CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 8/99

ARNOLD KEITH AUGUST	First Applicant
VERONICA PEARL SIBONGILE MABUTHO	Second Applicant
versus	
THE ELECTORAL COMMISSION	First Respondent
THE CHAIRPERSON OF THE ELECTORAL COMMISSION	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Fourth Respondent

Heard on : 19 March 1999

Decided on : 1 April 1999

JUDGMENT

SACHS J:

The Context

[1] The issue before this Court concerns the voting rights of prisoners. It arises in an appeal against the judgment of Els J in the Transvaal High Court which in effect

held that the Electoral Commission (the Commission)[1] had no obligation to ensure that awaiting trial and sentenced prisoners may register and vote in the general elections which has been announced for 2 June 1999.

[2] In the first democratic elections held five years ago, Parliament determined that, with certain specified exceptions, all prisoners could vote. The interim Constitution[2] provided for universal adult suffrage and did not expressly disqualify any prisoners. It did, however, provide that disqualifications could be prescribed by law.[3] The Electoral Act[4] (the 1993 Electoral Act) disqualified persons on four grounds, two of which related to mental incapacity, the third to drug dependency and the fourth to imprisonment for specified serious offences. More specifically, section 16(d) of the 1993 Electoral Act declared that no person shall be entitled to vote in the election if that person was:

> "(d) detained in a prison after being convicted and sentenced without the option of a fine in respect of . . . (i) [m]urder, robbery with aggravating circumstances and rape; or (ii) any attempt to commit [such an] offence. . ."[5]

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1 The Electoral Commission is established under chapter 9 of the 1996 Constitution.

2 Constitution of the Republic of South Africa, Act 200 of 1993.

3 Section 6(c); see also section 21(2).

4 Act 202 of 1993.

5 Section 16 of the Electoral Act 202 of 1993, reads as follows:

> **"Persons not entitled to vote.** - Notwithstanding the provisions of section 15, no person shall be entitled to vote in the election if that person is-
>
> (a) subject to an order of court declaring him or her to be of unsound mind or mentally disordered or affected;

All other prisoners were therefore entitled to vote. This Act went on to state that the Commission should make regulations providing for voting stations for and the procedure regulating the casting and counting of votes by prisoners and persons awaiting trial, other than those specifically excluded.[6]

[3] The 1996 Constitution provides that one of the values on which the one, sovereign and democratic state of the Republic of South Africa is founded is "[u]niversal adult suffrage" and "a national common voters roll".[7] It goes on to guarantee that "[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; . . ."[8] Unlike the interim Constitution, however, the above sections contain no provision allowing for disqualifications from voting to be prescribed by law. Accordingly, if Parliament seeks to limit the unqualified right of adult suffrage entrenched in the Constitution, it will be obliged to do so in terms of a law of general application which

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(b) detained as a mentally ill patient under the Mental Health Act, 1973 (Act No. 18 of 1973), or any other applicable law of the Republic, as the case may be;

(c) detained under the Prevention and Treatment of Drug Dependency Act, 1992 (Act No. 20 of 1992), or any other applicable law of the Republic, as the case may be; or

(d) detained in a prison after being convicted and sentenced without the option of a fine in respect of any of the following offences irrespective of any other sentence in respect of any offence not mentioned hereunder which is served concurrently with the first-mentioned sentence:

(i) Murder, robbery with aggravating circumstances and rape; or

(ii) any attempt to commit any offence referred to in subparagraph (i)."

6 Section 76(1).

7 Section 1(d) of the 1996 Constitution.

8 Section 19(3)(a).

meets the requirements of reasonableness and justifiability as set out in section 36.[9]

[4] As far as the coming general elections are concerned, Parliament has not sought to limit the right of prisoners to vote. The Electoral Act[10] (the 1998 Electoral Act) provides that:

> "6(1) Any South African citizen in possession of an identity document may apply for registration as a voter.
>
> 7(1) A person applying for registration as a voter must do so -
>
> (a) in the prescribed manner; and
>
> (b) only for the voting district in which that person is ordinarily resident.
>
> 8(1) If satisfied that a person's application for registration complies with this Act, the chief electoral officer must register that person as a voter by making the requisite entries in the voters' roll."

