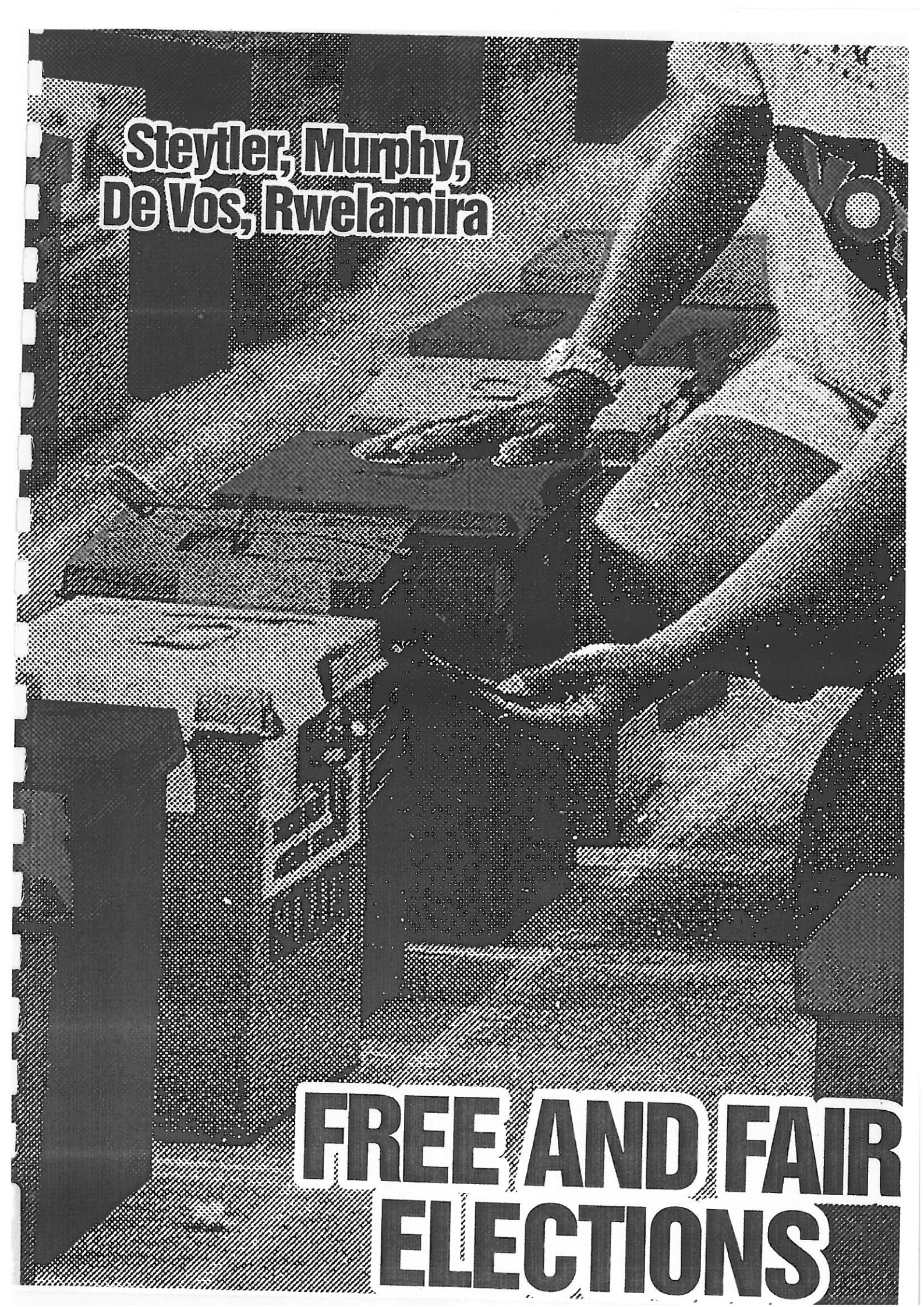
Steytler, Murphy,
De Vos, Rwelamira
FREE AND FAIR
ELECTIONS

