CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/04

MINISTER OF HOME AFFAIRS	Applicant
versus	
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE RE-INTEGRATION OF OFFENDERS (NICRO)	First Respondent
ELISE ERASMUS	Second Respondent
ROLAND SCHWAGERL	Third Respondent
THE ELECTORAL COMMISSION	Fourth Respondent
MINISTER OF CORRECTIONAL SERVICES	Fifth Respondent

Heard on : 25 February 2004

Decided on : 3 March 2004

JUDGMENT

CHASKALSON CJ:

[1] This application is concerned with the right to vote enshrined in section 19(3) of the Constitution. We have been called upon to deal with it as a matter of urgency on the eve of the elections which are to be held on 14 April 2004, some seven weeks after argument was addressed to us.

[2] The dispute arises out of the Electoral Laws Amendment Act[1] (the Amendment Act) which amends the Electoral Act.[2] The Amendment Act was promulgated on 6 November 2003 and brought into force on 17 December 2003.[3] It introduced provisions into the Electoral Act which in effect deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections during the period of their imprisonment. The crisp point in this application is the constitutionality of these provisions.

[3] The proceedings have not taken a normal course. Litigation commenced in the Cape High Court (the High Court) on 23 December 2003, six days after the Amendment Act was brought into force. An urgent application was lodged on that date in the High Court by the National Institute for Crime Prevention and the Re-integration of Offenders (Nicro) and two convicted prisoners serving sentences of imprisonment, for an order declaring the provisions that deprive serving prisoners of the right to participate in the upcoming elections, to be inconsistent with the Constitution and invalid.

[4] The Minister of Home Affairs (the Minster) only lodged an answering affidavit in the High Court on 29 January 2004, and on the following day he applied urgently to

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[1] Act 34 of 2003.

[2] Act 73 of 1998.

[3] The Amendment Act was published in Government Gazette 25687 GN 1641, 6 November 2003. However, the proclamation purporting to bring the Amendment Act into operation was published in Government Gazette 25672 GN 70, 3 November 2003 – 3 days before the Gazette containing the Amendment Act was published. Thus a re-proclamation, Government Gazette 25860 GN 78, was issued on 17 December 2003 announcing the commencement of the Amendment Act.

this Court, through the State Attorney, for an order allowing the dispute in the matter pending in the High Court to be brought directly to this Court for determination. Nicro and the two convicted prisoners supported the application. There is no satisfactory explanation why this urgent matter was allowed to stagnate in the High Court for over a month. It should have been dealt with promptly. If this had happened a decision could have been given early in January and if the matter had then to come to this Court, it could have been disposed of without the extraordinary difficulties that have arisen as a direct consequence of this delay.

[5] To the knowledge of the parties, the Constitutional Court was not in session on 30 January 2004. Following the lodging of the application for direct access the Registrar, on instructions of the Chief Justice, wrote to the State Attorney on 3 February 2004, as follows:

> "1. The delay in this matter is due to the delay on the part of the respondents in filing their answering affidavits. Some six weeks have passed since the application was served on the respondents and second respondent's affidavit has still not yet been lodged. If that affidavit is lodged expeditiously, and the applicant's replying affidavit (if any) is also lodged expeditiously, it should be possible for the matter to be disposed of in the Cape High Court during February. If either party wishes to take the matter further after that, the same papers could be used, and a date allocated within a week of the arguments being lodged in the Constitutional Court.
>
> 2. The Constitutional Court is in the process of moving from its existing premises to new premises on Constitution Hill. That move will only be completed on 13 February.
>
> 3. The papers presently before us were only completed yesterday when the affidavits in the Cape High Court were lodged with the registrar. Arrangements have

been made for the papers to be sent to those judges who do not have access to their chambers in Johannesburg.

4. As the parties wish the case to be disposed of urgently they should make arrangements now for the preparation and exchange of written arguments which will be necessary for an expeditious hearing in the High Court. That would be the desirable course to follow.

5. An application for direct access can only be granted on request by the Court itself. If there are differences between the judges, those will have to be resolved before a decision can be taken. The Court is reluctant to deal with matters without a judgment of another court, and you should not assume that direct access will be granted.

6. No communication has yet been received from the attorneys for the respondents with regard to the application for direct access. The documents that have been lodged will be referred to the judges of the Constitutional Court for their consideration. It is essential, however, that the communication referred to in paragraph 16 of the founding affidavit be communicated to the registrar without any further delay."

[6] The legal representatives of Nicro and the two prisoners took the view that it was desirable for the matter to be dealt with by the High Court and applied for a hearing date there asking that the matter be dealt with urgently. This was the correct course to take.[4] The matter should, however, have been dealt with early in January and not delayed for over a month. The Minister opposed the application and asked the

[4] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) para 9; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) para 4; *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) para 5; *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) para 29; *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa intervening)* 2002 (5) SA 392 (CC); 2002 (10) BCLR 1092 (CC) para 7; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR (1) (CC) para 6; *Ex Parte Omar* 2003 (10) BCLR 1087 (CC) para 4.

High Court to stay the proceedings before it until his application for direct access to this Court had been determined.

[7] This resulted in a further delay. The judge who dealt with the application in the High Court concluded that a decision by her on the merits of the application would undermine the application for direct access. She accordingly reserved judgment on the merits of the dispute and postponed the application pending a decision by this Court whether to grant direct access. This proved to be doubly unfortunate. First, it delayed the process in the High Court. Secondly, owing to an unexpected sad death in her family, she would not have been in a position to deliver the reserved judgment on the merits promptly if this Court had refused direct access. This Court, which convened on 16 February 2004 for the current term, refused the application for direct access. However, in the light of the facts set out above it was obliged to recall its order, grant the application, and deal with the matter urgently as a court of first and final instance.

[8] We heard the application on 25 February 2004. It raises important issues on which I would have preferred to have had more time to formulate a judgment. Unfortunately that is not possible because further delay would frustrate any relief that this Court might grant to the applicants.

[9] For the purposes of this judgment, the parties will be referred to as they were in the High Court application. Thus Nicro and the two prisoners serving sentences

without the option of a fine who brought the initial application in the High Court will be cited as the applicants, and the Minister of Home Affairs, the Electoral Commission (the Commission) and the Minister of Correctional Services will be cited as the respondents.

Background to the impugned provisions

[10] Section 1 of the Electoral Act provides that a "voter" is a South African citizen who is 18 years old or older and whose name appears on the voters' roll.[5] Section 1 of that Act, read with section 5, defines "voters' roll" as the national common voters' roll compiled and maintained by the chief electoral officer. It appears from section 8 of the Act that a person's name will only be entered on the voters' roll once that person has registered as a voter.[6]

[11] Prior to its amendment, the Electoral Act contained no provisions dealing specifically with prisoners serving sentences of imprisonment. If this had remained so, in terms of the decision of this Court in *August and Another v Electoral Commission and Others,*[7] the Commission would have been obliged to allow prisoners

[5] The relevant part of section 1 reads as follows:

> "'voter' means a South African citizen —
> (a) who is 18 years old or older; and
> (b) whose name appears on the voters' roll".

[6] Section 8(1) reads as follows:

> "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."

[7] 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

to register as voters and to vote in the upcoming elections and would also have been obliged to provide the necessary facilities to enable this to be done.

[12] The changes introduced into the Electoral Act by the Amendment Act include sections 8(2)(f), and 24B(1) and (2). They read as follows:

> "8(2) The chief electoral officer may not register a person as a voter if that person —
> . . .
> (f) is serving a sentence of imprisonment without the option of a fine."
>
> "24B(1) In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters' roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voters' roll for the voting district in which he or she is in prison."
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> "24B(2) A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine."

[13] In effect, these changes disenfranchised prisoners serving sentences of imprisonment without the option of a fine by precluding them from registering as voters and voting whilst in prison. Unsentenced prisoners, and prisoners incarcerated because of their failure to pay fines imposed on them, retained the right to register and vote.

[14] Special provision was made by the Amendment Act to regulate the voting of those prisoners who retained the right to vote. Under section 8, a person's name may

only be entered on the voters' roll for the voting district in which that person is ordinarily resident. Where a prisoner is "ordinarily resident" is regulated by two deeming provisions. For registration purposes, a prisoner is regarded to be "ordinarily resident" in the voting district where that person normally lived when not imprisoned.[8] For voting purposes, section 24B(1) stipulates that a prisoner who is not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters' roll for another district will be deemed for that election day to be registered for the voting district in which the prison is located.[9]

[15] Section 64 of the Electoral Act empowers the Commission to establish mobile voting stations in a voting district.[10] In terms of section 64(1A)(b), introduced by the Amendment Act, such mobile voting stations may be employed where necessary for use in a prison.[11]

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[8] Section 7(3)(b) reads as follows:

> "For the purpose of registration on the voters' roll a person is not regarded to be ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained."

