for an identity document for the first time will not immediately be able to get a temporary identity certificate if their birth was never registered as they will not be on the population register.

[114] Temporary identity certificates may be issued in terms of section 16 of the 1997 Identification Act.[4] Section 1(xii) of the Electoral Act provides that temporary identity certificates issued under the 1997 Identification Act are adequate for registration and voting. Doubt was aired during argument as to whether it was competent for the Department of Home Affairs to issue temporary identity certificates in terms of the 1997

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4 Section 16 provides that:

> "When any person has applied for an identity card, or has for official purposes lodged his or her identity card with the Director-General, the Director-General may on application issue to the person concerned whose particulars are included in the population register in terms of section 8, a temporary identity certificate in the prescribed form and manner, which, for the period and on the conditions mentioned therein, shall for the purpose of this Act be regarded as his or her identity card."

Identification Act at this stage. In my view, there is no doubt that the department is competent to do so. The manner and form for applying for temporary identity certificates in terms of that Act have been prescribed and published.[5] In terms of those regulations, a temporary identity certificate will not contain a bar-code even though it will contain the names and identity number of its holder.[6] Even though section 16 provides that temporary identity certificates may only be issued when a person has applied for an "identity card" (the new identification system established by the 1997 Identification Act which is not yet in operation), the definition of "identity card" in the 1997 Identification Act is sufficiently wide to include other identity documents.[7] Accordingly, an application for an identity document under the 1986 Identification Act would meet the requirement of an application for an identity card contained in section 16. A more difficult question, not raised in argument in this case and which I therefore do not intend to answer, was the question of whether documents may continue to be issued in terms of section 9 of the 1986 Identification Act,[8] and if they may be, whether such documents would be documents

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[5] See R75 of 1998 published in *Government Gazette* Regulation Gazette 6248 dated 31 July 1998.

[6] Regulation 10 read with Annexure 8.

[7] Identity card is defined in section 1 of the 1997 Act as follows:

> "'identity card' means the identity card referred to in section 14 and, unless clearly inconsistent with the provisions of this Act, includes an identity document referred to in section 25(1) or (2)."

Documents referred to in sections 25(1) and (2) of the Act include identity documents issued in terms of the 1986 Act. For the text of section 25(1), see n 2 above, and for the text of section 25(2), see n 10 below.

[8] Section 9 of the 1986 Act provides for temporary identity certificates in the following manner:

> "When any person has applied for an identity document, or has for official purposes lodged his identity document with the Director-General, the Director-General may on application issue to the person concerned whose particulars are included in the population register in terms of section 6, a temporary identity certificate in the prescribed form and manner, which, for the period and on the conditions mentioned therein, shall

contemplated by section 1(xii) of the Electoral Act and adequate for registration and voting.

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for the purposes of this Act be regarded as his identity document.”

Section 25(1) of the 1997 Act (cited above n 2) authorises the Director-General to continue issuing identity documents in accordance with the 1986 Act. However, neither the 1997 Act, nor the 1986 Act, define “identity document” to include temporary identification certificates. There must be doubt therefore whether the transitional provisions of section 25 of the 1997 Act permit the issue of temporary identification certificates under the 1986 Act.

[115] Section 8(3) of the 1986 Identification Act expressly preserved the validity of identification documents issued in terms of earlier legislation.[9] Similarly, section 25(2) of the 1997 Identification Act preserved the validity of earlier documents.[10] At present, therefore, identity documents issued before 1986 in terms of earlier legislation referred to in the 1986 Act are valid identity documents and there is no obligation upon their holders to apply for new documents. However, the 1997 Identification Act does contemplate that the Minister of Home Affairs may impose such an obligation in due course, once the identity card system comes into operation. For the present, however, identity documents issued in terms of earlier legislation continue to be valid for purposes other than registration and voting. The crisp question raised in this case is whether, in effectively declaring them to be invalid for the purposes of voting, but leaving them valid for other purposes, Parliament acted constitutionally. In order to answer that question, it is

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[9] Section 8(3) of the 1986 Identification Act provided that:

> "Until such time as an identity document is issued to a person in terms of this Act -
> (a) an identity document referred to in section 13 of the Population Registration Act, 1950 (Act No 30 of 1950); or
> (b) a reference book as defined in section 1 of the Blacks Abolition of Passes and Co-ordination of Documents) [sic] Act, 1952 (Act No 67 of 1952),
> issued before the commencement of the this Act to the person concerned, shall for the purposes of this Act be deemed to be an identity document."

[10] Section 25(2) provides that:

> "(a) Any identity document issued in terms of an Act repealed by section 24, or which remain valid under a provision of such law, shall remain valid until an identity card is issued in terms of section 14 or until a date contemplated in paragraph (b).
> (b) The Minister may by notice in the *Gazette* fix a date for the replacement of identity documents referred to in paragraph (a) and may make regulations regarding such replacement."

Section 24 of the Act repealed the 1986 Identification Act and all its amending legislation. It was common cause that no notice has been issued by the Minister in terms of section 25(2)(b).

necessary to consider the relevant constitutional provisions.

Constitutional framework

[116] A reading of our Constitution leaves one with no doubt that it entrenches beyond doubt the right to vote and the right to free and fair elections as rights central to the maintenance of a democratic order. Section 19(2) and (3) provide that:

> "(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
>> (b) to stand for public office and, if elected, to hold office."