The disqualifications are given as follows:

> "8(2) The chief electoral officer may not register a person as a voter if that person -
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> (a) has applied for registration fraudulently or otherwise than in the prescribed manner;
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> (b) is not a South African citizen;
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> (c) has been declared by the High Court to be of unsound mind or mentally disordered;
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> (d) is detained under the Mental Health Act, 1973 (Act No. 18 of 1973); or
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> (e) is not ordinarily resident in the voting district for which that person has applied for registration."

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[9] Section 36(1) provides:

> "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 . . ."

[10] Act 73 of 1998.

Prisoners are not included in the list of disqualified persons.

[5] The Act goes on to deal with applications for special votes by persons who find it impossible to appear in person at the voting stations. Section 33 provides for special votes in the following terms:

> "(1) The Commission-
> (a) must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in which the person is registered as a voter, due to that person's-
> (i) physical infirmity or disability, or pregnancy;
> (ii) absence from the Republic on Government service or membership of the household of the person so being absent; or
> (iii) absence from that voting district while serving as an officer in the election concerned, or while on duty as a member of the security services in connection with the election;
> (b) may prescribe other categories of persons who may apply for special votes."

Once more, no express mention is made of prisoners.

The Issues

[6] It was in this setting of legislative silence, where Parliament has done nothing to limit the constitutional entitlement of prisoners to vote, that the applicants approached the Commission to ensure that as prisoners they would indeed be enabled to register and vote. First applicant is a convicted prisoner serving a long sentence for fraud, while the second applicant is an unsentenced prisoner in custody awaiting her

trial later this year on charges of fraud. Acting in their own interest and on behalf of all prisoners, the applicants sought an undertaking from the Commission that prisoners would be able to take part in the elections.

[7] It is not necessary to canvass the extensive correspondence conducted with the respondents on their behalf by the Legal Resources Centre (the LRC) save to say that the applicants asserted their claims even before the 1998 Electoral Act was promulgated on 16 October 1998.[11] When no satisfactory response was received from the Commission, the applicants launched an application on 23 December 1998 for a declaration and orders enabling them and other prisoners to register and vote. On 21 January 1999, the Commission wrote to the LRC in the following terms:

> "We confirm that the Commission will not oppose the application, save to make representations to persuade the court to pronounce itself on the issues raised in our letter and further that the Commission will abide the decision of the said Court. In that regard, the Commission undertakes to do everything within its capacity to enable prisoners to register and to vote should the Court's decision be to that effect."

The Commission therefore made it plain that it undertook, within its capacity, to enable prisoners to register and vote should a court so order.

[8] The matter came before Els J in the Transvaal High Court on 22 February 1999 and judgment was delivered the next day. Relying heavily on the affidavit filed by the second respondent, the learned judge stated that in his view there had been neither a

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[11] As early as 22 September 1998, the LRC had sent a letter to the chief electoral officer asking the Commission whether prisoners would be allowed to participate in the 1999 elections and to supply reasons for any such decision. The Commission responded in a letter, dated 5 October 1998, which described the constitutionally prescribed functions and mandate of the Commission, its duties and functions under the Electoral Commission Act, 51 of 1996, but failed to address the issue of what (if any) arrangements were being made to allow prisoners to apply for registration and to vote. It was not until 8 December 1998, that the chief electoral officer responded to the LRC's request by unequivocally stating in the letter that the Commission had

commission nor an omission on the part of first and second respondents which resulted in undue limitation to the constitutional right of prisoners to vote. He went on to hold that

> "[a]ll prisoners have the right to register as voters and to vote as any other South African citizen who is over 18 and in [possession] of an identification document. If a person does something which deprives him or her of the opportunity to register as a voter or to vote, the first and second respondents cannot be held responsible. An example is a person who specifically decides not to register because he does not want to vote, also a person who is on vacation and decides not to return to his ordinary place of residence for the purpose of voting. The predicament in which the first and second applicants and all other prisoners, sentenced or unsentenced, find themselves, is of their own making. They have deprived themselves of the opportunity to register and or to vote." (Emphasis in the original).