[9] See above para 12.

[10] Section 64 reads as follows:

> "The Commission must establish for an election one voting station, or one voting station and a mobile voting station, or only a mobile voting station, in each voting district in which the election will be held."

[11] Section 64(1A)(b) reads as follows:

> "The Commission may establish a mobile voting station only if —
> . . .
> (b) the mobile voting station is necessary for use at a prison."

[16] The applicants who challenged the validity of the changes made in respect of the voting rights of prisoners sought the following relief in the notice of motion lodged with the urgent application. First, an order declaring section 8(2)(f), the phrase "and not serving a sentence of imprisonment without the option of a fine" in section 24B(1), and section 24B(2) of the Electoral Act to be unconstitutional and invalid; and secondly, an order directing the second and third respondents to ensure that all prisoners who are or will be entitled, in terms of the Electoral Act, to vote in the forthcoming elections, are afforded a reasonable opportunity to register as voters for and to vote in the forthcoming elections. If granted, this relief would remove the provisions that disenfranchised them.

[17] I turn now to deal with the arguments advanced on behalf of the applicants in support of their claims.

Sections 1 and 3 of the Constitution

[18] In the founding affidavit the applicants rely in the first instance on sections 1(d) and 3(2) of the Constitution which form part of the first chapter that contains the founding provisions of the Constitution. They contend that sections 8(2)(f) and 24B(1) and (2) of the Electoral Act, which disenfranchise them, are inconsistent with these provisions which are absolute and not subject to limitation in terms of the Constitution.[12]

[12] Section 36 of the Constitution is dealt with more fully in paragraph 33 and later paragraphs below. It makes provision for the limitation of rights in the Bill of Rights and the criteria according to which this can be done.

[19] There is no substance in this contention and counsel for the applicants correctly did not seek to support it. Section 1 deals with the values of the Constitution and section 3 with the rights of citizenship. Neither of these sections requires voting rights to be absolute and immune from limitation.

[20] Section 1 reads as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (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."

[21] The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

[22] The first section of the Bill of Rights (which is section 7 of the Constitution), provides:

> "(1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

[23] The rights entrenched in the Bill of Rights include equality, dignity, and various other human rights and freedoms. These rights give effect to the founding values and must be construed consistently with them. They are, however, not absolute and in principle are subject to limitation in terms of section 36(1) of the Constitution which provides:

> "(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 legislation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve that purpose."

[24] Section 3 of the Constitution makes provision for a common and equal citizenship. Section 3 provides:

> "(1) There is a common South African citizenship
> (2) All citizens are –
>
> (a) equally entitled to the rights, privileges and benefits of citizenship; and
> (b) equally subject to the duties and responsibilities of citizenship.

> (3) National legislation must provide for the acquisition, loss and restoration of citizenship."

This section includes both an entitlement to the rights that citizens have and an obligation to comply with the duties and responsibilities of citizenship. The rights include the right to vote in elections. The duties and responsibilities include at least an obligation to respect the rights of others and to comply with the law.

[25] To sum up, the right to vote is vested in all citizens. It is informed by the foundational values in section 1 of the Constitution and in particular section 1(d). It is, however, not an absolute right. It is subject to limitation in terms of section 36. Citizens who commit crimes break the law in breach of their constitutional duty not to do so. It is within this framework that the challenge to the constitutionality of sections 8(2)(f) and 24B(1) and (2) of the Electoral Act must be determined.

[26] In their founding affidavit, the applicants contend that various rights that prisoners have were infringed by the provisions of the Electoral Act disenfranchising them. Although they based their claim initially on the alleged infringement of the rights contained in sections 9,[13] 10,[14] 12(1)(a),[15] 15(1),[16] 33,[17] 35(2)(e),[18] and

[13] This section entrenches the right to equality.

[14] This section entrenches the right to dignity.

[15] Section 12(1)(a) of the Constitution provides:

> "Everyone has the right to freedom and security of the person, which includes the right –
> (a) not to be deprived of freedom arbitrarily or without just cause."

[16] Section 15(1) of the Constitution provides:

> "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

35(3)(n)[19] of the Constitution, at the hearing they relied only on the right to vote and the right to equality.

The right to vote

[27] The right to vote is entrenched 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 of the Constitution, and to do so in secret".

[28] As Sachs J held in *August*:

> "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."[20]

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[17] Section 33 of the Constitution guarantees the right to administrative action that is lawful, reasonable and administratively fair.

[18] Section 35(2)(e) of the Constitution provides:

> "Everyone who is detained, including every sentenced prisoner, has the right –
> . . .
> (e) to conditions of detention that are consistent with human dignity".

[19] Section 35(3)(n) of the Constitution provides:

> "Every accused person has the right to a fair trial, which includes the right –
> . . .
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing ".

[20] Above n 7 para 16.

The right to vote "by its very nature imposes positive obligations upon the legislature and the executive".[21] This was reaffirmed in *New National Party of South Africa v Government of the RSA and Others*[22] where the "nature, ambit and importance" of the right to vote was analysed by Yacoob J. He stressed that this right which is fundamental to democracy requires proper arrangements to be made for its effective exercise.[23] This is the task of the legislature and the executive which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections.

[29] In terms of the Constitution, elections for the national assembly are based on the national common voters' roll,[24] and elections for provincial legislatures and municipal councils on the province's segment[25] and the municipality's segment[26] of the national common voters' roll respectively. Inclusion in the national common voters' roll is thus essential for the exercise of the right to vote.[27]

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[21] Id para 16.

[22] 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC).

[23] Id para 11.

[24] See section 1(d) and section 46(1)(b) of the Constitution which expressly prescribe that the electoral system for the national assembly must be "based on the national common voters roll".

[25] Section 105(1)(b) of the Constitution provides that an election for a provincial legislature "is based on that province's segment of the national common voters roll".

[26] Section 157(2)(a) of the Constitution provides:

> "The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system – (a) of proportional representation based on that municipality's segment of the national common voters roll".

[27] Section 38(2)(b) of the Electoral Act provides:

> "A voter is entitled to vote at a voting station –
> . . .

[30] The Constitution requires elections to be managed by the Commission in accordance with national legislation.[28] The relevant legislation is the Electoral Act. It makes provision for various matters pertaining to the running of elections including the registration of voters and the compilation of a national common voters' roll. The voters' roll must contain the names of all registered voters and be kept open for registration until the date of proclamation of the election date by the President. Once the election date has been proclaimed, the voters' roll is closed and persons whose names are not on the roll may not vote in the elections.[29] The implications of this for the relief claimed by the applicants are dealt with later in this judgment.

[31] The Electoral Act curtails the right of convicted prisoners to vote in elections in two respects. Convicted prisoners who on the day of the elections are serving a sentence of imprisonment without the option of a fine are precluded by section 24B(2) from voting. Convicted prisoners serving a sentence of imprisonment without the option of a fine are precluded by section 8(2)(f) from registering as voters whilst they are in prison. Thus, if they had not registered before being imprisoned and are

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(b) if that voter's name is in the certified segment of the voters' roll for the voting district concerned."

[28] Section 190(1)(a) of the Constitution provides:

"The Electoral Commission must –
(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation".

[29] Section 24(1) of the Electoral Act provides:

"The voters' roll, or the segments of the voters' roll that must be used for an election, are those as they exist on the day the election is proclaimed."

released from prison after the voters' roll has closed but before the day of the elections, they will not be able to vote even though they are no longer in prison.

[32] Counsel for the Minister correctly accepted that these provisions limit the voting rights of convicted prisoners serving sentences of imprisonment without the option of a fine. Counsel contended, however, that the limitation is justifiable in terms of section 36 of the Constitution. Whether or not that is so is the question that has to be decided in this application.

The limitation analysis

[33] Section 36 calls for a proportionality analysis in which the question ultimately

> "is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[30]

[34] Counsel for the applicants submitted that the Minister has the onus of proving that the admitted limitation of the right to vote is reasonable and justifiable and, if this cannot be established, the application must succeed. Although "onus" is not infrequently used in this context it is, as this Court has had occasion to point out previously, an onus of a special type.[31] It is not the conventional onus of proof as it is

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[30] *S v Manamela and Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para 32; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) para 31.