The paramount importance of these rights, however, is marked by the inclusion of the following within section 1 of the Constitution:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>> . . . .
>> (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 1 is subject to special and rigorous amendment procedures.[11]

[11] See section 74(1) of the Constitution which requires that an amendment to section 1 of the Constitution may only be made with a supporting vote of at least 75% of the members of the National Assembly and with the support of six of nine provinces in the National Council of Provinces. This, the most rigorous procedure prescribed for amendment of the Constitution, is reserved for amendments to section 1 and to section 74, the amending procedure itself.

[117] That our Constitution should emphasise the value of the right to vote and the right to free and fair elections based on a national common voters' roll is no surprise.[12] It was only in 1994, after a long struggle for democracy, that the right to vote was extended to all South Africans regardless of race. The achievement of a democracy and of the right to vote is therefore fresh in our memories. Only one democratic election for national and provincial government has ever been held in South Africa. The second fast approaches.

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12 Constitutional Principle VIII contained in schedule 4 to the Constitution of the Republic of South Africa Act, 200 of 1993 provided that:

> "There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation."

The Constitutional Principles were principles adopted in the Multi-Party Negotiating Forum as principles which were to be reflected in the Constitution drawn up after the first democratic elections were held in 1994. See *ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC); 1996 (11) BCLR 1419 (CC).

[118] The right to vote and the right to free and fair elections based on a national common voters' roll cannot be observed unless the government, both the legislature and the executive, and, of course, the Electoral Commission (the Commission),[13] take the necessary positive steps to ensure that a voters' roll is compiled and the election is held. Unlike some of the other rights in chapter 2 of the Constitution, the primary obligation which section 19(2) and (3) impose upon government is not a negative one, requiring government to refrain from conduct which could cause an infringement of the right, but a positive one, requiring government to take positive steps to ensure that the right is fulfilled.

[119] The importance of the obligation to enact legislation and take steps to further the right to vote in free and fair elections which is imposed by section 19(2) and (3) upon the legislature, the executive and the Commission, should not be understated. South African democracy is still in its infancy and requires nurturing and care to ensure it becomes firmly established. The Preamble to the Constitution recognises that we are only beginning the task of building a democratic society when it records the following:

> "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

[13] Chapter 9 of the Constitution provides for an Electoral Commission as one of the institutions to strengthen constitutional democracy in South Africa. It is an independent institution that must act impartially (section 181(2)) and is accountable to the National Assembly to whom it must report annually (section 181(5)). Its task is to manage elections and ensure that they are free and fair (section 190(1)).

> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person; and
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

[120] The obligation to afford citizens the right to vote in regular, free and fair elections is important not only because of the relative youth of our constitutional democracy but also because of the emphatic denial of democracy in the past. Many of the injustices of the past flowed directly from the denial of the right to vote on the basis of race to the majority of South Africans. The denial of the right to vote entrenched political power in the hands of white South Africans. That power was used systematically to further the interests of white South Africans and to disadvantage black South Africans. As South Africans, therefore, we should be aware of the power of the franchise, and the importance of its universality.

[121] In exercising the right to vote, each citizen affirms and invigorates our constitutional democracy. To build the resilient democracy envisaged by the Constitution, we need to establish a culture of participation in the political process, as well as tolerance of different political views and a recognition that democracy can be a unifying force even where political goals may be diverse. The responsibility for building such a democracy is placed, in part, on the legislature, executive and the Commission. One of the important ways that those institutions meet that responsibility is in providing for and regulating

regular, free and fair elections. The responsibility, however, is shared too by other organs of state, as well as political parties and, of course, citizens.

[122] The right to vote is more than a symbol of our common citizenship, it is also an instrument for determining who should exercise political power in our society. It is in this sense that the United States Supreme Court held that the right to vote is "preservative of all rights."[14] Its role in determining who should exercise political power, makes the right to vote worthy of particular scrutiny by a court to ensure that fair participation in the political process is afforded. I cannot agree with Yacoob J therefore when he states (at para 24 of his judgment) that the principle of separation of powers means that it is inappropriate for a court to determine whether a legislature has acted reasonably in relation to the regulation of elections. Instead, Yacoob J suggests that a court should determine whether such regulation is rationally connected to a legitimate government purpose.[15] Such an approach is appropriate in relation to determining whether legislation giving rise to differential treatment is constitutional,[16] but it seems to me far too

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14 See *Yick Wo v Hopkins* 118 US 356 (1886) at 370 per Matthews J, cited with approval in *Harper v Virginia State Board of Elections* 383 US 663 (1966) at 667, per Douglas J. Similarly in *Reynolds v Sims* 377 US 533 at 561 -2, Warren CJ stated:

> " . . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

15 Yacoob J adds a further test to the test of rational connection. That second test is discussed at paras 126-27 below.

16 See, for example, *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

deferential a standard for determining whether legislation enacted by Parliament to enable citizens to exercise their right to vote gives rise to an infringement of the right to vote. In my view, it is quite appropriate to require Parliament to act reasonably.[17] The right to vote is foundational to a democratic system. Without it, there can be no democracy at all. What is more the right cannot be exercised in the absence of a legislative framework. That framework should seek to enhance democracy not limit it. To do so, it needs to draw all citizens into the political process. Regulation, which falls short of prohibiting voting by a specified class of voters,[18] but which nevertheless has the effect of limiting the number of eligible voters needs to be in reasonable pursuance of an appropriate government purpose. For a court to require such a level of justification, is not to trample on the terrain of Parliament, but to provide protection for a right which is fundamental to

[17] In the United States, the Supreme Court has recognised that a more stringent test than rational scrutiny is appropriate to voting. See, for example, *Kramer v Union Free School District No 15* 395 US 621 (1969) at 627-8; *Dunn v Blumstein* 405 US 330 (1972) at 335; and *Reynolds v Sims* cited above n14 at 562.

