

**NEW NATIONAL PARTY OF SOUTH AFRICA v GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA AND OTHERS**

CCT 9/99

**THE DEMOCRATIC PARTY v THE MINISTER OF HOME AFFAIRS N.O AND
ANOTHER**

CCT 11/99

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

In two separate applications, the New National Party (NNP) and the Democratic Party (DP) applied to the Constitutional Court for leave to appeal against the judgments of the Cape High Court and the Transvaal High Court respectively. The parties sought an order declaring the provisions of the Electoral Act unconstitutional, because people could not use identity documents issued to them in terms of old legislation to identify themselves, which would enable them to register and vote in the forthcoming general elections on 2 June 1999. As these were matters of considerable public importance and had a bearing on the integrity of the forthcoming elections, the Court was prepared to deal with them as matters of urgency, and as if leave to appeal had been granted. Justice Yacoob and Justice Goldstone, on behalf of the majority of the Constitutional Court dismissed the NNP and DP appeals respectively, with no order as to costs. Justice O' Regan dissented in both cases.

The requirement of the bar-coded identity document was challenged by both the NNP and the DP. The reasoning of Justice Yacoob in dismissing this challenge in the NNP case was endorsed by Justice Goldstone in the DP case. In the NNP case, Justice Yacoob found that the documentary requirements prescribed by the Electoral Act did not infringe the Constitution. The Court applied a two part test. First, the Court asked whether there was a rational connection between the electoral scheme that Parliament adopts and the achievement of a legitimate governmental purpose. Secondly, it must be ascertained whether the scheme, though rational, infringed the right to vote.

a) Rational connection:

The Court found that the requirement of the bar-coded identity document was rationally related to the legitimate governmental purpose of ensuring the effective exercise of the right to vote. The NNP and DP argued that South African citizens who were in possession of other identity documents ought to be allowed to use them for registration and voting as the bar-coded identity document offered no advantage over the older identity documents. In holding the legislative scheme to be rational, the Court rejected the NNP and DP's argument for three reasons. First, the presence of the bar-code, and the fact that only one document is involved, allowed for quick and efficient verification of the holders details. Secondly, there was a record of the fingerprints of bar-coded identity document holders which would help prevent electoral fraud. Thirdly, (and which the Court found to be significant) was that other forms of identity documents were issued on a racial basis and it was a legacy of South Africa's history of racial discrimination.

b) Denial of the Right to vote:

The NNP contended that millions of potential voters will be deprived of this right, because the Department of Home Affairs did not have the capacity to issue the documents in the limited time available prior to the elections. The Court expressed concern that the Electoral Act prescribing the documentary requirements was passed as late as October 1998. Evidence was led that there had been publicity of the requirement from April 1998, and that by July 1998, eighty percent of the population already possessed bar-coded identity documents. Registration was permissible if an applicant had either a bar-coded identity document, or had applied for such a document. The Court concluded that those who did not possess bar-coded identity documents had six months to make applications and that those who wanted to exercise this right and who took reasonable steps in pursuit of the right could have made such applications timeously and registered as voters..

The Court found that Parliament is obliged to provide for a scheme 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. An appellant before the court has to establish that the scheme provided for is not reasonably capable of achieving that purpose and the appellants had failed to do this.

Additional issues raised in the DP case:

After expressing full agreement with the reasons given by Justice Yacoob in dismissing the NNP case, Justice Goldstone considered three additional issues that were raised in the DP case.

First, the DP contended that the documentary requirement violated the equality provision of the Constitution in that it constituted indirect discrimination on the basis of race, age, residence, belief, conscience or political affiliation. The contention was based on surveys which showed that by November 1998 a greater proportion of potential white voters, rural voters, and younger voters did not possess the bar-coded identity documents. The Court held that there was no evidence to show what impact the documentary requirement had in fact had on the various categories of persons, and if there was such an impact, whether it constituted unfair discrimination. The Court accordingly rejected this argument.

Secondly, the DP challenged the High Court's decision not to refer the matter for the hearing of oral evidence. Emphasizing inconsistencies in the information furnished by the Department of Home Affairs about its capacity to produce bar-coded identity documents, the DP averred that referral to oral evidence would have provided the lower court with more accurate information. The Constitutional Court noted that the DP's challenge concerned the constitutionality of the impugned provisions of the Electoral Act, and not the failure of the Department to properly implement these provisions. The Court held that in the circumstances it was not clear that the evidence that the DP wished to lead would be relevant to the decision of the case. The matter was one of great urgency in which there had been a need for a quick decision, and it had not been shown that the High Court was wrong in refusing to refer the matter for the hearing of oral evidence. The appeal on this issue accordingly failed.