FREE AND FAIR ELECTIONS

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Preface

The first democratic election for a Constitutional Assembly is set for 27 April 1994. The value of the election will be determined by the extent to which it has been free and fair. A considerable body of jurisprudence has developed in democratic countries about the meaning of the two concepts 'free' and 'fair'. In South Africa elections have also been held, but on a racist basis. The rules for these elections incorporated many of the principles of free and fair elections. Changing circumstances and a new electorate, however, call for a new look at electoral law. The aim of this book is to explore the legal principles underlying free and fair elections and suggest appropriate legal rules to ensure that the forthcoming election is free and fair. At the same time the principles will remain appropriate for subsequent elections.

The Department of Public and Adjective Law as well as other members of the Law Faculty of the University of the Western Cape seek through this collection of essays to contribute to the formulation of appropriate legal rules for the conduct of free and fair elections. The opinions expressed in the chapters are those of the individual authors. It is thus inevitable that there will be conflicts between chapters. Rather than seeing this as a weakness, however, one should see it as encouraging debate.

Editors
November 1993

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Introduction – Free and fair elections

Pierre de Vos, John Murphy and Nico Steytler

The election of 27 April 1994 will be the most widely contested poll ever held in South Africa. For the first time in the history of South Africa all South Africans will be able to cast a vote, irrespective of race, colour or gender. The successful outcome of the election is by no means ensured. Many obstacles lie in the way of a genuinely free and fair election. This book represents, in part, an attempt to point out some of the dangers on this road and to suggest solutions for some of the problems.

But even a successful outcome of the first election will represent only the crossing of another hurdle on the way to a real representative democracy. Voters will cast their votes to elect an interim government and constitution-making body which, in its turn, will draw up a final constitution. In this regard the election can be seen as a trial run for a future election in terms of the final democratic constitution. This book also represents, in part, a further attempt to formulate the broader fundamental principles in terms of which future elections could be held. In doing so, this book attempts to take cognizance of the particular history of the franchise in South Africa and the meaning of the 1994 election for the country.

1. The History of the franchise in South Africa

The history of the franchise in South Africa cannot be recounted without taking cognizance of the racial, ethnic and gender differentiation and classification which so obsessed the early European colonizers of South Africa. It is the history of a franchise granted by the colonizers to white men who lived in the colonies, gradually extended to African, Indian and coloured men (before being restricted and later withdrawn) and extended finally to white women.

Before the unification of South Africa in 1910 each of the four colonies had its own peculiar provisions regarding franchise. When representative government was instituted in the Cape Colony in 1852, the franchise was granted to all male British subjects on the basis of property qualifications, regardless of race or religion. Only those potential voters who had inhabited a house for at least 12 months prior to registering as a voter, at a rental value of not less than R100 a year, could register (Marais 1991, 217). In 1892 a further restriction was added to the property qualification, namely that a male wishing to register as a voter had to be able to sign his name and write down his address. This was in response to the addition of the Transkeian and Ciskeian Territories to the Cape Colony and was obviously

aimed at limiting the number of black voters (Marais 1991, 231). In 1909 85 per cent of registered voters in the Cape were white, 10 per cent coloured and only five per cent African (Dugard 1978, 18).

In Natal, white men were for the first time granted the right to elect representatives to a legislative assembly in 1856. In 1859 the franchise was extended to Indians living in Natal. However, this franchise was retracted in 1893 on the ground that 'persons who are natives or descendants in the male line of natives of countries which have not possessed representative elective institutions founded on the Parliamentary franchise are also disqualified from voting' (Marais 1991, 209). Those Indians who had been registered as voters did not lose their vote, but by 1907 only 150 Indian voters were still alive (Worrall 1975, 227).

In 1856 the franchise was granted to black people living in Natal on the same conditions as in the Cape Colony four years previously. But Act 11 of 1865 further restricted the franchise of black people in Natal because the white rulers feared that large numbers of black people would obtain the right to vote (Marais 1991, 229). Apart from certain property qualifications, a black person had to have resided in Natal for twelve years, been exempt from Bantu Law for at least seven years, submit a certificate signed by three whites supporting his application, and have permission to register as a voter from the Lieutenant-General, who had an absolute discretion to grant or refuse such application (Tomlinson 1954, 31). The law was administered in such a way that, to all intents and purposes, black people were debarred from obtaining the franchise (Marais 1991, 230).