[18] Legislation which prohibits a specified class of voters from voting will be a breach of section 19. It will then be for Parliament to show that such legislation is justifiable. See *August and another v Electoral Commission and others* CCT8/99, as yet unreported decision of this Court dated 1 April 1999.

democracy and which cannot be exercised at all unless Parliament enacts an appropriate legislative framework.

[123] It is true that the structure of our Constitution generally reserves questions of reasonableness and justifiability for circumstances when a litigant has shown that a right has been infringed.[19] However, there are rights which contain broad equitable defining characteristics, such as the right to free and fair elections,[20] the right to a fair trial,[21] the right not to be unfairly discriminated against,[22] and the right to fair labour practices.[23] It seems to me therefore that the inclusion of an equitable consideration at the threshold level of the right is not impermissible. In my view, this is a case where the right is properly

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19 Section 36 provides that:

> "(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."

20 Section 19(2), quoted above at para 116.

21 Section 35(3) provides that:

> "Every accused person has a right to a fair trial . . . ".

22 Section 9(3) provides that:

> "The state many not unfairly discriminate directly or indirectly against anyone on one or more grounds . . . ".

23 Section 23(1) provides that:

> "Everyone has the right to fair labour practices."

defined by reference to the concept of reasonableness, and reasonableness is therefore relevant at the threshold stage of the right. There are two inter-related reasons for this. First, in order to exercise the right to vote, Parliament must enact legislation to facilitate its exercise. Inevitably, however, in establishing procedures and rules for the conduct of elections, those procedures and rules have restrictive implications for the ability of people to vote. The establishment of the date of an election, the location of polling booths, the hours of voting and the determination of which documents prospective voters will require in order to register and vote, are all rules and regulations which are necessary in order for the right to be exercised at all. An election cannot be held, nor can the right to vote be exercised, without such rules and regulations being established. That such rules and regulations may limit some people's ability to exercise the right to vote is an inevitable consequence of an exercise which requires the adult population of a country to all go to the polls in a short period of time. It cannot be said that such regulatory measures are of themselves a breach of the right to vote, such as would require justification in terms of section 36 of the Constitution.[24] For they are not, generally speaking, a limitation of the right to vote, but a necessary form of regulation to facilitate the right to vote.

[124] An interpretation of the right to vote which would render all regulation of elections to be a limitation of that right is based on a misunderstanding of the nature of the right. Voting requires compliance with the reasonable rules regulating the elections. It would be

[24] See n 19 above.

nonsensical to assert that there would have been a breach of the right to vote of a person who failed through carelessness to attend a polling station to vote on the correct day. The right to vote requires citizens to co-operate with reasonable regulation. The nature of elections is that some people may be unable to vote as a result of reasonable regulation enacted by government.[25] It cannot be said that their right to vote has been limited. However, where a restriction on the right to vote arises not because of reasonable rules and regulations established by government for the conduct of the election, but because government introduces an unreasonable regulation, then a breach of the right will have been established.[26] The onus of establishing that a regulation is unreasonable will, or course, rest on the person asserting it.

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25 It follows from what I have said that I cannot accept the approach adopted by the full bench of the Transvaal High Court in *Democratic Party v Minister of Home Affairs and another* unreported decision dated 5 March 1999.

26 In addition, a breach of the right to vote may be established when a specified class of voters are, in effect, excluded from voting, as happened in *August and another v Electoral Commission and others* CCT8/99, as yet unreported judgment of this Court dated 1 April 1999.

[125] Secondly, the nature of the right to vote is that relief granted after the date of the elections will rarely be effective. Once an election has been held, it will often be too late for a citizen to seek effective constitutional relief to be afforded the right to vote, as a court will ordinarily be extremely reluctant to overturn an election.[27] Jurisprudential development of the right must therefore permit prospective scrutiny of the electoral process to ensure that the right is protected. Requiring a litigant to show a breach of the right in advance, or a threatened breach of the right, will raise difficult questions as to the nature of the test that should be met and of the proof required to meet the test.

[126] In this regard, Yacoob J proposes a test (at para 23) which requires a litigant to show:

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[27] It is worth noting in this regard that section 110 of the Electoral Act provides that:

> "(1) Any mistake in the certified segment of the voters' roll referred to in section 24 or the final list or candidates referred to in section 31 does not invalidate that voters' roll or that list of candidates.
> (2) An election may not be set aside because of a mistake in the conduct of the election or a failure to comply with this Act, unless the mistake or failure materially affected the result of the election."

> "that, as at the date of the adoption of the measure, its probable consequence would be that those who would want to vote, would not be able to do so, even though they act reasonably in pursuit of the right."

