South African prisoner's right to vote

by

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Addendum to "Prisoner's right litigation in South Africa: a critical evaluation"

Pierre de Vos

1. Introduction

The South African Constitution states that every adult citizen has the right to vote.[1] There has therefore been some legal controversy around the questions of whether it would be unconstitutional to limit the right of any prisoner to cast a vote in national elections. Before the last Parliamentary and Provincial national election in 1999 a group of prisoners challenged and order of the Electoral Commission which excluded all prisoners from voting. In the case of *August and Another v Electoral Commission and Others*,[2] The Constitutional Court declared this action by the Commission invalid. However, the judgment did not authoritatively answer the question of whether prisoners could be denied the vote because the Court relied on the fact that the Commission had not acted in terms of a law of general limitation and their action could therefore not be constitutionally justified in terms of the limitation clause.[3]

When Parliament therefore amended the Electoral Act[4] in 2003 to, in effect, deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections, it was predictable that the amendments would be challenged in Court. This duly happened and in *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)*[5] the Constitutional Court declared these amendments invalid. In this addendum I discuss the reasoning employed by the Court in this case, point out that the Court did not shy away from its Constitutional responsibilities to protect the unpopular and marginalised prison population and conclude that the case bodes well for any future prisoner's rights litigation.

2. The Constitutional Court and the prisoner's right to vote

2.1 The right to vote

In the *NICRO* case, the Constitutional Court had to decide whether the changes to the Electoral Act curtailed the Constitutional right of prisoner's to vote in an unjustifiable manner. The Act curtailed the rights of convicted prisoners to vote in elections in two ways. First, the Act prohibited convicted prisoners who on the day of the elections were serving a sentence of imprisonment without the option of a fine, from voting.[6] Second, the Act prevented convicted prisoners serving a sentence of imprisonment without the option of a fine from registering as

[1] Section 19(3) states 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…
[2] 1999 (4) BCLR 363 (CC). This case was discussed in detail in my Civil Society Prison Reform Initiative sponsored paper "Prisoner's rights litigation in South Africa since 1994: a critical evaluation".
[3] In *August* the Court found that it was common cause that denying all prisoners the right to vote contravened s 19(3)(a) of the Constitution. The action could also not be justified in terms of the limitation clause because s 36 states that the "rights in the Bill of Rights may be limited only in terms of a 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…"
[4] Act 73 of 2003, amended by the Electoral Laws Amendment Act 34 of 2003.
[5] 2004 (5) BCLR 445 (CC).
[6] Section 24B(2).

voters while they are in prison, thus disenfranchising those prisoners who had not registered to vote before entering prison and who had been released after the voters roll had closed but before the day of the election.[7]

In the majority judgment of Chief Justice Chaskalson,[8] emphasis is placed on the fact that the right to vote was an important right as it was informed by the foundational values of the Constitution set out in s 1 of that document.[9] Furthermore, the right to vote by its very nature imposed positive obligations upon the legislature and the executive and thus require proper arrangements to be made for its effective exercise.[10] The task of providing the legal framework and the infrastructure and resources necessary for the holding of free and fair elections fell on the legislature and the executive.

Given the importance of this right, it was proper that all parties agreed that the provisions in dispute limited the voting rights of convicted prisoners serving a sentence without the option of a fine. The only question was whether this limitation was justifiable in terms of s 36 of the Constitution.[11] The case was therefore determined with reference to the application of the limitation clause, exactly because the scope and content of the right of every adult citizen to vote was seen as being relatively uncontroversial and clear-cut. In this sense, the right to vote is not too dissimilar from the rights of arrested and detained individuals guaranteed by section 35 of the Constitution. While prisoners are also protected by the relatively open-ended right to human dignity set out in section 10,[12] litigation against prison authorities on behalf of prisoners will often rely on the provisions of section 35(2) and the scope and content of some of these provisions are relatively clear-cut. The legal question will thus often also be decided with reference to the limitation clause.[13] An understanding of the Court's attitudes and arguments in the case under discussion will therefore be of great assistance when making strategic decisions about whether to litigate on behalf of prisoners. As explained below, a limitation clause enquiry requires an assessment based on the concrete and distinct legislative and social setting of each case, and it is therefore not possible to directly apply the reasoning of the Court in one set of circumstances in another case, but such reasoning does provide some insight into the way in which the Court will deal with future cases.