[31] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as amicus curiae)* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) para

understood in civil and criminal trials where disputes of fact have to be resolved. It is rather a burden to justify a limitation where that becomes an issue in a section 36 analysis. That is how it is described by Somyalo AJ in *Moise v Greater Germiston Transitional Local Council*,[32] who said:

> "It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity - indeed an obligation - to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary *onus*, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."[33]

[35] This calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences

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19; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) para 20.

[32] *Moise* above n 31.

[33] Id para 19.

unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them.

[36] Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may however be cases where despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge.[34]

[34] *Phillips* above n 31 para 21.

[37] Ultimately what is involved in a limitation analysis is the balancing of means and ends. This entails an analysis of all relevant considerations

> "to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose."[35]

In this process, different and sometimes conflicting interests and values may have to be taken into account. Context is all important and sufficient material should always be placed before a court dealing with such matters to enable it to weigh up and evaluate the competing values and interests in their proper context.

[38] With this in mind, I turn now to an examination of the reasons given on behalf of the Minister for denying the vote to prisoners sentenced to imprisonment without the option of a fine.

Contentions advanced on behalf of the Minister

[39] Mr Gilder, the Director-General of Home Affairs, in an answering affidavit lodged on behalf of the Minister gives the government's reasons for limiting the voting rights of prisoners. He says that prior to the passing of the Amendment Act consideration was given to the need to make provision for voting by people qualified to vote, but who would not be able to find their way to polling stations on election day. Arrangements necessary for this purpose would involve sanctioning the casting

[35] *Manamela* above n 30 para 66; *Phillips* above n 31 para 22.

of special votes at places other than polling stations, and the use of mobile voting stations on election day to enable people unable to travel to polling stations to cast their votes.

[40] According to Mr Gilder, both these procedures involve risks for the integrity of the voting process. Scrutiny to ensure that there is no tampering with special votes or interference with voters at mobile voting stations presents certain difficulties. Arrangements have to be made for the storage and transportation of the special votes to places where they can be counted and this too has risks. Moreover, the provision of special arrangements of this nature puts a strain on the logistical and financial resources available to the Commission for the purpose of conducting the elections and this too has to be taken into account.

[41] For these reasons, the categories of people for whom special arrangements should be made had to be limited. The favoured categories were people unable to travel to polling stations because of physical infirmities, disabilities or pregnancy, persons and members of their household absent from the Republic on government service, and people who would be absent from their voting districts on election day because of duties connected with the elections.

[42] In addition, attention was given to the position of prisoners. Regard was had to the decision of this Court in *August*[36] where it was held that absent legislation

[36] Above n 7.

preventing them from doing so, prisoners have a constitutional right to vote, and the Commission has no power to disenfranchise them by failing to make adequate provision for this vote. The question whether legislation disqualifying prisoners or categories of prisoners from voting could be justified under section 36 of the Constitution was not raised in the *August* case and the judgment specifically refrained from dealing with that issue.[37]

[43] According to Mr Gilder, it was appreciated that in the light of this judgment, unless the position of prisoners was addressed in legislation, arrangements would have to be made for them to vote. He says that it was decided that some but not all prisoners should be allowed to vote. A distinction was made between three classes of prisoners. Awaiting trial prisoners were entitled to the benefit of the presumption of innocence and should not be excluded from voting. Prisoners sentenced to a fine with the alternative of imprisonment who were in custody because they had not paid the fine should also be allowed to vote. Their being in custody was in all probability due to their inability to pay the fines and they should not lose the right to vote because of their poverty. Prisoners serving sentences of imprisonment without the option of a fine were, however, in a different category. It was considered reasonable to deny them the right to register or vote whilst they were serving their sentences.

[44] Mr Gilder says that the main rationale for this is that these prisoners have been deprived of their liberty by a court after a fair trial. This has various consequences.

[37] Id para 31.

Because their liberty has been curtailed, they are unable to avail themselves of the ordinary facilities made available for voter registration and voting. If they were not excluded from registering and voting then, in the light of the decision in the *August* case,[38] special provision would have had to have been made for them to vote. There are, however, other categories of persons who for good reasons have difficulty in getting to registration and voting stations. Rather than putting the scarce resources of the state at the disposal of convicted prisoners, such resources should, he contends, be used for the provision of facilities to enable law abiding citizens to register and vote.

[45] The main thrust of the justification offered by him was that it would be unfair to make provision for voting by prisoners and not to do the same for law abiding citizens unable to vote. Although counsel for the Minister correctly did not support this contention, Mr Gilder went so far as to contend in his affidavit that the prisoners had not been deprived of their right to vote saying: "There was no denial of the right to vote. There was simply a refusal to make special arrangements." A similar contention was specifically rejected by this Court in *August*.[39] When people are incarcerated under the laws of the country and no arrangements are made for them to vote, it cannot be said that their right to vote has not been impaired. The contention is also untenable in the light of section 24B(2) of the Electoral Act which provides in express terms that prisoners may only vote if they are not serving sentences of imprisonment without the option of a fine.

[38] Above n 7.

[39] Id para 21.

[46] Mr Gilder also referred to the fact that various open and democratic societies curtail the right of prisoners to vote. He says that it is reasonable to do so, particularly in a country like ours where there are strong feelings against the high level of crime. It would not be fair, he says, to devote resources to criminals who are responsible for their own inability to vote, if similar provision cannot be made for deserving categories of people who through no fault of their own are unable to register or attend polling stations on election day. Counsel for the Minister submitted that making provision for convicted prisoners to vote would in these circumstances send an incorrect message to the public that the government is soft on crime.

Logistics and expense

[47] Counsel for the applicants contended that issues such as cost are not relevant to an enquiry into the limitation of rights. In *Ferreira v Levin NO and Others: Vryenhoek and Others v Powell NO and Others*,[40] Ackermann J pointed out that problems involving resources cannot be resolved in the abstract "but must be confronted in the context of South African conditions and resources — political, social, economic and human".[41] Whilst it is true, as Ackermann J explained in his judgment, that what is reasonable in "one country with vast resources, does not necessarily justify placing an identical burden on a country with significantly less

[40] 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[41] Id para 133 [footnotes omitted].

resources"[42] the right to vote is foundational to democracy which is a core value of our Constitution. In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected.

[48] Resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote. There is a difference, however, between a decision by Parliament or the Commission as to what is reasonable in that regard, and legislation that effectively disenfranchises a category of citizens.

[49] In the present case, however, it is not necessary to take this issue further for the factual basis for the justification based on cost and the lack of resources has not been established. Arrangements for registering voters were made at all prisons to accommodate unsentenced prisoners and those serving sentences because they had not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. There is nothing to suggest that expanding these arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission. Apart from asserting that it would be costly to do so, no information as to the logistical problems or estimates of the costs involved were provided by Mr Gilder. The Commission abided the decision of the Court. It lodged affidavits to explain its attitude to the Court, and was represented by counsel at the hearing. It did not place any information before the

[42] Id

Court in regard to costs and logistics and did not suggest that it would be unable to make the arrangements necessary to enable all prisoners to vote.

[50] It will no doubt be costly and logistically difficult because of time pressures to go through the registration process again for the benefit of prisoners who were not previously allowed to register. But if that be necessary, the added cost and allocation of human resources will be due largely to the prior exclusion.

[51] In so far as this aspect of the case is concerned, the burden of justifying the limitation falls at the first hurdle and it is not necessary to engage in the proportionality analysis that would have been necessary if the factual underpinning for the contention based on lack of resources had been established.

Favouring prisoners over other voters

[52] There is no substance in the contention that prisoners would be favoured over others who have difficulty in attending polling stations if arrangements are made to enable them to register and vote at the prisons in which they are detained.

[53] Prisoners are prevented from voting by the provisions of the Electoral Act and by the action that the state has taken against them. Their position cannot be compared to people whose freedom has not been curtailed by law and who require special arrangements to be made for them to be able to vote. Whether the failure to make such arrangements for particular categories of persons is reasonable and justifiable

will depend on the facts of those cases. We are not called upon to consider that in the present case. The mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners. Whether or not that is reasonable as a matter of policy raises different considerations.