This test requires a citizen to show that he or she has acted reasonably, but does not permit the court to consider whether Parliament has acted reasonably in enacting the electoral regulations with which citizens must comply. Given the constitutional obligations imposed upon Parliament to enhance democracy by providing for free and fair elections, it seems incongruous and inappropriate that this Court should be able to determine whether *citizens* have acted reasonably, but not *Parliament*. Citizens, of course, have an obligation to comply with reasonable regulations made by Parliament and the Commission in order to exercise their right to vote. This Court must however determine whether Parliament (and the Commission) has acted reasonably in making such regulations. If citizens do not comply with reasonable regulations, they cannot complain that their right to vote has been infringed. The test proposed by Yacoob J may also be difficult to apply. South Africa is a diverse society. Some of its citizens are fully literate and live in wealth and comfort, many however are disadvantaged both educationally and materially. What is reasonable for one group of citizens, may be quite unreasonable for another. It is not clear to me how the test established by the majority can accommodate sensitively the realities of South African society. Related to this difficulty with the test, is the problem that the test may be evasive of application in relation to those citizens who are unaware of legislative provisions which qualify the right to vote. In this case, evidence was produced which showed that in July 1998, almost 60% of South Africans were unaware of the fact that

they would need a bar-coded ID to vote.[28] Many of them may still be unaware of that fact. Ignorance will lead to non-compliance. Is such non-compliance always to be considered unreasonable conduct? It seems to me therefore that the test adopted by the majority may be difficult to apply.

[127] In my view, the proper approach is to require legislative regulation of the right to vote to be reasonable. As a test, it is less difficult to implement than the test adopted by the majority. It will enable appropriate scrutiny of legislative measures regulating elections before they are held and it emphasises not only the importance of the right to vote but also the importance of the obligation imposed upon Parliament to enact measures in a manner which will enhance, not inhibit, the growth of democracy in South Africa.

[128] Whether a particular provision regulating some aspect of an election is a reasonable one will depend upon the circumstances of each case. Relevant considerations will include the nature of the regulation, its purpose and its likely effect on the right to vote. These considerations will need to be considered in the light of the centrality of free and fair elections and the right to vote in the democratic order which our Constitution establishes. The question that needs to be answered in this case therefore is whether the

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[28] This figure came from the National Survey of the HSRC discussed below at para 132 and following.

measure introduced by Parliament to restrict the range of identity documents was a reasonable provision in the circumstances in which Parliament chose to adopt it. To answer that question we need to turn to consider the circumstances in which this provision was enacted.

Historical context

[129] The 1994 elections were held at short notice, and without a common voters' roll. After the elections had been held, the Independent Electoral Commission reported to the government and included in its report a list of recommendations for the future. Those recommendations included the following:

> "1. Time
> No electoral administration should ever again be called upon to plan or implement an election in a hurry. Haste is the thief of administrative or financial efficiency. In the glow of elections of national reconciliation the electorate was indulgent. Its forbearance should not be tried again.
> 2. Voters' roll
> Although there is no theoretical impediment to the conduct of an election without a written record of the electorate, it is highly desirable in the interests of efficiency and credibility. Compiling a comprehensive voters' roll is an expensive and time-consuming exercise. Once it has been compiled, time, effort and skill have to be expended in keeping it up-to-date. ...
> 3. Voter identification
> Comprehensive and updated voters' rolls should preferably be supported by a reliable system for the identification of each prospective voter. Ideally no voter should be issued with a ballot paper unless her or his identity is proven there and then. Save in exceptional

circumstances (eg. closely knit stable and small, communities), this should be done by the presentation of a document bearing detailed biographical and residential information together with a photograph.

4. Choice of voting station

Although it is not uncommon for voters to be given the right to exercise the franchise at a voting station of choice, it is more common for electoral legislation to limit a voter's right to vote to a particular district or even to a polling station within that district. Clearly the narrower the restriction, the tighter the control."

[130] Many of the recommendations made by the Independent Electoral Commission in 1994 were accepted by government and incorporated into the 1996 Constitution, the 1996 Electoral Commission Act and the 1998 Electoral Act as well as into the planning for the forthcoming election. Of those listed above, the requirement of a national common voters' roll, of district-based elections and of adequate identification to permit voting and registration, are all features of the forthcoming election. However, as this case illustrates, the advice of the Independent Electoral Commission concerning the need for timely planning of elections has, unfortunately, not been heeded scrupulously, as it should have been. It has been clear since the 1996 Constitution came into operation on 4 February 1997, that the next national election would take place between April and July 1999.[29]

[131] On 17 October 1996, the Electoral Commission Act, 51 of 1996 (the Electoral Commission Act) was promulgated. However the Electoral Commission (the

[29] Section 49(1) of the 1996 Constitution provides that the National Assembly is elected for a term of five years. Section 49(2) provides that when the term of office of the National Assembly expires, the President must set a date for elections which must be held within 90 days of the expiry of the term. Item 4(2) of schedule 6 to the Constitution provides that the current term of the National Assembly must be considered

Commission) only began functioning in July 1997, shortly after its commissioners were appointed. According to the affidavit of the fourth respondent filed in the court below, in their initial planning, the Commission intended that the form of identification that should be used for the 1999 elections was the bar-coded ID. The fourth respondent submitted that:

> "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 bar-coded 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."

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to expire on 30 April 1999, therefore elections must be held before the end of July 1999.

[132] However, during March, April and May 1998, it came to the Commission's attention that insisting on the bar-coded ID as the only competent ID for the elections could have the result that it would disenfranchise many, otherwise eligible, voters. The Commission consulted the Department of Home Affairs which estimated that 96% of the electorate had bar-coded IDs. The Human Sciences Research Council (the HSRC) was then commissioned to conduct a survey to determine the number of eligible voters who did not have a bar-coded ID. The HSRC undertook two comprehensive surveys on the position nationally and regionally and reported to the department of Home Affairs and the Commission during July and August 1998.