2.2 Is the limitation on the prisoner's right to vote justifiable

2.2.1 The limitation clause

To understand the significance of the case under discussion, it is important to take cognisance of two important and interrelated aspects relating to the limitation clause enquiry.

First, the Constitutional Court has stated on several occasions that section 36 calls for a proportionality analysis. This means that the court must make an assessment "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

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[7] Section 8(2)(f). See *Nicro* case supra note 5, par 31.

[8] Endorsed by eight other Justices, namely Langa DCJ; Mokgoro, Moseneke, O'Regan, Sachs, Skweyiya, Van der Westhuizen and Yacoob JJ.

[9] Chaskalson CJ par 25, endorsing the view expressed in *New National party of South Africa v Government of the RSA* 1999(5) BCLR 489 (CC). See also the partly dissenting opinion of Ngcobo J, par 142.

[10] *Nicro* case supra note 5, par 28.

[11] *Nicro* case supra note 5, par 32.

[12] See Pierre de Vos "Prisoner's right litigation in South Africa: a critical evaluation", section 4, for an overview of the Constitutional rights protecting prisoners.

[13] Even when the scope and content of the rights of prisoners as set out in section 35(2) are not as clear cut, such as in the case of the prisoner's right to "adequate accommodation", the Court will require some input from the government about what actually constituted such adequate accommodation.

losing sight of the ultimate values to be protected".[14] This means that each case must be determined with reference to its own circumstances and the outcome will depend, in part, on the importance of the right and the severity of the infringement on the one hand, and the importance of the limitation on the other. What is required, in effect is a balancing of all the various interests, but especially those of the individuals whose rights are being limited on the one hand, and those of society and the state on the other, taking into account whether less restrictive means could have been used to achieve the same purpose.[15] Although each case will be different, a judgement like the one under discussions will give some indication of what weight the members of the Court will give to the various interests at stake in future cases.[16]

Second, once a claimant has shown that there has been an infringement of one of the rights, the respondent will carry the burden to justify the limitation. In as much as the justification rests on factual and/or policy considerations, "the party contending for justification must put such material before the Court".[17] In some cases the concerns being addressed by the impugned legislation may be of a subjective nature and not capable of proof – for example it may be based on policy considerations. In such cases, as a general rule, the party relying on the justification must still 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".[18] The Court has stated that:

> *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*.[19]

But context is all important, so a failure to place all important material before the court will make it difficult or even impossible to weigh up and evaluate the competing values and interests in their proper context.

This means that where a government department – the Department of Correctional Services, say – fails to engage in an honest, serious and competent manner with the judicial process and thus fails to put the relevant material before the Court, applicants will often stand a good chance of winning their case once they have shown that an infringement of a specific right had indeed occurred. Tardiness, disorganisation, a tendency to pass the buck, and a general lack of knowledge about the policy issues facing a department will thus severely hamper the ability of such a department in justifying any limitations placed by the relevant legislation on the rights of individuals.

2.2.2 Majority judgment

The representatives of the Department of Home Affairs provided three interlinking justifications for limiting the rights of prisoners. First, they argued that logistics (a lack of human and organisational resources) and cost considerations required the state to limit the rights of prisoners to vote. Second, they argued that it was necessary to limit the rights of prisoners to vote to ensure that prisoners are not favoured over others who might have

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[14] *Moise v Greater Germiston Transitional Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as amicus curiae)* 2001 (8) BCLR 765 (CC) par 19, as quoted in *Nicro* case par 33.
[15] *Nicro* supa note 5, par 37.
[16] *Moise* supra note 14, par 19.
[17] Ibid..
[18] *Nicro* supra note 5, par 36.
[19] Ibid. See also *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2003 (4) BCLR 357 (CC) par 20.

difficulty in attending polling stations but for whom no arrangements have been made. Third, they argued, by implication,[20] that at a level of policy it was 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.