Policy

[54] Mr Gilder says in his affidavit that

> "in a country in which crime is a major problem and there is a strongly negative attitude to criminals it would be highly insensitive, and indeed irresponsible, to say to law-abiding citizens that some of the resources which could have been utilised to ameliorate the effect of the obligation to get themselves to their voting stations have been diverted to those who have infringed their rights. This applies especially to victims of crimes, whether involving violence or even a crime such as theft. Confidence in the electoral process could be seriously undermined."

[55] Counsel for the Minister submitted that this gives rise to a concern that if prisoners are allowed to vote that will send a message to the public that the government is soft on crime. Counsel pointed out that this perception is not correct, and, as appears from Mr Gilder's affidavit, the government has in fact taken various stringent measures to combat crime.

[56] This Court has previously expressed concern about the need

> "to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights."[43]

A fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration.[44] It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals.

[57] I will assume that Mr Gilder intended to convey something different. That at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of section 3 of the Constitution.

[58] The justification of such a policy, however, raises difficult and complex issues. This is well illustrated by the decision of the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)*.[45] In 1988, Mr Sauvé, a convicted prisoner serving a sentence of imprisonment, unsuccessfully challenged the constitutionality of a

[43] *S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) para 68.

[44] Above n 7 para 18.

[45] 2002 S.C.C. 68.

provision of the Canada Elections Act[46] which in effect deprived convicted prisoners of their right to vote whilst serving their sentences. On appeal, the Supreme Court of Canada disposed of the matter summarily in an oral judgment holding that the legislation did not meet the minimum impairment test required for the limitation of rights in Canada.[47] Following this decision new legislation was prepared in which prisoners sentenced to two years' imprisonment or more were denied the right to vote whilst in prison. That legislation was preceded by an investigation into the matter by a special committee on electoral reform which reviewed a report by a Commission (the Lortie Commission)[48] which had previously considered the same issue. That Commission had recommended that only those prisoners who had been convicted of an offence punishable by a maximum of life imprisonment and who had been sentenced to imprisonment for ten years or more should be disqualified from voting. The report of the Special Committee is referred to in the judgment of Gonthier J who said that the Committee

> "spent a great deal of time trying to determine whether a two year cutoff or five years or seven years or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually the Special Committee recommended a two-year cutoff since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution".[49]

[46] R.S.C. 1985 c. E-2.

[47] *Sauvé v Canada (Attorney General); Belczowski v Canada* [1993] 2 S. C. R. 438 para 2.

[48] Above n 45 para 164.

[49] Id

[59] The Canadian government contended that the disqualification served two broad objectives: to enhance civic responsibility and respect for the rule of law; and to provide additional punishment, or "enhance the general purposes of the criminal sanction".[50]

[60] It appears from the judgments in the *Sauvé* case that the record of evidence included details of the previous reports on whether it would be appropriate and consistent with Canadian values to disqualify prisoners from voting. There was also a considerable body of expert evidence dealing with this issue. In dealing with the minimum impairment test, the Crown and its experts gave three reasons for supporting the legislation. They were:

> "only prisoners serving sentences of two years or more are disenfranchised, and thus the provision only targets what Parliament has identified as those who have perpetrated 'serious offences'; the disenfranchisement is temporary, in the sense that the vote returns to the offenders once they leave jail; and the return of the vote once the offender leaves jail is automatic."[51]

[61] The Supreme Court of Canada divided 5 to 4 on the decision. The majority took the view that the government had failed to establish a rational connection between the denial of prisoners' right to vote and the objectives of enhancing respect for the law and ensuring appropriate punishment. McLachlin CJ, writing for the majority, said:

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[50] Id para 21.

[51] Id para 166.

> "The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardises its claims to representative democracy, and erodes the basis of its right to convict and punish law-breakers."[52]

[62] She concluded this part of her judgment as follows:

> "When the facade of rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognised goal of sentencing. On all counts, the case that section 51(e) [of the Canada Elections Act] furthers lawful punishment objectives fails."[53]

She went on to question whether the measure would, if rational, have met the minimum impairment test and the requirements of proportionality, and concluded that it did not.

[63] Gonthier J writing for the minority took a different view, saying:

> "Given that the objectives are largely symbolic, common sense dictates that social condemnation of criminal activity and a desire to promote civic responsibility are

[52] Id para 34.

[53] Id para 52.

> reflected in the disenfranchisement of those who have committed serious crimes. This justification is rooted in a reasonable and rational social and political philosophy which has been adopted by Parliament. Further, it can hardly be seen as 'novel', as stated in the Chief Justice's reasons, at para 41. The view of the courts below is that generally supported by democratic countries. Countries including the United States, the United Kingdom, Australia, New Zealand, and many European countries such as France and Germany, have, by virtue of choosing some form of prisoner disenfranchisement, also identified a connection between objectives similar to those advanced in the case at bar and the means of prisoner disenfranchisement."[54]

[64] Gonthier J distinguished the first *Sauvé* case[55] on the grounds that it dealt with a blanket exclusion of prisoners regardless of the duration of their incarceration, and concluded that the two year line drawn by Parliament after an exhaustive investigation of the matter was an acceptable line:

> "Since Parliament has drawn a line which identifies which incarcerated offenders have committed serious enough crimes to warrant being deprived of the vote, any alternative line will not be of equal effectiveness. Equal effectiveness is a dimension of the analysis that should not be under emphasised, as it relates directly to Parliament's ability to pursue its legitimate objectives effectively. Any other line insisted upon amounts to second-guessing Parliament as to what amounts to a 'serious' crime."[56]

Conclusion

[65] In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the

[54] Id para 159.

[55] Above n 47.

[56] Above n 45 para 163.

disenfranchisement was intended to serve. In so far as the government relies upon policy considerations, there should be sufficient information to enable the Court to assess and evaluate the policy that is being pursued. In this regard, and bearing in mind that we are concerned here with legislation that disenfranchises voters, I agree with the comments of McLachlin CJ in the second *Sauvé* case:

> "At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remains constant throughout the justification process. As this Court has stated, the objective 'must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective'".[57]

[66] I have dealt in some detail with the second *Sauvé* case[58] because the two judgments are both compelling and articulate lucidly the case for and against prisoner disenfranchisement. What will be apparent from the reference to the two judgments is that the present case is markedly different from *Sauvé*. The main thrust of the justification in the present case was directed to the logistical and cost issues which cannot be sustained. The policy issue has been introduced into the case almost tangentially. In contrast, the detailed record in the second *Sauvé* case contained evidence which addressed the issues relevant to the policy decisions to disenfranchise prisoners, and the purpose that it would serve. In the present case we have only statements such as that made by counsel that the government does not want to be seen

[57] Id para 23 [footnote omitted].

[58] Above n 45.

to be soft on crime, and that made by Mr Gilder that it would be unfair to others who cannot vote to allow prisoners to vote.

[67] Moreover, we are concerned with a blanket exclusion akin to that which failed to pass scrutiny in the first *Sauvé* case.[59] Mr Gilder mentions crimes involving violence or even theft, but the legislation is not tailored to such crimes. Its target is every prisoner sentenced to imprisonment without the option of a fine. We have no information about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions. In short we have wholly inadequate information on which to conduct the limitation analysis that is called for. Moreover, the provisions as formulated appear to disenfranchise prisoners whose convictions and sentences are under appeal. Another relevant factor to consider is the fact that the Electoral Act prohibits all prisoners sentenced to imprisonment without the option of a fine from voting, while the Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for election.[60] No explanation is given, and none is apparent, as to why a person who

[59] Above n 47.

[60] Section 47(1)(e) of the Constitution provides:

> "Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except –
>
> . . .
>
> (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the

qualifies to be a candidate should be disqualified from voting. In the circumstances, the attempt by the Minister to justify the limitation fails, and the challenge to the constitutionality of the legislation on the ground that it infringes the right to vote must be upheld. That being so, there is no need to discuss the case based on the right to equality, and whether in the circumstances of this case it should be treated separately or taken only as reinforcing the right to vote, which is the primary right on which the applicants rely.

Remedy

[68] As stated above, the Commission indicated its intention to abide the judgment of this Court.[61] Though it did so, it also filed heads of argument and was represented at the hearing. An affidavit was filed in the proceedings before the High Court by the chief electoral officer and a further affidavit filed in this Court made by the Commission's attorney.

[69] In its heads of argument and in the affidavit filed shortly before the hearing in this Court, the Commission drew attention to the fact that the election date of 14 April 2004 had formally been proclaimed on 11 February 2004[62] and that the voters' roll had closed on that date in terms of section 24 of the Electoral Act. The Commission

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conviction or sentence has been determined, or until the time for appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed."