[133] The major findings of the National Survey as reported by the HSRC were the following:

> "C One in ten (10,6 per cent) 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 into the age group 17 to 21 years.
>
> C Of those individuals who do possess a valid South African ID, 84,4 per cent had a green bar-coded ID, 5,0 per cent a green ID not bar-coded and 3,4 per cent had green IDs of which the type was unknown to them. A further 5,0 per cent had a blue ID while 0,8 per cent of the respondents had an ID issued by the former TBVC states. Less than one percent of the respondents had only a reference book or other form of ID.
>
> C Taken together the results suggest that between 5,3 million and 5,9 million people do not have a green bar-coded ID.
>
> C The absence of an ID was most pronounced among individuals living in rural areas.
>
> C Almost a quarter of those respondents without any form of ID or an ID other than a green

bar-coded one, reported that they had applied for a new ID.

- Of those individuals who did apply for a new ID, almost 38 per cent had been waiting for more than 12 weeks while an additional 25 per cent reported that they had been waiting for more than twenty weeks.
- Almost 60 per cent of the respondents were unaware of the fact that they need to have a bar-coded 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 per cent were undecided at the time of the survey.

The results of this study suggest that it would be unrealistic to attempt to issue green bar-coded IDs 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 IDs as a valid form of identification and direct resources towards ensuring that those individuals who do not have any ID obtain their IDs in time for the 1999 election. In addition, if one wants to maintain computerised control, one would have to replace that small number of IDs issued by the former TBVC states which are not recorded with the Department of Home Affairs, with new green bar-coded IDs."

The Regional Survey report prepared by the HSRC contains similar findings.

[134] The department disputed these findings. They were however confirmed by a further independent survey, entitled *Opinion 99*, conducted by the South African Broadcasting Corporation, the Institute for Democracy in South Africa and Markinor, and released in November 1998. This survey found 76% of the eligible electorate had the correct identity documents at the time they conducted their survey, while approximately 13% had old IDs and 11% no IDs at all. Like the HSRC survey very few people (less than 1%) had TBVC documents.

[135] In his affidavit, the Director-General continued to dispute the validity of the HSRC

and *Opinion 99* surveys. However his own evidence was open to question. He averred that the department had calculated from the population register that there were approximately 1,6 million people without bar-coded IDs and that this number would continuously decline as IDs were issued. The figure of 1,6 million was questioned, quite correctly, by the appellant. It is not possible to determine from the population register how many people are without IDs as many people have never been included in the population register at all. What proportion of those eligible voters who do not have IDs are not yet on the population register cannot be determined on the evidence placed before us in this case. Neither the HSRC surveys, nor the *Opinion 99* survey sought to establish this figure. The department itself cannot know from the Register how many people are not on the Register. The figure of 1,6 million provided by the Director-General cannot therefore be accepted.

[136] The Director-General also rejected the finding of the HSRC that approximately 2,5 to 2,8 million eligible voters had no form of identification at all, two-thirds of whom were between the ages of 17 and 21 years of age. The reason for the rejection of this finding is that this group of people would require an identification document and therefore must have one. Other than this assertion, no other evidence was presented by the Director-General to show why he rejected this aspect of the HSRC's findings. On the other hand, the Director-General accepted the HSRC's finding that approximately 2,2 million people had incorrect identity documents. However, the Director-General states that this amounts to 4,4% of the eligible voters. Given that the number of eligible voters is about 25 million

people, the figure is in fact closer to 10% of the electorate. It is not clear why the department accepts the HSRC figure of 2,2 million having wrong identity documents in the light of the statement that its figures show that only 1,6 million people are without bar-coded IDs. No explanation of this apparent conflict was provided by the Director-General. A further statement on the Director-General's affidavit seems inexplicable in the light of the averment that the department considered there to be 1,6 million voters without bar-coded IDs. He averred that the department was preparing to issue 5 million identity documents in the run-up to the elections. Once again no clarity was provided in this regard. In sum, therefore, the figures provided by the Director-General to indicate the number of people without identity documents or with the wrong identity documents are contradictory and confusing. On the other hand, the appellant provided an affidavit from an expert, Professor Sadie, which was not disputed by the first, second and third respondents which supported, in the main, the findings of the HSRC surveys and confirmed that they had been conducted in a scientific and reliable fashion. In conclusion, I find, and here I am in agreement with Yacoob J, that the broad findings of the HSRC and *Opinion 99* surveys must be accepted as correct and the evidence of the Director-General rejected.

[137] The Commission also accepted the correctness of the findings of the HSRC surveys. Indeed, the Commission decided that it would be prudent in the circumstances to recommend to Parliament that the requirement of a bar-coded ID be abandoned and that all documents recognised under the 1997 Identification Act should be recognised for the

purposes of voting and registration. The Commission accepted that this would mean that some prospective voters would produce TBVC documents, but that given the HSRC surveys, the number of such voters would be trivial and other means for verification could be used.

[138] Parliament chose not to accept the recommendation of the Commission. It enacted the provisions described in the first part of this judgment. The Electoral Act was promulgated on 16 October 1998. It was clear at that time that the election would have to be held before the end of July 1999. There is one further matter that needs to be considered before the question of whether the provisions enacted by Parliament are reasonable or not can be considered and that is the question of the capacity of the department of Home Affairs to issue temporary registration certificates and bar-coded IDs.