Bearing in mind what he regarded as insurmountable logistical, financial and administrative difficulties, and on the basis that special measures to accommodate voters should be reserved for those voters "whose predicament was not of their own making", Els J dismissed the application, making no order as to costs.

[9] Wishing to appeal to this Court the applicants then applied for a certificate in terms of rule 18 of the Rules of this Court. The learned judge, in effect, issued a negative certificate on the grounds that although the matter was of public interest and the evidence was sufficient for a decision to be made, nevertheless there were no reasonable prospects that this Court would arrive at a conclusion different from his.

[10] The applicants, relying on the right to vote, the right to equality and the right to dignity, sought leave to appeal to this Court. They seek an order declaring that they

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made no arrangements to allow prisoners to vote in the forthcoming elections.

and all prisoners are entitled to register as voters on the national common voters' roll and to vote in the forthcoming general elections, and requiring the respondents to make all necessary arrangements to enable them and all prisoners to do so. The Court set the matter down for expedited hearing on the basis that the application for leave to appeal and the merits of the proposed appeal would be argued simultaneously.

[11] At the hearing in this Court, counsel for the applicants contended that the right to vote of all persons, including prisoners, was entrenched in the Constitution and that all prisoners' rights, save those necessarily taken away by the fact of incarceration, were protected by the common law and the Constitution. He argued that the Commission was accordingly under a duty to facilitate the registration of prisoners who were eligible to vote, as well as to create conditions enabling them to vote, and that the Court should issue a declaration affirming the rights of applicants and all prisoners to register and vote and an order directing the respondents to make the necessary arrangements for these rights to be realised.

[12] The Centre for Applied Legal Studies[12] was admitted as an *amicus curiae* in order to introduce a new argument. They quoted statistics to show that on 31 December 1998, 37% of all prisoners, that is 54 121 out of 146 278, were unsentenced prisoners awaiting trial. Further, at 15 February 1999, more than 20 000 awaiting trial

[12] The Centre for Applied Legal Studies (CALS) is a legal research and advocacy centre located at the University of the Witwatersrand in Johannesburg. It conducts research and engages in litigation, training and advocacy for the promotion of human rights and democracy in South Africa. CALS was granted leave by the Court to appear as an amicus curiae on behalf of the Penal Advocacy Network (PAN). As its name suggests, PAN is a network of organisations committed to penal reform and prisoner support. Included amongst its members are Lawyers for Human Rights, the Centre for the Study of Violence and Reconciliation, the Human Rights Committee and the National Institute for the Prevention of Crime and Rehabilitation of Offenders (NICRO).

prisoners had been granted bail but had been unable to pay, and that in the case of more than 8 000 of these, the amounts of bail had been R600 or less. There were also nearly 200 prisoners who were serving sentences because they had been unable to pay the fines imposed on them. It was contended that these prisoners were being unfairly discriminated against on grounds of poverty in violation of the equality provisions of section 9 of the Constitution, poverty constituting an unspecified ground of unfair discrimination.[13]

[13] The third and fourth respondents, being the Department of Home Affairs and the Department of Correctional Services respectively, did not oppose the application. The first and second respondents, the Commission and the Chairperson of the Commission respectively, formally lodged a notice of intention to oppose and filed an answering affidavit deposed to by the second respondent. At the hearing in this Court, counsel for the respondents denied that the first and second respondents had done anything to limit the applicants' rights to register or vote and supported the conclusion reached by Els J that the predicament in which the applicants found themselves was of their own making. Counsel also pointed to the difficulty first and second respondents had in attributing a meaning to the phrase "ordinarily resident" as contained in section 7(1)(b) of the 1998 Electoral Act. This difficulty has been set out in the second respondent's answering affidavit in which he posed the question: Is ordinary residence the place where the person was ordinarily resident before he or she was