[61] Above para 49.

[62] The President set the date of 14 April 2004 as the date on which the election of the National Assembly will occur in a proclamation published in Government Gazette 26020 GN 14, 11 February 2004. On the same day, the nine Provincial Premiers issued proclamations designating 14 April 2004 as the date on which the election of the provincial legislatures would take place.

also noted that the voters' roll had been certified in terms of section 24(2) of the Electoral Act on 20 February 2004. Accordingly, it was argued, the consequential relief sought by the applicants would no longer be competent as the roll could not be re-opened or supplemented in terms of the Electoral Act. Moreover, it was argued that it would not be competent for this Court to grant an order requiring the voters' roll to be re-opened to permit the registration of prisoners.

[70] Section 24 of the Electoral Act provides as follows:

> "(1) The voters' roll, or the segments of the voters' roll that must be used for an election, are those as they exist on the day the election is proclaimed.
> (2) By not later than the relevant date stated in the election time table, the chief electoral officer must certify the voters' roll to be used in that election and publish it by making it available for inspection at the following venues:
> (a) At the Commission's head office, the segments for all voting districts in which the election will take place;
> (b) in each province, at the office of the Commission's provincial representative, the segments for all voting districts in the province in which the election will take place; and
> (c) at the office of each municipality, the segments for all voting districts in that municipality in which the election will take place."

This provision, counsel for the Commission argued, effectively barred any further registration once the roll had closed on the date the elections were proclaimed.

[71] Section 24 of the Electoral Act is an important provision which promotes the conduct of free and fair elections in accordance with the fundamental values of our

Constitution.[63] The process of compilation of the voters' roll is carefully regulated by the Electoral Act. It requires timeous completion of the roll,[64] and affords voters and political parties an opportunity to examine and, where appropriate, object to the voters' roll[65] so that they can be satisfied that the roll has been properly compiled. Timeous closure of the roll enhances public confidence in the elections by avoiding complaints that the roll has been tampered with at the last minute or in some improper fashion. The roll accordingly remains open for inspection as provided for in section 24(2). We must not underestimate the importance of these provisions as key to protecting the legitimacy of democratic elections.

[72] In response to the argument raised by the Commission, the applicants lodged an application seeking to amend the relief they sought. They sought the addition of the following paragraphs to their notice of motion:

> "3A Insofar as it is necessary, the second respondent and its duly authorised officials are ordered and directed forthwith to make the requisite entries in the voters' roll of all prisoners, regardless of whether or not such prisoners have been sentenced to imprisonment without the option of a fine, who are entitled to register as voters in terms of the relevant provision of sections 7 and 8 of the Electoral Act 73 of 1998.
>
> 3B The Second Respondent and its duly authorised officials are ordered and directed to implement the relief sought in paragraphs 3 and 3A above within such period as will enable the prisoners who are entitled to vote, regardless of whether or

[63] See section 1(d) of the Constitution which provides that amongst the founding values of our Constitution are "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

[64] See Chapter 2 of the Electoral Act.

[65] See section 15 of the Electoral Act.

not such prisoners have been sentenced to imprisonment without the option of a fine, to vote on the date of the election at the voting stations as determined by the second respondent.

3C The Second Respondent and its duly authorised officials are ordered and directed forthwith to amend if necessary, the election timetable which it is required to be published in terms of section 20(2) of the Electoral Act, in order to give effect to the relief sought in prayers 3 to 3B."

Alternatively to paragraphs 3B and 3C, the applicants sought alternative relief in the event that the second respondent and its duly authorised officials were unable to give effect to the relief sought in prayers 3B and 3C. That relief was the following:

"4. The second respondent is ordered to postpone in terms of section 22 of the Electoral Act the voting on the proclaimed election date to a date which falls within the period referred to in sections 49(2) and 108(2) of the Constitution, in order to ensure that all the prisoners who are entitled to vote, regardless of whether or not they have been sentenced to imprisonment without the option of a fine, will be able to register as voters and will be able to vote on the date to which voting has been postponed."

[73] The question that arises now for us to consider is whether this Court can make an order requiring the Commission to make arrangements to register prisoners for voting despite the fact that the voters' roll has now closed in terms of section 24 of the Electoral Act. Section 172(1) of the Constitution provides as follows:

"When deciding a constitutional matter within its power, a court ─

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including ─

(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Another relevant provision of the Constitution is section 38 which provides that courts may grant "appropriate relief" for the infringement of rights. These two provisions read together require a court, when providing a remedy for the infringement of a constitutional right, to grant appropriate relief to the applicant which must be relief that is just and equitable in the circumstances of the case.

[74] This Court has said on many occasions that in granting appropriate relief, and making an order that is just and equitable under section 172(1)(b), it is imperative that where possible and appropriate successful litigants should obtain relief[66] and that that relief should be effective. As Ackermann J reasoned in *Fose v Minister of Safety and Security*:[67]

> "This Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an

[66] *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) para 32; *Dawood and Another, Shalabi and Another, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 66.

[67] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

> entrenched right has occurred, it be effectively vindicated. The courts have particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[68]

Other considerations, too, are relevant to determining what is just and equitable. Where possible relief should not be granted only to the applicants before a court, but to all those similarly situated to the applicants.[69] On the other hand, particularly in the context of retrospective orders, the court must consider the potential disruption and uncertainty that an order could occasion.[70]

[75] The Constitution expressly permits courts to suspend an order of invalidity. When a court does so, the effect of the order is to permit the unconstitutional provision to continue to operate pending the end of the suspension period. A court only makes such an order, of course, where it is just and equitable to do so in the light of all the facts of a particular case. Thus the effect of a suspension order is to permit a provision in conflict with the Constitution to continue to operate for a limited period.

[76] In this case, the Commission has argued that because the voters' roll has closed, the provisions of section 24 stand as a complete bar to consequential relief in favour of the applicants who have demonstrated that their constitutional rights have been infringed. The Commission, however, also states that it is practically possible for the prisoners to be registered and to be allowed to vote, and that the difficulty lies not in

[68] Id para 69.

[69] *Bhulwana* above n 66 para 32.

[70] Id

the logistical challenge of rectifying the situation, but simply in the legal impediment caused by section 24(1).

[77] Section 172(1) states that a court may make any order that is "just and equitable". It then includes within that the power to make an order suspending the effect of a declaration of invalidity, which effectively permits the Court to order that an unconstitutional state of affairs continue for a fixed period. In the light of this, it would seem strange were the terms "just and equitable" not broad to enough to permit a court to make an order which has the effect of creating a limited exception to the provisions of a statute for a short period of time in appropriate circumstances. The greater power to permit the continued infringement of the Constitution must imply the lesser power to sanction an exception to the application of an otherwise mandatory statutory provision for a limited period of time to protect a constitutional right. This must of course be done within the overriding considerations of justice and equity. These considerations must be understood in the light of the constitutional imperative of providing appropriate relief to successful litigants. It would be consistent with this imperative for the Constitution to be interpreted to empower this Court to create an exception to the operation of a mandatory statutory provision to enable successful litigants to enjoy their constitutional rights. We conclude, in the light of the aforegoing, that this Court has the competence to order consequential relief as sought by the applicant and section 24 will not per se operate as a bar to such relief. The question that remains for us to consider is whether such relief is just and equitable in the circumstances of this case.

[78] The consequential relief sought by the applicants requires a supplementary voters' roll of a relatively small number of voters to be compiled. This process of compilation requires the registration of prisoners who wish to register in prisons, followed by an opportunity to be afforded to them to appeal any refusal to register them. It also requires the provision of an opportunity for others, including political parties, to inspect and if necessary object to the supplementary voters' rolls so compiled. The Commission has indicated to the Court that this process will be logistically possible within the time available before the election date.

[79] In considering whether to grant such consequential relief, a key consideration is the importance of affording successful litigants effective relief. A further consideration is the fact that in this case the applicants have acted as expeditiously as possible to ensure they obtain the relief they seek. As mentioned earlier, the legislation under challenge was promulgated on 17 December 2003 and the challenge in the High Court was launched six days later. No blame can therefore attach to the applicants in regard to the urgency of this matter. The Court must also consider whether granting the consequential relief sought will prejudice the purposes of section 24 or otherwise threaten the ability of the Commission to run free and fair elections. We are persuaded that in this case, consequential relief will not occasion this risk.