The majority dismissed the first two arguments out of hand. Regarding the first argument, the Chief Justice found that the factual basis for the contentions made was never established. Because arrangements were made to register all those unsentenced prisoners and those prisoners in jail merely because they could not pay the fine, it was clear that the resources did exist to register all prisoners to vote and to allow them to vote on election day.[21] The burden justifying the limitation therefore fell "at the first hurdle" because sufficient evidence was not placed before the court.[22]

The second argument was also rejected because the court distinguished between the position of prisoners and the positions of others who might have had difficulty in attending polling stations on election day. Prisoners are prevented from voting by legislation and by the action that the State has taken against them. The implication is therefore that they are in a unique position because they are locked up and cannot be compared with other categories of people. It was therefore not justifiable reason to prevent all prisoners from voting to say that other categories of persons might also not have been catered for.[23]

The crux of the case centred on the question of weather the rights of convicted prisoners serving sentences of imprisonment without the option of a fine could be limited for policy reasons. First, the Court established with reference to Canadian case law, that it could only be limited for *legitimate* policy reasons. Importantly, the Chief justice made it clear that the alarming levels of crime should not be used to justify drastic limitations of rights, including the rights of prisoners and that the State could not limit rights merely to enhance its image regarding the combating of crime.[24] This is an important principle that will make it more difficult for Parliament in future to adopt legislation limiting the rights of accused or imprisoned individuals if that legislation does not have a legitimate purpose. And a legitimate purpose cannot be merely the need for a knee-jerk response to the public's outrage about crime. The Chief Justice did outline a list of possible legitimate policy reasons, including: the need for government to denounce crime and to communicate to the public that the rights citizens have are related to their duties and obligations as citizens;[25] thus to enhance civic responsibility and respect for the law;[26] or to provide additional punishment or enhance the general purpose of the criminal sanction.[27]

After discussing the Canadian jurisprudence on the topic the Chief Justice came to the conclusion that the limitation in this instance was not justifiable. Justice Chaskalson pointed out that where the purpose of the

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[20] Counsel for the Minister, in fact, argued that if prisoners would be allowed to vote, it would send out a message to the public that the government is soft on crime. It was therefore necessary to limit the rights of prisoners to vote to ensure that the public do not misunderstand the government's attitude towards crime. Chief Justice Chaskalson rejected this argument on the basis that it would be untenable to limit a fundamental right, such as the right to vote, merely to protect the government's image. However, the Chief Justice assumed that the Minister had intended to put forward the policy argument as set out above instead. See *Nicro* supra note 5, par 55-56.
[21] Ibid. par 49.
[22] Ibid. par 51.
[23] Ibid. par 53.
[24] Ibid. par 56.
[25] Ibid. par 57.
[26] Ibid. par 59.
[27] Ibid., quoting from a Canadian Supreme Court judgment *Sauvé v Canada (Attorney General); Belczowski v Canada* [1993] 2 SCR 438 par 2.

legislation is not self-evident "there is a need for it [the government] to place sufficient information before the Court to enable it to know exactly what purpose the 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."[28] These objectives must be accurately and precisely defined so as to provide a clear framework for evaluating the importance of the purpose so that a Court can determine weather the limitation had been crated with sufficient precision not to limit the rights more than is necessary.[29] In the case under the discussion the problem was that the main thrust of the government's justification related to logistical and cost matters, which, as noted above, were not legitimate reasons for limiting the rights. The government only tangentially introduced a legitimate purpose for the limitation by referring to the policy considerations set out above. In the absence of more precise information it was impossible for the Court to find that the limitation was justifiable.[30]

The fact that the amendments contained a blanket exclusion of all convicted prisoners serving a sentence without the option of a fine, made it even more difficult for the majority of the Court to find in favour of the government. Chief Justice Chaskalson noted that the Court was not presented with any 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".[31] The judgment therefore suggests that the Court would be sympathetic to legislation that limited the rights of prisoners convicted of more serious offences, but that no evidence was placed before the Court that the ban would only "catch" those prisoners convicted of serious offences. The tardiness of the government, first, by not seriously considering the factual basis for the policy decision to ban such a large category of prisoner's from voting and, second, by not furnishing the Court with sufficient information to justify the limitation, therefore made it impossible for the Court to find in its favour.

This point that the legislation was ill considered, is further illustrated by two further points raised by the Chief Justice. First, the Court pointed out that the impugned provision appears also to disenfranchise prisoners whose convictions and sentences are under appeal. Second, it pointed out that 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.[32] There is no explanation why a person who qualifies to be a candidate in an election should then be disqualified from voting.[33]

From this judgment it is clear that at least nine of the judges of the Constitutional Court found that the government had not met the burden of proof required.

2.2.3 Minority judgments

Justice Madala dissented from the majority view, while Justice Ngcobo partly dissented from the majority judgment. It is clear that in both cases, the justices in general were less sympathetic to the rights of prisoners and more sympathetic to the government's notion that crime was a serious problem in South Africa and that some drastic measures had to be taken to combat crime.