[13] See *Harksen v Lane NO and Others* 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at para 51 and 52.

incarcerated, or is the prison the ordinary residence of a prisoner? The second respondent averred that the first of these interpretations would present the respondents and the electoral process with immense logistical, financial and administrative difficulties. He emphasised that if prisoners were allowed to vote within the prison and thereafter the ballot papers had to be transported for counting to the various places from which the prisoners had come, the logistical exercise would be enormously costly and time consuming. The affidavit went on to aver that

> ". . . [a]s a special vote can take many forms, it is a costly and a logistically difficult process which requires substantial funding as well as significant logistical preparations . . . it is significant to note that while the Respondents should promote constitutional democracy and register votes, it is the obligation of the voter to apply for registration as a voter and to vote and not the obligation of the Respondents to seek out every potentially enfranchised person. In other words, it is up to the voter to ensure that he is appropriately positioned for voting purposes."

The second respondent also averred that the second of these interpretations would create difficulties for the Commission. Apart from this general averment of difficulty, however, counsel was unable to point to any specific evidence on the record establishing insuperable problems that would arise if the second possible interpretation of the phrase "ordinarily resident" were to be adopted. Even on the first interpretation of the phrase, no explanation was tendered to show why providing special votes for prisoners was any more difficult than providing special votes for the other categories of voters referred to in section 33 of the 1998 Electoral Act, such as persons in hospital and diplomats abroad.[14] Finally, in his affidavit, the second

[14] See para 5 above.

respondent invited the court to issue appropriate directions, having regard to the abovementioned factors.

Constitutional and Statutory Context

[14] Section 1(d) of the founding provisions of our Constitution declares that:

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

[15] Section 19 provides that:

> "(1) Every citizen is free to make political choices, which includes the right -

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political

party; and

(c) to campaign for a political party or cause.

(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."

[16] The right to vote by its very nature imposes positive obligations upon the legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process. For this purpose the Constitution provides for the establishment of the Commission to manage elections and ensure that they are free and fair.[15] The Constitution requires the Commission to be an independent and impartial body[16] with such additional powers as are given to it by legislation. Section 5(1)(e) of the Electoral Commission Act[17] (the Commission Act) therefore provides that it is one of the functions of the Commission to

(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."

15 Section 190(1)(a) and (b).

16 Section 181(2).

17 The Electoral Commission Act 51 of 1996.

This clearly imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered.

[17] Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[18]

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[18] This point has been strongly emphasised in Canada. See *Haig v Canada* 105 DLR (4th) 577 (SCC) Cory J said at 613:

> "All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement."

See too *Sauve v Canada (Attorney General)* 7 OR (3rd) 481 (CAO) per Arbour JA at 488:

> "[I]ncarceration conditions should be made, as far as possible, compatible with the fullest possible exercise of the right to vote rather than advanced as a reason to deny that right altogether."

[18] It is a well-established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed.[19] Of course, the inroads which incarceration necessarily makes upon prisoners' personal rights and liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress. In *Minister of Justice v Hofmeyr*,[20] Hoexter JA emphasised the need to

> ". . . negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the

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[19] See *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 139J - 140B citing with approval the dissenting judgment of Corbett JA in *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A) at 39 C - E. See too *Woods v Minister of Justice, Legal and Parliamentary Affairs* 1995 (1) SA 703 (ZSC) per Gubbay CJ at 705H:

> "The view no longer holds firm in this [Zimbabwean] jurisdiction, and in many others, that by reason of his crime a prisoner sheds all basic rights at the prison gates. Rather he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system."

[20] Above n19.

> form of statutes or regulations. . . [T]he extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights."[21]

[19] These words were written before South Africa became a constitutional democracy. Now the common law rights have been reinforced and entrenched by the Constitution.[22] It is in this context that the powers and responsibilities of the Commission under the 1998 Electoral Act and the Commission Act must be interpreted, and the question should be answered as to whether prisoners' constitutional rights to vote will be infringed if no appropriate arrangements are made to enable them to register and vote.