Order

[80] The following order is made:

1. It is declared that the following provisions of the Electoral Act 73 of 1998 are inconsistent with the Constitution and invalid:
    a. the whole of section 8(2)(f);
    b. the phrase "and not serving a sentence of imprisonment without the option of a fine" in section 24B(1); and
    c. the whole of section 24B(2).

2. The Electoral Commission and the Minister of Correctional Services are ordered to ensure that all prisoners who are entitled to vote, in terms of the Electoral Act 73 of 1998 and paragraph 1 of this order, are afforded a reasonable opportunity to register as voters for, and to vote in, the forthcoming elections of April 2004.

3. Notwithstanding the provisions of Chapter 2 and section 24 of the Electoral Act 73 of 1998, the Electoral Commission is ordered that, not later than 9 April 2004, it must:
    a. give notice to prisons and prisoners that registration of voters will take place on a specified date;
    b. visit prisons and register prisoners who, pursuant to this order, are entitled to vote;
    c. prepare, print and distribute to all who are so entitled, a supplementary voters' roll of prisoners so registered; and

d. receive, properly consider and dispose of any objection or appeal relating to registration as a voter or the supplementary voters' roll.

4. The time within which the various steps referred to in paragraph 3 of this order may be taken may be determined by the Electoral Commission, with due regard to the provisions of paragraph 2 of this order.

5. The Electoral Commission is required on or before Wednesday 10 March 2004 to serve on the Minister of Correctional Services, Nicro and the two prisoners with whom it brought this application, and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraphs 2 and 3 of this order. Any interested person may inspect this affidavit at the Registrar's office once it has been lodged.

6. The Minister of Home Affairs is ordered to pay the costs of this application, including the costs of two counsel.

Langa DJC, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Chaskalson CJ.

MADALA J:

[81] In this matter, the National Institute for Crime Prevention and the Re-Integration of Offenders (Nicro) and two inmates of Pollsmoor Prison seek an order as a matter of urgency that certain provisions which amended the Electoral Act 73 of 1998 (the Electoral Act) be declared inconsistent with the Constitution and invalid. Consequentially, they seek that all prisoners be granted a reasonable opportunity to register as voters and to vote in this country's forthcoming general elections of the National Assembly and provincial legislatures scheduled to be held on 14 April 2004.

[82] The Minister opposes the application in which the crisp issue is whether certain limitations imposed on the exercise by certain prisoners of the right to vote meet the test of reasonableness and justifiability in the limitation clause.[1]

[83] The first applicant is Nicro, a voluntary association whose head office is in Cape Town. The second applicant is Elise Erasmus, an adult female who is serving a prison sentence of three years at Pollsmoor Women's Prison, Cape Town. The third applicant is Roland Schwagerl, an adult male serving a sentence of one year at Medium C Section, Pollsmoor Prison, Cape Town.

[84] The first respondent is the Minister of Home Affairs. The second respondent is the Electoral Commission. The third respondent is the Minister of Correctional Services.

[1] Section 36(1) of the Constitution.

[85] Prior to the 1999 elections this Court found itself inundated with a flurry of urgent applications surrounding the issue of the right to vote. We are again finding ourselves in the untenable situation, where we must rule on another application which is concerned with the same right to vote at the eleventh hour with general elections having been proclaimed for 14 April 2004.

[86] While it is clearly the right of litigants to approach this Court to seek a resolution of their disputes where the parties have seen the dispute in the making, they ought to approach courts expeditiously to avoid having their matters being heard in a slap-dash manner, and to afford their counsel sufficient leeway to properly prepare their cases and to afford justices reasonable time to read and research the cases.

[87] In my view, the matter has been dealt with in a slap-dash manner because the applicants who now approach this Court as a matter of urgency were at all times aware of the existence of the legislation now challenged. The matter could have been heard in the Cape High Court (the High Court) and set down as one of urgency and we could have been favoured with a judgment of that court – particularly because of the seminal importance of the issues being canvassed in this application. This Court in any event has previously expressed its reluctance to hear matters as a court of first instance without having the benefit of a judgment of the High Court. Of course if the application for direct access was granted, the matter would be heard expeditiously and

finality would be reached quickly. But the Court was in recess and there was no quorum to sit to hear the matter.

[88] The dispute in this case arises from certain provisions of the Electoral Laws Amendment Act 34 of 2003 which came into operation on 17 December 2003 – having been published as far back as the 6 November 2003.[2]

Background

[89] The full history of how this application came to be moved directly in this Court, by-passing the High Court where it was initiated, has been dealt with fully in the judgment of the Chief Justice and need not be repeated here.

[90] Suffice to mention that in the first democratic elections, Parliament determined that, with certain specified exceptions, all prisoners could vote. The interim Constitution had provided for universal adult suffrage and did not expressly disqualify any prisoner, but made the further provision that disqualification could be made by law. The Electoral Act 202 of 1993 disqualified certain persons on four grounds, one of which was imprisonment for certain specified serious offences.

[91] Section 16(d) of the 1993 Electoral Act had provided that no person would be entitled to vote if that person was detained in a prison after being convicted and sentenced without the option of a fine in respect of:

[2] Government Gazette 25687 GN 1641, 6 November 2003.

(a) murder, robbery with aggravating circumstances and rape;

(b) or any attempt to commit [such an] offence.

[92] Save for these exceptions all other prisoners could exercise the right to vote.

[93] Following upon the decision of this Court in *August and Another v Electoral Commission and Others*[3] in which it ordered that:

> "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' roll.
>
> 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 in terms of prayer 3.1 above or otherwise".

One would have expected Parliament to put in place what legislation it desired in respect of the voting rights of prisoners. This was not done.

[94] Besides the challenge to the right to vote the applicants contend that their not being able to register and to vote violates the right to equal protection and benefit of the law which is enshrined in section 9(1) of the Constitution.

[3] 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

[95] Furthermore, it is the applicants' contention that by not being allowed to register to vote, prisoners are being unfairly discriminated against in violation of section 9(3) of the Constitution.

[96] A denial of the right to register and to vote also infringes the right to human dignity which is contained in section 10 of the Constitution.

[97] Finally, it is the applicants' case that the limitation placed on prisoners by not allowing them to register and to vote, is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of section 36(1) of the Constitution.

The impugned provisions

[98] The amendments which were made to the Electoral Act and which are challenged in this application are sections 8(2)(f) and 24B(1) and (2). These sections provide as follows:

> "8(2): The chief electoral officer may not register a person as a voter if that person -
> …
> (f) is serving a sentence of imprisonment without the option of a fine."
>
> "24B(1): In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters' roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voter's roll for the voting district in which he or she is in prison."

> "24B(2) A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine."

[99] The applicants contend that the amendments disenfranchise both persons who will be serving sentences of imprisonment without the option of a fine on election day and those who, although released on election day were not registered prior to their incarceration but were serving sentences of imprisonment without the option of a fine on those days when registration took place.

[100] It has been said that once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is justifiable. As was stated by Somyalo AJ in *Moise v Greater Germiston Transitional Local Council*: *Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* that:

> "The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity - indeed an obligation - to do so."[4]

[101] Although the absence and, I would venture to say, the paucity of the justification evidence and argument does not necessarily result in invalidity of the

[4] 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) para 19.

impugned provision, it may tip the scales against the state in appropriate situations. Whatever the situation, the Court is not relieved of the obligation to conduct the justification analysis and satisfy itself as to the real status of the provisions being challenged.[5]

[102] In the present case, the Minister concedes that the overall effect of the impugned provisions is to limit the constitutional right to vote which by inference also includes the right to register as a voter. The Minister also concedes that he has the responsibility of establishing that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. We now embark upon that consideration.

Justification

[103] The limitation analysis is based in our Constitution on section 36(1) which 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, 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."

[5] *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) para 20.

[104] The process of analysing whether the limitation of a right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom has been described in *S v Makwanyane and Another*[6] as:

> "The weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests."

[105] The relevant considerations in the balancing process were stated to include:

> "The nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[7]

[106] It was stated in *S v Manamela (Director-General of Justice Intervening)* that:

> "It should be noted that the five factors expressly itemised in s 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means

[6] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 104.

[7] Id

> which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[8]

[107] Furthermore, the standard of proof for a section 36 analysis is that obtaining in civil matters – preponderance of probabilities and not the higher onerous test of proof beyond reasonable doubt.

[108] The Minister also states that logistical arrangements would be difficult and costly at this stage and may even amount to unfair favouritism. I do not think there is any substance to this argument and, in my view it cannot stand, particularly when one considers that arrangements have been made or have to be made for certain other categories of prisoners to vote – provided of course that they have been registered to vote.