[139] Much time was spent on the papers and in court considering whether the department had the necessary capacity to issue the necessary documents in time. The appellant asserted that the department could not and the department responded that it could. In his answering affidavit, the Director-General filed a document which identified the number of applications for first-time identity documents and reissued documents it had received, together with the number of documents it had issued from January 1997 to November 1998. It shows that during the whole of 1997, approximately 1,2 million applications for new IDs and 1,4 million applications for reissued IDs were received and

approximately 2,5 million IDs were dispatched. During the first eleven months of 1998, approximately 1,2 million applications for new IDs and 1,8 million applications for reissues were received and approximately 3 million were dispatched.

[140] According to the affidavit of Professor Sadie, the backlog of documents for which applications had been received but which had not been issued grew dramatically over this period from approximately 95 000 at the end of January 1997 to in excess of 450 000 at the end of November 1998. Despite this Court's request that the equivalent information for months subsequent to November 1998 be made available to this Court after the hearing of this matter, that information was not supplied in the same format as it had previously been supplied, making it impossible to analyse what has happened in the period in question. It is impossible therefore on the information currently before us to determine how, if at all, the backlog has continued to grow since November 1998. What is apparent, however, is that although there was some increase in the number of applications for bar-coded IDs after October 1998, unless that pattern changed dramatically in the period after November 1998, something we cannot know without proper figures having been made available to us, a very significant number of people probably still have not applied for bar-coded IDs and therefore have become unable to vote.

[141] In my view, however, in determining whether the legislative provisions under challenge are reasonable or not, the extent to which the department has been able to issue bar-coded IDs in the period since the legislation was enacted is not directly relevant. What

is relevant is the reasonable perceptions of its capacity at the time that the legislation was enacted. In that regard, it remains only one of the considerations that is relevant to the question of whether Parliament acted reasonably in determining what documents would be required for registration and voting in the 1999 elections when it did so.

Purpose and effect of legislation in relation to those voters with no IDs at all

[142] There can be no doubt that, as the Independent Electoral Commission Report in 1994 (quoted above at para 129) suggested, a necessary component of a free and fair election is a reliable form of identification. It was necessary therefore for Parliament to provide that valid identification was required in order to register and to vote. For those without any form of identification in October 1998, the only form of identification that they could lawfully be issued in terms of existing legislation was (and is) a bar-coded ID under the 1986 Identification Act. The purpose of the legislation in relation to such people therefore is the legitimate and compelling purpose that voters require lawful and valid identification in order to vote.

[143] The likely effect of the legislation is also clear. According to the HSRC and *Opinion 99* surveys, nearly ten percent of the eligible electorate, between 2,5 and 2,8 million people had no valid form of identification. Two-thirds of that number were young people between the ages of 17 and 21. They were predominantly African people living in rural areas. Even though some inroads into those figures have probably been made since

the HSRC surveys were conducted, and such inroads could reasonably have been expected by Parliament when it enacted the legislation, nevertheless a very significant number of people will not be able to vote because they do not have IDs. It may be that some of them know that they need an ID to vote and have chosen not to obtain one. Many may not know of the requirement. Some may have sought to have obtained one, but been unable to succeed. Whatever the circumstances, it is indeed a great misfortune that such a substantial number of people will be unable to exercise their democratic right to vote in the forthcoming election. It is similarly of great concern that the majority of those so affected are young African people who would otherwise be first-time voters and who come predominantly from rural areas.

[144] In his affidavit, the Director-General did point to an identification campaign launched early in 1998 whose primary purpose was to encourage those with no forms of identification at all to apply for identification documents in sufficient time to enable them to register for and vote in the 1999 elections. It is unfortunate that, despite that campaign, the number of first-time applicants for identification documents did not appear to increase significantly.

[145] In sum, the effect of the legislative provision in this case, harsh as it is, does not render the provision itself unreasonable. If we are to have a free and fair election, voters must have valid identification. The conclusion, therefore, is inevitable that the provisions of the Electoral Act are not unreasonable in relation to those voters who had no form of

valid or recognised identification at all when the legislation was promulgated.

Purpose and effect of legislation in respect of those voters who have valid IDs

[146] It is necessary then to turn to the question of whether the decision to exclude from registration and voting potential voters in possession of lawful and valid IDs, albeit not issued under the 1986 Identification Act, is reasonable in the circumstances. Because these potential voters have a form of lawful and valid identification, it is not open to the first, second and third respondents to rely on the need for a reliable form of identification as the primary purpose of the legislation in relation to them. The affidavits filed by the first, second and third respondents do not address crisply and firmly the issue of the legislative purpose sought to be served by the challenged provisions in relation to voters who have valid forms of identification. In his affidavit, the Director-General states that the bar-coded ID was accepted by all the parties as the most reliable form of identification, but no detail was provided in this regard. A further purpose suggested by the Director-General in his affidavit was the administrative convenience that the use of bar-coded documents would provide.

[147] In argument, Mr Semenya, counsel for the first, second and third respondents suggested three legitimate government purposes sought to be achieved by the provision: the administrative convenience that the bar-coded ID would provide as an identification document at registration and polling stations; the fact that the bar-coded ID was the most

secure form of identification; and the desirability of one non-racial form of identification forming the basis for the national common voters' roll.