[20] As has been stated above, the right of every adult citizen to vote in elections for every legislative body is given in unqualified terms. The first and second respondents correctly conceded that prisoners retain the right to vote, since Parliament has not passed any law limiting that right. It is not necessary in the present case to determine whether or not Parliament could have disqualified all or any prisoners. The fact is that it has not sought to do so. The basic argument of the respondents, therefore, was that although the right of prisoners to vote remained intact, prisoners had lost the opportunity to exercise that right through their own misconduct. This argument was accepted by Els J. At the heart of his judgment is a statement that prisoners are the authors of their own misfortune and therefore cannot require special arrangements to

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[21] At 141 C - D.

[22] This was affirmed by Chaskalson P in *S v Makwanyane and Another* 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) at paras 142 - 3.

be made for them to vote.

[21][The suggestion that prisoners otherwise eligible should be disqualified from enjoying their rights not by statute, but by the mere fact of their incarceration, was considered and firmly rejected by the US Supreme Court in the case of *O'Brien v Skinner*.[23] Speaking for the Court, Burger CJ stated that the appellant prisoners were:

> " . . . not disabled from voting except by reason of not being able physically - in the very literal sense - to go to the polls on election day or to make the appropriate registration in advance by mail."[24]

He held that their voting rights were being infringed, although:

> " . . . under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote."[25]

[22] Marshall J was even more emphatic in his concurring judgment. He said:

> " . . . [N]or can it be contended that denial of absentee ballots to [prisoners] does not deprive them of their right to vote any more than it deprives others who may 'similarly' find it 'impracticable' to get to the polls on election day . . . ; here, it is the State which is both physically preventing [the prisoners] from going to the polls and denying them alternative means of casting their ballots. *Denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to*

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23 414 US 524 (1973).

24 At 528.

25 At 530.

these [prisoners]."[26] (My emphasis.)

These views are directly applicable in the present case. In reality no provision has been made either in the 1998 Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote. The Commission accordingly has not complied with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that. The applicants have accordingly established a threatened breach of section 19 of the Constitution.

[23] In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of section 36 of the Constitution as there was no law of general application upon which they could rely to do so.

Ordinarily Resident

[24] It is necessary now to turn to the proper interpretation of the phrase "ordinarily resident" which occupied so much attention during the proceedings. As noted above, the second respondent in his answering affidavit identified the difficulties the Commission had faced in applying this phrase. In his judgment, Els J held that:

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[26] At 532 -3.

> " . . . 'ordinary residence' means a commonplace abode where a person, under normal circumstances of life, lives or conducts his or her affairs. It is argued on behalf of the applicant that ordinary resident should be interpreted as the prison, where the prisoners are incarcerated. With this argument I cannot agree."

The phrase "ordinarily resident" is not, however, a term of art. It is well established in our law that the word "residence" must be interpreted in its context.[27] Its meaning depends on the context in which it is used and the purpose it is intended to serve.

[25] Section 7(1) of the 1998 Electoral Act provides:

> "A person applying for registration as a voter must do so -
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> (a) in the prescribed manner; and
> (b) only for the voting district in which that person is ordinarily resident."

The purpose of the phrase "ordinarily resident" is to facilitate the electoral process. It will, for example, enable the allocation of voters to voting districts, each with their own polling stations, so that an identified and relatively small number of voters resident in that district during the period of registration and voting will vote in it. The voters' roll for each district will be prepared on the basis of those that have registered for each district. This will facilitate easy and accurate identification on voting day and prevent long queues.

