

## SACHS J ABRIDGED JUDGMENT

### *August and Another v Electoral Commission and Others*

#### *The Context*

[1] The issue before this Court concerns the voting rights of prisoners. It arises in an appeal against the judgment of Els J in the Transvaal High Court which in effect held that the Electoral Commission (the Commission)<sup>1</sup> had no obligation to ensure that awaiting trial and sentenced prisoners may register and vote in the general elections which has been announced for 2 June 1999.

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

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

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

[3] The 1996 Constitution provides that one of the values on which the one, sovereign and democratic state of the Republic of South Africa is founded is “[u]niversal adult suffrage” and “a national common voters roll”.<sup>7</sup> It goes on to guarantee that “[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; . . .”<sup>8</sup> Unlike the interim Constitution, however, the above sections contain no provision allowing for disqualifications from voting to be prescribed by law. Accordingly, if Parliament seeks to limit the unqualified right of adult suffrage entrenched in the Constitution, it will be obliged to do so in terms of a law of general application which meets the requirements of reasonableness and justifiability as set out in section 36.

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

“6(1) Any South African citizen in possession of an identity document may apply for registration as a voter.

7(1) A person applying for registration as a voter must do so -

- (a) in the prescribed manner; and
- (b) only for the voting district in which that person is ordinarily resident.

8(1) If satisfied that a person's application for registration complies with this Act, the chief electoral officer must register that person as a voter by making the requisite entries in the voters' roll.”

The disqualifications are given as follows:

“8(2) The chief electoral officer may not register a person as a voter if that person

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- (a) has applied for registration fraudulently or otherwise than in the prescribed manner;
- (b) is not a South African citizen;
- (c) has been declared by the High Court to be of unsound mind or mentally disordered;
- (d) is detained under the Mental Health Act, 1973 (Act No. 18 of 1973); or

- (e) is not ordinarily resident in the voting district for which that person has applied for registration.”

Prisoners are not included in the list of disqualified persons.

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

“(1) The Commission-

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

Once more, no express mention is made of prisoners.

### *The Issues*

- [6] It was in this setting of legislative silence, where Parliament has done nothing to limit the constitutional entitlement of prisoners to vote, that the applicants approached the Commission to ensure that as prisoners they would indeed be enabled to register and vote. First applicant is a convicted prisoner serving a long sentence for fraud, while the second applicant is an unsentenced prisoner in custody awaiting her trial later this year on charges of fraud. Acting in their own interest and on behalf of all prisoners, the applicants sought an undertaking from the Commission that prisoners would be able to take part in the elections.

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

[12] The Centre for Applied Legal Studies was admitted as an *amicus curiae* in order to introduce a new argument. They quoted statistics to show that on 31 December 1998, 37% of all prisoners, that is 54 121 out of 146 278, were unsentenced prisoners awaiting trial. Further, at 15 February 1999, more than 20 000 awaiting trial prisoners had been granted bail but had been unable to pay, and that in the case of more than 8 000 of these, the amounts of bail had been R600 or less. There were also nearly 200 prisoners who were serving sentences because they had been unable to pay the fines imposed on them. It was contended that these prisoners were being unfairly discriminated against on grounds of poverty in violation of the equality provisions of section 9 of the Constitution, poverty constituting an unspecified ground of unfair discrimination.

Counsel also pointed to the difficulty first and second respondents had in attributing a meaning to the phrase "ordinarily resident" as contained in section 7(1)(b) of the 1998 Electoral Act. This difficulty has been set out in the second respondent's answering affidavit in which he posed the question: Is ordinary residence the place where the person was ordinarily resident before he or she was incarcerated, or is the prison the ordinary residence of a prisoner? The second respondent averred that the first of these interpretations would present the respondents and the electoral process with immense logistical, financial and administrative difficulties. He emphasised that if prisoners were allowed to vote within the prison and thereafter the ballot papers had to be transported for counting to the various places from which the prisoners had come, the logistical exercise would be enormously costly and time consuming. The affidavit went on to aver that

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

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

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

(e) “. . . compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters.”

[17] Universal adult suffrage on a common voter's roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an

all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.