[148] The evidence makes it clear that the Commission has designed the registration and electoral processes so that use can be made of electronic equipment to scan bar-coded IDs. This system will facilitate the process of checking prior to permitting a person to register or vote. However it is still possible to enter manually an identity number to perform the same process. The bar-coded ID is therefore more convenient than the older forms of IDs which do not have a bar-code. The use of bar-coded documents should result in fewer delays at registration and polling stations. On the other hand, neither temporary identity certificates nor temporary registration certificates contain bar-codes. They as well as older forms of identity document are nevertheless compatible with the system as designed. As more than 85% of the electorate who have identity documents have bar-coded documents, the delay caused by the use of non-bar-coded documents will not be excessive. It is only those identity documents with numbers which do not correlate with the population register which will give rise to difficulties. The only such documents are those of the former TBVC territories. Very few of these documents remain in circulation and the problems created by them would according to the fourth respondent be "trivial". In conclusion, then, this reason, while a legitimate one which will assist in the smooth operation of the election, is not one of great importance.

[149] The second purpose suggested by the first, second and third respondents relates to

the greater security of bar-coded IDs over older forms of identification. In his answering affidavit, the Director-General asserts that the greater security of such documents was accepted by all political parties in Parliament at the time the matter was debated. No details were provided as to why the bar-coded IDs were more secure than other forms of identification.

[150] It does appear from the legislation that for the first time under the 1986 Identification Act, the population register was required to include the fingerprints of all those over the age of 16. It would appear, but it was nowhere stated on the papers, that this injunction is met by requiring those who apply for bar-coded IDs to furnish their fingerprints.[30] It seems therefore that a bar-coded ID may provide greater security than other forms of identification. It is striking, however, that the first, second and third respondents did not produce any detailed evidence in this regard in the affidavits, nor was any reliance placed upon it in the heads of argument. Indeed, it was only relied on with any conviction, once the matter had been raised with counsel by the Court.

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30 See section 6(1)(g) of the 1986 Identification Act. Section 6(3) makes it plain that those who were in possession of valid identity documents at the time that the Act came into force were not obliged to furnish their fingerprints. The Minister was given the power to require such persons to provide their fingerprints by a certain date to be published in the Gazette. No such notice seems ever to have been published.

[151] On the other hand, it is clear from the fourth respondent's affidavit, the relevant portion of which is cited above at para 131 above, that the additional security features of the bar-coded ID were not central to the Commission's initial decision to require its use. Instead, the Commission required its use primarily because it provided a correlation between the identity number in the identification document and the entry on the national population register. Such a correlation, fourth respondent stated, existed between old South African identification documents and the register, but did not exist between old TBVC documents and the register. This had led the Commission initially to consider permitting all older identification documents, but not TBVC documents. Because this was perceived to be discriminatory, the Commission then decided that only bar-coded documents should be permitted. As outlined above, however, once it became clear, first, that many eligible voters with old but valid forms of identification would be adversely affected by this approach, and secondly that very few TBVC documents remain in existence, the Commission concluded that all older identification documents should be permitted. In conclusion, there can be no doubt that to the extent that the bar-coded ID contained added security features, it was desirable. On the other hand, it is also clear, that at least as far as the Commission was concerned, insistence on the bar-coded ID arose from the desire to obtain correlation to the population register, not for fingerprints or other security features. The question to be considered in a moment is whether the added security was sufficient to render the insistence on the bar-coded ID reasonable in the context of the effect of such insistence.

[152] The third reason proffered by these respondents was the desirability of a common identification document which contains no taint of a racist past. This reason was suggested nowhere on the papers, but was proffered for the first time from the bar. There can be no doubt that establishing a uniform system of identity documents to eradicate such a taint is an important one. However, when Parliament introduced the 1997 Identification Act, it expressly maintained the validity of all documents deemed valid by the 1986 Identification Act. It is clear from the 1997 Identification Act that Parliament has designed a brand new system of identification which is to be introduced shortly, the identification card. In the light of the imminent introduction of a brand new system of identification, it made sense for Parliament in 1997 to retain older IDs until the new system was introduced. Once that system is introduced, section 25(2)(b) of the 1997 Identification Act permits the Minister to fix a date in the *Gazette* by which all South Africans must apply for the new document. Once that is done, the older, tainted forms of identification will become invalid.

[153] The incremental and considered system provided for in the 1997 Identification Act has been dramatically affected by the challenged provisions of the Electoral Act which render valid forms of identification invalid for purposes of voting. Prospective voters are therefore required to obtain bar-coded IDs in a short period of time. No sooner will they have done so, than the new system of identification will in all probability come into force in terms of which they may well be required to get yet another form of identification. In

the light of the foregoing, and in the absence of any firm assertion to this effect on the papers, I find it hard to accept that this indeed was the purpose sought to be achieved by Parliament in this case. Even if it were to be accepted as a legitimate purpose, the question remains as to whether it was reasonable in the context of the number of people who did not have bar-coded IDs.

[154] In sum, the legislative purposes identified by Mr Semenya as the goal of the provisions under challenge insofar as voters who are already in possession of lawful and valid identity documents are concerned, relate to a relatively small increase in administrative convenience, some increase in security features contained in the bar-coded ID (although there is no detailed, articulate and undisputed evidence in this regard), as well as the rendering obsolete of identity documents bearing a racist taint. If the legislative provisions enacted were to have little or no effect on the ability of eligible voters to participate in the election, the question of whether they were reasonable would end here. However, that is not the case.