[26] In addition, section 2(a) of the 1998 Electoral Act requires that the Act be interpreted "in a manner that gives effect to the constitutional declarations, guarantees

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[27] " . . . [T]he word 'residence' is one which is capable or bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act." *Buck v Parker* 1908 TS 1100 at 1104; "The expressions 'resident' and 'ordinarily resident' are not technical expressions which always bear the same meaning; they must be interpreted in the context in which they are used." Ramsbottom J in *Biro v Minister of the Interior*, 1957 (1) SA 234 (T) at 239H.

and responsibilities contained in the Constitution". The Act must therefore be interpreted in a way which enhances enfranchisement and underlines the positive responsibilities of the Commission in facilitating registration and voting. The phrase "ordinarily resident" must therefore be interpreted in a way which facilitates both the constitutional and legislative objectives.

[27] I cannot agree with Els J in regard to the meaning of "ordinarily resident" in the context of the Electoral Act. It is clear from section 7(1) of the Act that the relevant date for determining where a person is "ordinarily resident" is the date upon which the person registers. Whether a person is "ordinarily resident" at that date at a particular place will depend on the circumstances of each case. When people are imprisoned, they are forced to leave their homes and to reside in prison. They have no choice. They eat, sleep and exercise in prison. The vast majority of prisoners had nowhere else where they were legally entitled to live on the dates fixed for registration. It will be seen for the reasons given at paragraph 37 below, that the order made in this case relating to registration, affects those prisoners who were imprisoned during all the periods of registration for voting between November 1998 and March 1999. Such prisoners will mostly have been in prison for more than three months and they generally will be "ordinarily resident" in prison as a result. This is not to say that a person may not have two residences.[28] Depending on the circumstances, it may be permissible to allow prisoners to register in the districts where they lived before they

[28] See, for example, *Fox v Stirk and another* [1970] 2 QB 463 (CA) at 472.

were imprisoned.

[28] There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in the prisons or special votes could be provided to prisoners. Prisoners are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted. The Commission should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and that the objective of achieving an easily managed poll on election day is accomplished.

[29] The question of a concentrated prison electorate exercising disproportionate local influence was raised as casting doubt on such an interpretation. The forthcoming elections are, however, being conducted by means of a system of proportional representation on the basis of national and provincial party lists, so that treating prisons as the places of ordinary residence will not significantly distort the outcome. The concentration of prisoners might have more significance for local government elections where the ward system plays an important role. These elections will, however, only be held in 18 months time, and Parliament has ample opportunity to consider this question should it wish to do so.

[30] It was also contended that if special arrangements were to be made for prisoners, then the resources of the Commission would be strained to bursting point by the need to make equivalent arrangements for citizens abroad, pilots, long-distance truck drivers, and poor persons living in remote areas without public transport. A

similar argument was robustly rejected by Marshall J in *O'Brien*.[29] On the one hand we have a determinate class of persons, subject to relatively easy and inexpensive administrative control, who have consistently asserted their claims, who are physically prevented from exercising their voting rights whatever their wishes are and who have been given a specific undertaking by the first and second respondents that should the Court so direct, the necessary arrangements would be made for them to register and vote. On the other hand there are speculative notional claims by a variety of other persons who could point to difficulty rather than impossibility of enjoyment of rights, and who have not come timeously to court to assert their claims. We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.

[31] We recognise that, in a country like ours, racked by criminal violence, the idea that murderers, rapists and armed robbers should be entitled to vote will offend many people. Many open and democratic societies impose voting disabilities on some categories of prisoners.[30] Certain classes of prisoners were in fact disqualified by

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[29] Above at para 21.

[30] Many countries disqualify all or some classes of sentenced prisoners from voting. In France, certain crimes are identified which carry automatic forfeiture of political rights; in Greece, trial courts are permitted to order such forfeiture on a case by case basis; in Germany, prisoners convicted of offences which target the integrity of the German state or its democratic order forfeit the right to vote. A more common trend is to specify that the length of sentence being served shall determine the forfeiture of the right. In Sri Lanka it is 6 months, in Canada 2 years, in New Zealand 3 years, in Australia 5 years. In the United Kingdom and Japan all persons serving sentences are excluded, while in Denmark, Ireland, Israel, Sweden and Switzerland, all prisoners can vote.

legislation[31] from voting in the 1994 elections, but that was specifically sanctioned by the interim Constitution.[32] Although there is no comparable provision in the 1996 Constitution, it recognises that limitations may be imposed upon the exercise of fundamental rights, provided they are reasonable and justifiable and otherwise meet the requirements of section 36. The question whether legislation disqualifying prisoners, or categories of prisoners, from voting could be justified under section 36 was not raised in these proceedings and need not be dealt with. This judgment should not be read, however, as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners. But, absent such legislation, prisoners have a constitutional right to vote and neither the Commission nor this Court has the power to disenfranchise them.