Thirdly, the DP contended that temporary identification certificates (TICs) could not be issued by the Department of Home Affairs, and that they in fact were not being issued. TICs are documents issued to enable potential voters to register and vote if they had made an application for a bar-coded identity documents but have not yet received them. The Court held that the validity of the Act did not depend on the ability of the Department to issue TICs. It expressed agreement, however, with O'Regan J's conclusion in her dissent in the NNP case, that there was

no legal impediment to the issuing of TICs and there was no evidence showing that they were not being issued.

The Independence of the Independent Electoral Commission:

The NNP contended that the independence of the Commission as guaranteed in the Constitution, was infringed by government's conduct in two respects. First, government's refusal to accept the advice of the Electoral Commission that bar-coded identity documents should not be the only identification document acceptable for the purposes of registration and voting, and secondly, in providing inadequate funding for the Commission. The NNP claimed that this conduct was unconstitutional as it resulted in the Commission not being able to exercise its powers and functions. In a majority judgment written by Justice Langa D.P, the Court held that the provisions requiring bar-coded identity documents for registration and voting, contrary to the recommendation of the Electoral Commission, did not infringe the independence or impartiality of the Commission. The electoral law had to be made by Parliament and not the Commission, and there was nothing in the Electoral Act which detracted from the independence of the Commission.

The NNP also contended that because of inadequate funding, the Commission had been required to use public servants and not its own employees in conducting the registration of voters and this had detracted from its independence. The Court held that it was clear from the evidence of the former chairman of the Commission that this arrangement had been agreed to by the Commission, and that it would not infringe its independence as long as it was able to direct the registration drives and exercise control over the public servants seconded to it for that purpose. There was no evidence to suggest that this had not happened.

In dealing with the inadequate funding of the Commission, the Court noted that there was competition for resources and that institutions are unlikely to obtain the full budget that they request. In dealing with the administrative independence of the Commission the Court found that 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. Justice Langa D.P, found that the Department of Home Affairs, the Department of State Expenditure and the Minister of Finance have failed to appreciate the true import of the requirement of the Constitution which provides 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 to the executive, and that all other organs of the state must assist and protect it to ensure its independence. Despite this finding the Court concluded that the evidence showed that the Commission had at all times asserted its independence, and that the actions of the Department of Home Affairs and other organs of government, though inconsistent with their obligations under the Constitution, had in fact not resulted in the independence of the Commission being impaired. The appeal on this issue was accordingly dismissed. An application by the NNP to amend its claim to seek a declaration of rights that the government had not carried out its duties under the Constitution was refused on the grounds that the case on which the NNP had originally approached the High Court had not been established. The Commission which was directly affected by the government's conduct had at all times asserted its independence, and did not consider it necessary to seek such relief itself. The appeal on this issue was accordingly dismissed.

Dissenting Judgment in NNP and DP cases:

In a dissenting judgment, Justice O'Regan held that the requirement of the bar-coded identity documents, as it related to those persons in possession of other valid identity documents, was an unreasonable infringement of the right to vote. The reasons for this finding of unreasonableness were, firstly, the fundamental importance of the right to vote in our democracy coupled with the constitutional obligation on the state to enact legislation which enfranchises, rather than disenfranchises. Secondly, the nature of the right to vote is such that relief granted after the date of the elections will rarely be effective, and would require a litigant to show a breach of the right in advance. Justice O'Regan held that in assessing this threatened breach of a right, a court must engage in heightened scrutiny of the legislation. Finally, the reasonableness of this provision depends on the circumstances of this case, namely that several surveys demonstrated that a substantial portion of eligible voters were unaware of the bar-coded identity requirement, the IEC's recommendation that such requirement be abandoned, and the capacity of the Department of Home Affairs to issue the necessary documents.

Justice O'Regan found that in the circumstances of this case, including the fact that other forms of ID's continued to remain valid for all other purposes, and that a new form of identification card will in future replace and invalidate all identity documents, including bar-coded identity documents, it was unreasonable for Parliament to specify that only one form of identity document was valid for the purposes of voting.

Justice O'Regan agreed substantively with the judgment of Justice Langa D.P.

13 April 1999.