[109] This case revolves around the question of whether the temporary suspension of the exercise of the right to vote by prisoners of a certain category is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[110] Much has been written and said about the fact that the right to vote is guaranteed to every citizen and that it, in fact, lies at the very heart of our democracy and cannot without good reason be lightly dismissed. There can be no doubt about the

[8] 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para 32.

truth of this statement which takes an added meaning to a people that had long been disenfranchised.

[111] In the present case the Minister who opposes the relief sought by the applicants has, rightly in my view, conceded that the provisions of the Electoral Act, as amended, indeed violate the rights in question. This means that the impugned provisions are inconsistent with the Constitution and are invalid unless they can be justified under section 36(1) of the Constitution.

[112] I have had the benefit of reading the judgment prepared by the Chief Justice and respectfully disagree with the findings and conclusion which he reaches, particularly on the lack of justification for the infringement of the said right.

[113] The objectives of government in denying certain prisoners the right to vote are multi-pronged and must be treated holistically as an attempt by government to inculcate responsibility in a society which, for decades, suffered the ravages of apartheid; demeaning its citizens and creating irresponsible persons whose lives have become a protest.

[114] Unfortunately what happens in South Africa today results squarely from our unsavoury recent past. It also means, for me, that uniquely South African problems require uniquely South African solutions and that one cannot simply import into a South African situation a solution derived from another country – no matter how

democratic it is said to be. It is true that many old democratic countries generally enfranchise the majority if not in fact all their citizens.

[115] But just as many temporarily disenfranchise prisoners in the pursuit of various stated objectives. As was stated by Gonthier J in *Sauvé v Canada* (Chief Electoral Officer):

> "Temporarily removing the vote from serious criminal offenders while they are incarcerated is both symbolic and concrete in effect. Returning it on being released from prison is the same."[9]

[116] I am in respectful agreement with these sentiments expressed by Gonthier J. In my view, the temporary removal of the vote and its restoration upon the release of the prisoner is salutary to the development and inculcation of a caring and responsible society. Even if the prisoner loses the chance to vote by a day, that will cause him or her to remember the day he or she could not exercise his or her right because of being on the wrong side of the law.

[117] In my view, the temporary removal of the right to vote by certain categories of prisoners is very much in line with the government objective of balancing individual rights and the values of our society. This must be more so in a country which is notoriously plagued by the scourge of crime. You cannot reward irresponsibility and

[9] 2002 S.C.C 68 para 103.

criminal conduct by affording a person who has no respect for the law the right and responsibility of voting.

International practice in respect of the right to vote

United States

[118] Professor L Tribe in *American Constitutional Law* observes:

> "Every state, as well as the federal government, imposes some restrictions on the franchise. Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity. If nothing else, even though anyone in the world might have some interest in any given election's outcome, a community should be empowered to exclude from its elections persons with no real nexus to the community as such.[10]

[119] In the United States the Constitution "is not violated if a state limits voting to citizens or if it deprives a citizen of the right to vote if he or she has been convicted of a felony."[11] It is the states in the United States that have control of disenfranchising prisoners in both state and federal elections. Nearly all states disenfranchise prisoners for a felony.

Europe

[10] Tribe *American Constitutional Law* 2 ed (1988) 1084.

[11] L Henkin *et al Human Rights* (1999) 151.

[120] In Europe the First Protocol to the European Commission on Human Rights guarantees free elections, and recognises the principles of universal suffrage but also notes that the right to vote is not absolute.[12]

[121] Furthermore, in Europe the practice of allowing prisoners to vote varies from country to country. According to Gonthier J:

> "Eighteen European Countries have no form of electoral ban for incarcerated offenders: Bosnia, Croatia, Cyprus, Denmark, Iceland, Ireland, Finland, Latvia, Lithuania, Macedonia, Netherlands, Poland, Slovenia, Spain, Sweden, Switzerland and the Ukraine. In Greece, prisoners serving life sentences or indefinite sentences are disqualified; otherwise the matter is left to the discretion of the court. In some other European countries, electoral disqualification depends on the crime committed or the length of the sentence: Austria, Malta and San Marino ban all prisoners serving more than one year from voting; Belgium disqualifies all offenders serving sentences of four months or more; Italy disenfranchises based on the crime committed and/or the sentence length; Norway removes the vote for prisoners sentenced for specific offences; and in France and Germany, the disqualification of a prisoner is dependent upon the sentence handed down by the court specifically providing for disenfranchisement (in France, certain crimes are identified which carry automatic forfeiture of political rights; in Germany, prisoners convicted of offences which target the integrity of the German state of its democratic order lose the vote). Armenia, Bulgaria, the Czech Republic, Estonia, Hungary, Luxembourg, Romania and Russia all have complete bans for sentenced offenders."[13]

[122] Australia, New Zealand and the United Kingdom all disenfranchise at least some categories of prisoners. It appears from a consideration of the above countries

[12] *H v Netherlands* [1983] 33 D.R. 242.

[13] Above n 9 para 130.

that no uniform policy can be deduced but the majority would appear to disenfranchise prisoners to some degree or another.

[123] It was argued for the Minister that given the nature of the right to vote, it can safely be assumed that there will be exclusions, on practical grounds, of some citizens in every society. The regulatory mechanism may be a hindrance to the exercise of the right to vote – thus necessarily excluding many people from voting.

[124] Prisoners fall into a special category by virtue of the restrictions imposed on their freedom of movement. It follows that if they are to be allowed to vote, special arrangements have to be made for them to register and vote. However, they ought not to be treated more favourably than others who, for some legitimate reason, are unable to exercise the right to vote by registering and voting as prescribed by the applicable statutory provisions. Examples of such persons are long distance drivers who are unlikely to be within reach of their voting stations on voting day.

[125] It was also argued that Parliament has made its choice, after a careful balancing exercise. As is clear, it has considered carefully the observations made in *August*.[1] For example, it took into account that, in principle, it was empowered to disenfranchise some prisoners. It also had regard to the implied suggestion that detainees and the poor must be given special consideration when amending the regulatory framework.

[1] Above n 3.

[126] The limitations also serve an important purpose. They ensure that the integrity of the voting process is protected. They give the pub lic the assurance that the interests and the rights of ordinary law-abiding citizens are as important as those of prisoners. In this way, they engender public confidence in the democratic process and the criminal justice system.

[127] In respect of the other rights which the applicants allege have been violated, that is, the right to equality, the right not to be unfairly discriminated against, and the right to human dignity, the Minister contends that it is for Nicro and the inmates of Pollsmoor Prison to establish a violation of such rights and further contends that they have not established such violation. In my view no serious effort was made at establishing such violation.

[128] I conclude that the Minister has made out a case for justification and that the application must be dismissed with costs.

NGCOBO J:

[129] This case raises important issues concerning the right of prisoners to vote. Ordinarily I would have preferred to have had more time to consider the matter, not because I need more time to make up my mind but to formulate the reasons for my

conclusion. However, the matter is extremely urgent. It is necessary that I announce my conclusion and reasons to it, once I have reached one. I therefore do so.

[130] The background to the present application has been fully set out in the main judgment. It need not be repeated here, save to the extent necessary for the purposes of this judgment.

[131] The Electoral Laws Amendment Act[1] introduced certain changes to the Electoral Act[2] (the Act). These changes have the effect of disenfranchising prisoners serving sentences of imprisonment without an option of a fine. They preclude these prisoners from registering as voters and voting while they are in prison. These changes were brought into operation on 17 December 2003. The elections are due to be held on 14 April 2004.

[132] Changes are contained in sections 8(2)(f) and 24B(1) and (2). These sections provide:

Section 8(2)(f):

> "The chief electoral officer may not register a person as a voter if that person –
> …
> (f) is serving a sentence of imprisonment without the option of a fine."

Section 24B(1):

[1] Act 34 of 2003.

[2] Act 73 of 1998.

> "In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence without the option of a fine and whose name appears on the voters' roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voters' roll for the voting district in which he or she is in prison."

Section 24B(2):

> "A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine."

[133] Whether these provisions pass constitutional muster is an issue confronting us in these proceedings.

[134] That the impugned provisions of the Act limit the right to vote of the affected prisoners cannot be gainsaid. The concession by the state in this regard was properly made. That much appears from the main judgment. The sole issue for consideration is therefore whether such a limitation is justifiable and reasonable under section 36(1) of the Constitution.