[32] In any event, this case is not only about criminals convicted of serious offences. Indeed the second applicant has not been convicted of any offence and, on the evidence of the amicus, more than a third of all prisoners are in her position. In addition, thousands of them are in prison because they cannot afford to pay low amounts of bail or small fines. One should not underestimate the difficulties that would confront the legislature in our particular context in determining whether or not certain classes of prisoners may legitimately have their right to vote limited.

[33] Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the Commission or this

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[31] Section 16 of the Electoral Act No. 200 of 1993.

[32] Section 6(c).

Court to decide which categories of prisoners, if any, should be deprived of the vote, and which should not. The Commission's duty is to manage the elections, not to determine the electorate; it must decide the how of voting, not the who. Similarly the task of this Court is to ensure that fundamental rights and democratic processes are protected.

[34] It is instructive to look at the situations in which the two applicants find themselves. The first applicant voted in the 1994 elections when he was already a prisoner. The 1996 Constitution guaranteed his right to vote in unqualified terms. Parliament has not sought to limit that right at all. He is informed that his right to vote remains intact and that the registration centres are as open to him as to anybody else. The only problem is that he is locked up. That a right requires an appropriate remedy was trenchantly affirmed by Centlivres CJ in *Minister of the Interior and Another v Harris and Others*:[33]

> "As I understand Mr Beyers' argument the substantive right would, in the event of such an Act having been passed, remain intact but there would be no adjective or procedural law whereby it could be enforced: in other words the individual concerned whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in sec. 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium."*

[33] 1952 (4) SA 769 (A) at 780 -1.

In this case, the first applicant has been effectively deprived of his right to vote.

[35] Similarly, the second applicant might be acquitted of the charges against her or else be released on bail before 2 June 1999. She could then go to the polling station but would not be able to vote because her name would not be on the voters' roll. Like the first applicant she too will have been disenfranchised, not by legislation but by logistics.

Conclusion

[36] General registration for voters closed on 15 March 1999.[34] I therefore conclude that prisoners, including the two applicants, are effectively being denied their constitutionally protected right to register and vote, and that the applicants are entitled to the remedy they sought. In the light of this conclusion it is not necessary to deal with the interesting argument advanced by the amicus.

[37] I now turn to the question of the appropriate remedy.[35] It follows from the foregoing that all prisoners, other than those expressly excluded by the 1998 Electoral Act, were entitled to register on the national common voters' roll. That they were not

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[34] This was announced by the Commission in terms of section 100 read with section 14 of the 1998 Electoral Act in R 302 published in *Government Gazette* 19831 dated 12 March 1999.

[35] Section 38 of the 1996 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. . ."

allowed to do so has the consequence that the Commission is now obliged to make arrangements for them to do so. However, the applicants only sought relief in this regard in respect of those prisoners who were in prison during the periods of national registration for the common voters' roll between November 1998 and March 1999 and therefore could not register at all. It is appropriate to limit the relief to those persons who were incarcerated during all the periods of registration and thereby effectively prevented from registering. Prisoners who were not incarcerated for all the periods of registration will have had the opportunity to register in the ordinary way. The order is accordingly tailored in the manner suggested by the applicants.[36]

[38] It also follows that prisoners, other than those expressly excluded by the 1998 Electoral Act, who have registered, either previously or in consequence of the order which follows, are entitled to vote in the coming general election. The Commission must therefore make the necessary arrangements to enable them to vote.