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[28] Ibid. par 65.
[29] Ibid.
[30] Ibid. 66.
[31] Ibid. par 67.
[32] Section 47(1)(e) of the Constitution.
[33] Ibid. par 67.

Justice Madala argued that in evaluating the purpose of the impugned provisions, one had to take a holistic approach, which will reveal that the provisions were aimed at inculcating 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".[34] Removing the vote from prisoners has both a symbolic and concrete effect: it sends a signal that irresponsible behaviour will not be tolerated by the state and also assists with the development and inculcation of a caring and responsible society.[35]

Applying these general principles to the question of whether the limitation of the right to vote was justifiable in the present case, Justice Madala pointed out, first, that prisoners fall within a special category because their freedom of movement are restricted. This means that special arrangements will have to be made to allow them to vote. But prisoners ought not to be treated more favourably than others who, for some legitimate reason, are unable to vote.[36] Second, he argued – contra the majority – that the Parliament had enacted the legislation after careful consideration, taking into account that only some categories of prisoners should be disenfranchised and attempting to protect pre-trial detainees and poor people who may be languishing in prison because they were unable to pay a fine.[37] Last, Justice Madala argued that the limitations serve an important (and presumably legitimate) purpose.

> *They ensure that the integrity of the voting process is protected. They give the public 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*.[38]

Justice Madala therefore concluded that the government had indeed made out a sufficiently strong case for justifying the limitation on the right to vote. It seems as if the fundamental difference in approaches taken by the majority and by Justice Madala can be traced back to a difference in opinion on where to place the emphasis when balancing the rights of prisoner's on the one hand, and the needs of the government and of society to combat crime on the other. While the majority seems to view prisoners as a vulnerable group most worthy of protection and therefore requires the government to provide clear and well-thought through reasons for any limitation of their rights, Justice Madala seems to suggest that given the crime epidemic – which are at least partly inspired by an apartheid-induced irresponsibility of many South Africans – the government should be given a margin of appreciation to deal with the matter.

Justice Ngcobo took a slightly different tack, but his judgement also seems to be influenced by a less benign view towards prisoners. He identifies an important (and legitimate) purpose of the provisions to be that of confirming a government policy that is aimed at denouncing crime and to communicate that policy to the public. Thus the policy is to denounce crime, thereby "sending a message to criminals that the rights citizens have are related to their duties and obligations as citizens".[39] Focusing on the problem of crime which "strikes at the very core of the fabric of society", Justice Ngcobo notes that crime undermines some of the fundamental human rights enshrined in the Constitution and that the State has a constitutional duty to eliminate crime.[40] The government therefore has a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of observance of civic duty and obligations. Although the right to vote is an important one, not least because it was denied so many South Africans in the past, it is not an absolute right. It is therefore legitimate for the government

[34] Ibid. par 113.
[35] Ibid. par 116.
[36] Ibid. par 124.
[37] Ibid. par 125.
[38] Ibid. par 126.
[39] Ibid. par 140.
[40] Ibid. par 144.

to limit the right of prisoner's to vote. It sends a signal to the prisoner that if he or she should be released and again commit a crime that attracts a prison sentence without the option of a fine, he or she will not vote in the next election. This message is an important one necessary to fight crime because it serves as a reminder that the duties and responsibilities of a citizen also include an obligation to respect the rights of others and to comply with the law.[41]

However, Justice Ngcobo tempered this view by stating that crime levels have not yet reached the stage where it can be viewed as a siege. It is therefore important to balance the rights of prisoners against the duty of the government to fight crime. In as much as the impugned provisions do not make any distinctions between those prisoners who are serving a sentence while awaiting the outcome of an appeal and those whose appeals have been finalised, the legislation goes too far. Because the former group may still be found not guilty they may be wrongly deprived of the right to vote if their acquittal or the reduction of the sentence on appeal comes after an election. To the extent that the legislation therefore does not make a distinction in this regard, it places an unjustifiable limitation on a prisoner's right to vote.[42]