[155] In the light of the HSRC survey, it was clear at the time the legislation was promulgated that a very significant proportion of eligible voters, although in possession of lawful IDs, were not in possession of bar-coded IDs. In addition, it was clear that there were an equally large number of voters with no IDs at all. The effect of the legislation was that, unless all of these eligible voters made application for a bar-coded ID, and, where possible, simultaneous application for a temporary registration certificate or

temporary identity certificate, they would not be able to register.

[156] It was also clear that, in the time that was available from the date the legislation was promulgated to the date by which the election had to take place, the issue of appropriate documents to all those not then in possession of them was a herculean task. The HSRC surveys, the *Opinion 99* survey and the Commission were all of the view that it was unwise in the circumstances to seek to undertake the task. By effectively doubling the number of voters without the prescribed forms of identification, Parliament made the achievement of that task all the more unlikely. This was done although the forthcoming election is only to be the second democratic general election ever held in South Africa, and at a time when there is a constitutional imperative to strengthen democracy and encourage participation in political process. The purposes for which Parliament chose to insist on the bar-coded ID have been discussed above. In my view, given the obligation upon Parliament to seek to facilitate the right to vote so as to build a culture of participation in the political process in our fledgling democracy, those purposes are inadequate to render Parliament's insistence on the bar-coded ID reasonable.

[157] Parliament enacted the challenged provisions despite the survey results of the HSRC which suggested that a large number of voters, although in possession of lawful identity documents, were not in possession of those required by the challenged provisions and despite the firm view to the contrary expressed by the Commission, the independent agency entrusted with the task of managing elections and ensuring that they are free and

fair.

[158] Given the likely effect that the provisions would have on eligible voters in the light of the relatively short period of time between the promulgation of the legislation and the date by which the election had to be held, I conclude therefore that it was unreasonable for Parliament to have enacted the provisions.

[159] Having reached the conclusion that Parliament acted in a manner which was unreasonable in the circumstances, I hold that the challenged provisions are in conflict with the right to vote. Given the structure of the Constitution, it is ordinarily necessary to consider whether the limitation caused by the challenged provisions is one which may be justifiable in terms of section 36 of the Constitution.[31]

[31] See n 19 above.

[160] Given the definition of the right I propose[32] and have applied, the exercise under section 36 in this case is similar to the exercise carried out to determine whether the challenged provisions were reasonable. The use of the concept of "reasonableness" as a defining characteristic at the threshold level has fully been explained above. The effect of it, is that it is not necessary to undertake a full and separate limitations analysis. As I have found, the government purposes suggested, while legitimate, do not weigh heavily in the scales of justification. Against that, one has the fact that a large number of voters who had lawful and valid forms of identification have been compelled to obtain other forms of identification in a short period of time in order to be able to register and vote. Failure to obtain the prescribed forms of identification will result in disenfranchisement. In my view, this result betrays a disregard for the importance of the right to vote in free and fair elections in a country where such a right is only in its infancy. The provisions cannot, in my view, be considered reasonable or justifiable in the circumstances.

[161] For these reasons I am in disagreement with my colleagues on this aspect of the judgment and order. As this is a minority judgment, it is not necessary to turn to the question of an appropriate remedy.

The independence of the Commission

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[32] See paras 116-128 above.

[162] In relation to the second issue in the case, concerning the impairment of the independence of the Commission, I agree with Langa DP, substantially for the reasons he gives, that no case has been established sufficient to warrant the grant of relief. Even though no relief is granted in this case, I wish to emphasise that independent institutions are an important structural component of our constitutional democracy. The Constitution obliges such institutions to be impartial and to perform their functions without fear, favour or prejudice.[33] Other organs of state are obliged to assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness.[34] It is clear that both constitutional obligations should be scrupulously observed.

33 Section 181(2) of the Constitution.

34 Section 181(3) of the Constitution.

[163] One aspect of the second part of the case dealt with by Langa DP requires separate consideration by me. The appellant asserted that Parliament's insistence on bar-coded identification constituted an infringement of the independence of the Commission. With this I cannot agree. As Langa DP states (at para 59 of his judgment), the competence to pass the Electoral Act which determined the prerequisites for voting vested in Parliament, not the Commission. Although in my view, Parliament's insistence on the bar-coded ID was unreasonable and a breach of the right to vote for the reasons I have given, it does not follow that Parliament's failure to follow the advice of the Commission constituted an impairment of the independence of the Commission. The competence to legislate in this area is for Parliament and Parliament alone. By legislating against the advice of the Commission, Parliament cannot be said to impair the independence of the Commission whose primary function lies in managing the elections and ensuring that they are free and fair. If the Commission considers that parliamentary regulation will prevent the possibility of elections being free and fair, it has a range of remedies to pursue.[35]

Conclusion

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[35] See, for example, section 14(4) of the Electoral Commission Act which provides that:

> "The Commission may, if it deems it necessary, publish a report on the likelihood or otherwise that it will be able to ensure that any pending elections will be free and fair."

[164] In conclusion, I cannot agree with the order proposed by Yacoob J or with the reasoning which supports that order. However, I am in substantial agreement with Langa DP's reasoning and conclusion that no relief should be granted the appellant in relation to the question of the impairment of the independence of the Commission.

For the Appellants: J A Le Roux SC and J C Heunis SC instructed by M F B Matthee Fourie.

For the Respondents: I A M Semenya SC, and M Naidoo instructed by the State Attorney (Pretoria).