[39] This Court does not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected. During the hearing of this matter, counsel for the Commission was invited to indicate what arrangements for registration and voting would best suit the Commission in order to assist the Court in making a precise order. The Commission did not provide the

[36] In these proceedings no relief has been sought, nor is any granted, with regard to persons who were not able to register, or who will not be able to vote, by reason of their detention in police cells. There may well have been no persons who were detained in police cells for the whole period of general registration of voters. We have been given no information in that regard. We also do not know what practical problems there may be in enabling persons who may be detained in police cells on 2 June 1999 to cast their votes. It is for the Commission, taking into account the right of all South Africans to register and vote, to consider the position of such people.

information. The determination of what arrangements should be made remains a matter pre-eminently for the Commission. It is important that there should be certainty as to what these arrangements will be. In the light of the fact that this Court is not in a position in the circumstances of the present case to give specific direction as to what is to be done, it is appropriate that the Commission be required to indicate how it will comply with the order that has been made. To that end the Commission is required to furnish an affidavit setting out the manner in which the order will be complied with, and to serve a copy of that affidavit on the attorneys for the applicants and the third and fourth respondents. A copy should be lodged with the Registrar of this Court which will then form part of the public record of this case. Any member of the public may inspect the affidavit once it has been lodged with the Registrar. In the light of the urgency of the matter, and the timetable for the election set out by the Commission,[37] a period of two weeks has been afforded to the Commission for the preparation of this affidavit.

[40] In making the order that follows I am mindful of the fact that the Commission requested the Court to provide an interpretation of the words "ordinarily resident". That guidance, so far as it is appropriate, has been given in paragraphs 27 and 28 above. In its letter to the applicants, the Commission undertook to do everything within its capacity to enable prisoners to register and to vote if the Court's decision was to that effect. The Commission has the power in terms of section 14(2) of the 1998 Electoral Act to prescribe cut-off dates for registration. It will, in order to

[37] In R 302, see note 34 above.

comply with the terms of this order, need to make arrangements for a special period of registration of prisoners. The fourth respondent too has at all times manifested its willingness to cooperate in the process of enabling prisoners to register and vote. I have no doubt that practical solutions will be found for what are essentially practical problems.

[41] The applicants were obliged by the position adopted by the first respondent to approach both the High Court and this Court for the relief to which they are entitled, and there is no reason in the circumstances of this case why costs in both courts should not follow the result, and first respondent be ordered to pay them.

[42] The Order

1. The application for leave to appeal to this Court is granted and the appeal is allowed in the terms set out below.

2. The order made by Els J in the High Court is set aside and replaced with the order made in 3 below.

3.1 It is declared that all persons who were prisoners during each and every period of registration between November 1998 and March 1999, and who are not excluded from voting by the provisions of section 8(2) of the Electoral Act 73 of 1998, are entitled to register as voters on the national common voters' rolls;

3.2 It is declared that all persons who are prisoners on the date of the general

election are entitled to vote in that election if they have registered to vote in terms of prayer 3.1 above or otherwise;

3.3 The respondents are to make all reasonable arrangements necessary to enable the applicants and other prisoners referred to in paragraph 3.1 above to register as voters on the national common voters' roll;

3.4 The respondents are to make all reasonable arrangements necessary to enable the applicants and other prisoners referred to in paragraph 3.2 above to vote at the forthcoming general election;

3.5 The first respondent is required, on or before Friday 16 April 1999, to serve on the applicants and the third and fourth respondents, and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraph 3.3 and 3.4 of this order. Any interested person may inspect this affidavit at the registrar's office once it has been lodged;

3.6 The first respondent is ordered to pay the applicants' costs, such costs to include those occasioned by the employment of two counsel.

4. The first respondent is ordered to pay the costs of the appeal to this Court, including the costs of the application for a certificate, such costs to include those occasioned by the employment of two counsel.

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

For the Applicants: G J Marcus SC and J Kentridge

instructed by the Legal Resources Centre.

For the Applicants: N J Motata and L G Nkosi-Thomas instructed by Maponya Incorporated.