[135] But first, what is the nature and scope of the enquiry under section 36(1)?

[136] The nature and the scope of the enquiry required by section 36 is set out in the main judgment. The nature and scope of the enquiry under section 36(1) was articulated as follows in *S v Manamela*:[3]

> "Although s 36(1) differs in various respects from s 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in s 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable."[4]

[137] I agree with the main judgment that in the context of section 36 it is not appropriate to refer to an "onus". As the main judgment holds, "[i]t is rather a burden to justify a limitation where that becomes an issue in a section 36 analysis."[5] That much is borne out by our prior jurisprudence on section 36.[6] In addition, I agree that in the context of section 36, it may not be possible to prove that a policy will be effective. Nor does it follow from that that the policy is not reasonable and justifiable.

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[3] *S v Manamela (Director-General of Justice intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC).

[4] Id para 33.

[5] Above para 34.

[6] *Moise v Greater Germiston Transitional Local Council: Minister of Constitutional Development (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) para 19; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) para 20.

[138] In my view, where the government is pursuing a policy that can be identified, it seems to me that the enquiry must then focus on that policy. The nature of the policy relied upon may be such that it does not require the state to furnish any reasons for the pursuit of the policy. The need to pursue such a policy may be so obvious that it calls for no explanation. This would be a case where the court must rely on common sense and judicial knowledge.[7] In my view, the present is such a case.

[139] As I understand the government's case, as it emerges from the papers, it is this: The level of crime in our country is unacceptably high. The government has taken a number of measures to deal firmly with crime. The government has also embarked upon a campaign of zero tolerance. It is against this background that the following statement by Mr Gilder must be understood:

> "In the face of these measures, it would be sending out the wrong signal were it to make special arrangements for prisoners whose freedom has been wrested from them but at the same time not accord such privileges to other persons who cannot be held responsible for their absence from their voting stations on election day and who are, no matter what measure of comparison is employed, at the very least, no less deserving of special arrangements."

[140] What is being conveyed here is that at the level of policy it is important for the government to denounce crime and to communicate that policy to the public. The policy that is being pursued here is one of denouncing crime and sending a message to

[7] See in this regard above para 36.

criminals that the rights citizens have are related to their duties and obligations as citizens. In my view that is a legitimate policy to pursue. It requires no reasons to understand the need to pursue the policy of denouncing crime.

[141] But should the claim of justification based on the pursuit of this policy be upheld? This question must be determined by reference to the requirements of section 36 of the Constitution.

[142] The importance of the right to vote cannot be gainsaid. One of the foundational values of our constitutional democracy is "universal adult suffrage, a national common voters roll, regular elections".[8] This foundational value is given expression in section 19(3) of the Constitution.[9] The importance of this right must, in particular, be understood in the context of our history. It was a history of denial of the franchise to the majority of the citizens of this country. It is a right that must therefore be zealously guarded. But like all rights contained in the Bill of Rights, it is "subject to the limitations contained or referred to in section 36".[10] The contention advanced by the applicants that this right is absolute, in my view, need therefore only be stated to be dismissed as utterly devoid of substance.

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[8] Section 1(d) of the Constitution.

[9] Section 19(3) provides that:

> "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."

[10] Section 7(3) of the Constitution.

[143] Yet the importance of the purpose of the limitation cannot be gainsaid either. The prevalence of crime in this country is not in dispute. This Court needs no statistics to establish this fact. The media tell part of this story of crime. The victims of crime tell their part too. The applicants themselves are a testimony to this fact.

[144] Crime strikes at the very core of the fabric of our society. It undermines some of the fundamental human rights enshrined in our Bill of Rights. It violates the right to life, the right to freedom and security, the right to property and the right to dignity to mention a few. It undermines the rule of law, a foundational value of our constitutional democracy. What is more, those who commit crimes violate their constitutional duties and responsibilities as citizens of this country. The state has a constitutional duty to eliminate crime. This obligation flows generally from its obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights."[11] It is also implicit, if not explicit, in the obligation to establish the national police service whose objects "are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[12]

[145] In my view, the government has a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of the observance of civic duties and obligations.

[11] Section 7(2) of the Constitution.

[12] Section 205(3) of the Constitution.

[146] I accept that the right to vote is an important right. The limitation, however, is not absolute. It is limited to the period during which a person is serving the sentence. To a certain extent the limitation takes into consideration the length of the sentence imposed upon the prisoner. Thus depending on the length of a sentence, a prisoner may lose the right to vote in more than one election. Those serving lengthy sentences are likely to lose the right to vote in more than one election while those like the two applicants in this case are likely to lose it in one election only.

[147] This limited limitation of the right to vote sends an unmistakable message to the prisoner. If you should be released and again commit a crime of a nature that attracts the prison sentence without the option of a fine, you will not vote in the next elections. That message is a necessary effort to fight crime. It is a reminder that the duties and responsibilities of a citizen also include an obligation to respect the rights of others and comply with the law. The convicted prisoners break the law in breach of their constitutional duty not to do so.

[148] That our Constitution does not take kindly to crime, is apparent from section 47(1)(e) of the Constitution. That section disqualifies from membership of the National Assembly any person who "is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine."[13] There is a similar

[13] Section 47(1)(e) provides:

> "Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except –

disqualification from membership in the provincial parliament.[14] However, disqualification is limited to a period of 5 years after the sentence has been served. These constitutional provisions once again send a clear image that crime will not be tolerated.

[149] As Madala J demonstrates in his judgment, our country is not alone in imposing a limitation on this right. Other democratic countries too do so as well. They do so to send the same message. There is no uniformity on how to send this message.

[150] Dealing with the importance of denouncing crime, Linden JA of the Federal Court of Canada – Court of Appeals in *Sauvé v Canada (Chief Electoral Officer)*[15] said:

> "In addition to electoral considerations, the main motivations in passing this law were the retributive and denunciatory aspects of the penal sanction. The courts cannot

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> . . .
> (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed."

[14] Section 106(1)(e) provides that:

> "Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except –
> . . .
> (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed."

[15] [2000] 2 F.C. 117.

> prevent Parliament from proportionately compromising Charter rights in the name of denouncing crime, even if they disagree with Parliament's penal philosophy. There are salutary effects of this legislation as well as valid objectives which were identified to the Court. Its main salutary effect is to express the sense of societal values of the community in relation to serious criminal behaviour and the right to vote in our society. It sends a message signalling Canadian values to the effect that those people who are found guilty of the most serious crimes will, while separated from society, lose access to one of the levers of electoral power. This legislation proclaims that values of civic responsibility are important to Canadians. The signal itself is an important benefit of the law. Moreover, disenfranchisement is a meaningful sanction which is noticed by offenders. Lastly, this legislation can be seen as a gentler, more humane alternative to additional incarceration. In the battle against crime, Courts cannot limit Parliament to a single punitive tool. On the other hand, the sole deleterious effect of the legislation is the withdrawal of the Charter-guaranteed right to vote. While this deprivation is serious, several facts were brought to the attention of the Court which mitigate its deleterious nature. Viewed as a civil consequence imposed as an alternative to additional incarceration which attaches to the most serious sentences for the most serious crimes, it must be concluded that this measure is proportional."[16]

[151] It is true that a government that considers itself under siege, whether from criminal or some other source is more likely to resort to drastic means to address the problem. In such difficult times fundamental human rights are more likely to be the first casualties. It is also true that in such times courts, as guardians of the constitutional democracy, must be vigilant. There is nothing to suggest that we have reached the stage of a siege. What is more, the means resorted to by the state cannot be described as being drastic. There is a limited limitation on the right to vote that lasts for the duration of the sentence.

[16] Id 120-1.

[152] However, the problem with the present limitation is that it makes no distinction between those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised. This distinction is important because the former may still be found not guilty on appeal or have their sentence reduced to a prison sentence with an option of a fine. To the impugned legislation this matters not. Yet it does because once acquitted or the sentence is reduced, the limitation no longer applies. If an outcome of the appeal comes after the elections, the person would have been wrongly deprived of the right to vote.

[153] To this extent, and this extent only, the limitation goes too far. It does not make the distinction which the Constitution makes. For this reason it is bad. However, this defect is in my view of the kind that could adequately be cured by reading in the following qualifying phrase: "but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired", after the phrase "serving a sentence of imprisonment without the option of a fine", into the provisions.

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For the first to third respondents:	I. V. Maleka SC and N. Fourie instructed by Legal Resources Centre (Cape Town).
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