3. Evaluation of the judgment – pointers for prisoners' rights litigation

It is important to note that the judgment deals with one of the most important rights in the bill of rights, a right that is informed by the foundational values set out in section 1 of the Constitution. Depending on the specific context, the Court will usually have difficulty in justifying the limitation of this right – also where it affects prisoners. One might argue that where other – less foundational – rights in the Bill of Rights are denied a prisoner, the Court might be less sympathetic. However, as noted above, the Constitutional Court has reiterated that the rights of prisoners as protected mainly by section 35(2) in the Constitution, dovetails with the right to human dignity, which in turn is a foundational value in the Constitution. As the Constitutional Court has noted, the justification for the limitation of a right will always be judged within the specific context and will depend on the specific circumstances of each case. Although I therefore come to some general conclusions about the potential impact of this case on prisoner's rights litigation, these general comments must be viewed in what has been said above. Every case is different and this must never be lost sight of.

Despite this caveat, I believe the *Nicro* case yields some important insights about the nature of prisoner's rights litigation.

First, despite the genuine concern about the high levels of crime in our society, a large majority of judges of the Constitutional Court – nine out of the eleven – displayed a remarkable concern for the rights of convicted prisoners serving time in a correctional facility. Although the judgment by Chief Justice Chaskalson confirmed that crime is a problem, it explicitly warned against a situation where the high levels of crime are used to justify extensive and inappropriate invasions of the rights of individuals – including the rights of prisoners. Prisoners are probably the most unpopular category of person in South Africa and it would be difficult for a Court – even the Constitutional Court – not be influenced by this fact. Yet, the Court rejected the notion that the government could deprive them of their rights for reasons of political expediency. This means that a large majority of the judges of the Constitutional Court will require the government to provide clear, well thought through and legitimate reasons, before entertaining any limit on the rights of prisoners. Mere references to the problems of crime will not suffice. This means that legislation or regulations purporting to address the problem of crime, but merely designed to

[41] Ibid. par 146.
[42] Ibid. par 152

send a signal to the public that the government is serious about fighting crime will not pass muster. The vote is not there to fight crime with, that is the task of the criminal justice system.

Second, even where the question before the Court is not in the first instance a question of a justifiable limitation, but rather whether what the exact scope and content of the right might be, the *Nicro* judgment seems to suggest that a majority of the justices on the Constitutional Court will not interpret these provisions overtly narrowly. For example, if a Court is called upon to determine whether the Department of Correctional Services has actually provided prisoners with adequate accommodation and nutrition, it will not be possible for the State to argue that many South Africans outside prison live in inadequate accommodation and have no adequate access to food. As Chief Justice Chaskalson has made clear, the state has a special duty towards prisoners exactly *because* they are incarcerated.

Third, the government lost this case in part, because it was tardy in the way it engaged with the Court. As my previous report made clear, the Department of Correctional Services has a particularly bad track record when it comes to the way it engages with Constitutional litigation. If we assume that the majority of judges will cast a critical eye on the justifications offered by the government for the infringement of the rights of prisoners – also those rights guaranteed in section 35(2) – and if we assume that the Department will continue to respond in a less than efficient manner, the prospect of success in litigation against the Department seems high.

Fourth, as both the majority[43] and Justice Madala[44] point out, many countries, also open and democratic countries, have limited the rights of prisoner's to vote, some of them quite severely. Yet, a large majority of Justices in this case found that the limit placed on the right to vote of prisoners convicted without the option of a fine, was not justifiable. This case was therefore not a clear-cut one in which most democratic societies would have taken the same route as the Court. This provides further evidence that the majority of justices will be sympathetic to well considered attack on legislation, regulations, actions or inactions that has the result of demeaning prisoners and affecting their rights explicitly guaranteed in section 35(2).

Lastly, the case reminds us that there is a growing body of international case law dealing with the right of prisoners to vote. Apart from the three cases dealt with in South Africa and mentioned above, Court in both Canada and Europe have now considered this matter. In the NICRO case, the Constitutional Court referred extensively and approvingly to the Canadian Supreme Court decision of *Sauve v Canada (Chief Electoral Officer).*[45] Recently, the European Court of Human Right struck down a United Kingdom law that bars a convicted prisoner serving a sentence from voting in elections in the UK.[46] This suggests that there is a growing body of opinion emerging from international tribunals that prisoner's should not be deprived of their basic democratic rights merely because they are incarcerated.

[43] Ibid. par 466.
[44] Ibid. par 118-122.
[45] 2002 SCC 68.
[46] *Hirst v United Kingdom* as yet unreported case application no. 74025/01.