The 1854 Constitution of the Free State Republic provided for a franchise for all 'citizens' of the Republic. Black people could not vote, however, since white pigmentation was a requirement for citizenship (Marais 1991, 19). The 1858 Constitution of the Transvaal Republic was unashamedly racist, expressly providing that 'the People desire to permit no equality between coloured people and the white inhabitants, either in church or State'. All black people were therefore excluded from both citizenship and the franchise (Marais 1991, 20).

When the Constitution of the Union of South Africa was drafted in 1909, the franchise was one of the most contentious constitutional questions. White men, of course, were given the right to vote. As for the voting rights of African and coloured men, a compromise was reached whereby the Cape, whose delegates to the constitutional convention favoured a limited colour-blind franchise, was allowed to retain its qualified franchise, while the northern provinces were allowed to maintain the exclusion of black people from participation in the electoral process (Dugard 1978, 26; Boulle 1989, 124). This agreement was entrenched in section 35 of the Constitution, which provided that no person eligible to become a voter in the Cape Province in terms of pre-Union requirements could be deprived of his right to vote on the grounds of his race or colour except by legislation passed by both Houses of Parliament sitting together, with a two-thirds majority of the total number of members of both houses. Section 152 provided for the entrenchment of section 35.

However, the South Africa Act of 1909 stipulated that only 'Europeans' could be elected to Parliament. Consequently, coloured and African voters had to vote for white candidates (Marais 1991, 220). Moreover, no mention was made of either extending the franchise to people of Indian descent or giving them representation in Parliament. Indians were seen as temporary residents in South Africa and were therefore denied the right to vote (Marais 1991, 209).

A number of petitions were submitted to the National Convention in 1909 on the subject of 'granting' the franchise to white women, but the convention (of men) decided against such a step, General Cristiaan de Wet being the strongest opponent of female suffrage (Marais 1991, 165). Some 21 years later, the Women Franchise Act 18 of 1930 finally extended the franchise to white women. However, this right was not extended to coloured or African women in the Cape Province, where coloured and African men had the qualified right to vote (Marais 1991, 166).

The process of restricting the franchise rights of African and coloured men began soon afterwards. In 1931 the income and property qualifications which applied in the Cape to all men who wanted to register as voters were scrapped in respect of white voters, but retained for African and coloured voters (Marais 1991, 233). Five years later the limited franchise for African men in the Cape was further restricted when Parliament passed the Representation of Natives Act 12 of 1936. This Act removed black men in the Cape Province from the common voters' roll and placed them on a separate voters' roll for the purpose of electing three white members to the House of Assembly and four white members to the Senate.

The Act was challenged on the grounds that it had not been passed in accordance with the requirements of the relevant entrenched constitutional clause. However, the Appellate Division held in *Ndlwana v Hofmeyer* 1937 AD 229 that Parliament could adopt any procedure as it saw fit. The removal of Africans from the common voters' roll was therefore upheld. The remaining attenuated right of African males to indirect representation in the white Parliament was ultimately abolished by the National Party government by means of the Promotion of Bantu Self-Government Act 46 of 1959.

Coming to power in 1948, the National Party moved quickly to further restrict the limited franchise of coloured males. Parliament adopted the Separate Representation of Voters Act 46 of 1951 by a simple majority. This Act removed coloured voters from the common voters' roll and placed them on a separate roll for the purpose of electing four white members to the House of Assembly. After a prolonged struggle between the Appellate Division and Parliament over the validity of this Act, Parliament finally succeeded in 1957 by enlarging the Senate and thus passing the Act by the constitutionally required two-thirds majority. These actions by Parliament were challenged as contravening the entrenched clauses of the Constitution in *Collins v Minister of Interior* 1957 (1) SA 552 (A). The Appellate Division declined to look at the motive of Parliament in enlarging the Senate and