CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/99

THE DEMOCRATIC PARTY	Applicant
versus	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE ELECTORAL COMMISSION	Second Respondent

Heard on : 29 March 1999

Decided on : 13 April 1999

JUDGMENT

GOLDSTONE J:

Introduction

[1] This is an application for leave to appeal against a judgment of the full bench of the Transvaal High Court in what was the second attack made by a political party on the constitutionality of provisions of the Electoral Act[1] (the Electoral Act). The first of these proceedings was initiated in the Cape of Good Hope High Court by the New National Party (NNP), the official opposition in the House of Assembly. In both cases the attack

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1 Act 73 of 1998.

was directed at the provisions of the Electoral Act which prescribe the documents which potential voters must possess in order to register and vote in the general election to be held on 2 June 1999.

[2] Both the High Court applications were dismissed and applications for leave to appeal directly to this Court were set down as matters of urgency in terms of directions issued by the President of this Court. The requirements of Rule 18 of the Rules of Court[2] were dispensed with and the parties were requested to address the merits of the appeals so that the applications for leave to appeal and, if granted, the appeals, could be argued simultaneously at each hearing.

[3] The applicant in this matter is the Democratic Party (DP), a political party represented in Parliament and which is contesting the forthcoming general election. The first respondent is the Minister for Home Affairs (the Minister) who is responsible for the promulgation and implementation of the Electoral Act. The second respondent is the Electoral Commission[3] (the Commission).

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2 Rule 18 provides for the procedure and time limits relating to applications for leave to appeal to this Court.

3 Established by section 181(1)(f) of the Constitution read with section 3 of the Electoral Commission Act 51 of 1996.

[4] In the case of *New National Party of South Africa v The Government of the Republic of South Africa and others*,[4] additional parties were cited, namely, the Government of the Republic of South Africa, the Minister of Home Affairs, the Minister of Finance, the Chairperson of the Commission and the Chief Electoral Officer. In addition to the attack on the provisions relating to the documents prescribed in the Electoral Act, the NNP sought declaratory relief in consequence of actions by the government which allegedly interfered with and impugned the independence of the Commission. This Court granted the application for leave to appeal in that case and the majority of the members of the Court agreed with the judgment of Yacoob J dismissing the appeal. A dissenting judgment has been written by O'Regan J. The judgments in the *New National Party* case will be delivered immediately prior to this one.

[5] Leave to appeal should be granted in this case for similar reasons to those given for such an order made by Yacoob J in the *New National Party* case.[5]

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4 CCT 9/99, an as yet unreported judgment of this Court delivered on 13 April 1999.

5 Id at paras 5-6.

[6] As in the *New National Party* case, the main thrust of the argument of the DP related to the constitutionality of the provisions of the Electoral Act which prescribe the documents necessary for registration and voting respectively. The averment is made that the bar-coded identity documents offer no advantage over the older identity documents[6] for the purpose of registration and voting, and that there is no reason why the latter should not have been used for this purpose, more particularly, since legislation is in place making provision for identity documents to be replaced by identity cards at some time in the future. It is contended that, in the circumstances, there is no rational connection between the provisions of the Electoral Act and any legitimate governmental purpose, that the Electoral Act infringes the right to vote and that the infringement is not justifiable under the provisions of section 36 of the Constitution. It was also contended in argument that the documentary requirements for voting were in all the circumstances of the case, unreasonable, and for that reason, even if there were a rational connection between the purpose of the legislation and the relevant provisions of the Electoral Act, such provisions infringed the constitutional right to vote contained in section 19(3)(a) of the Constitution.

[7] Although the averments made in the affidavits lodged on behalf of the DP relating to these matters are more precise than those made in the *New National Party* case, the two cases raise substantially the same issues concerning the validity of the Electoral Act.

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6 Identity documents issued prior to 1986 whose validity was maintained by section 8(3) of the Identification Act 72 of 1986 and section 25(1) of the Identification Act 68 of 1997.

Most of the submissions advanced on behalf of the DP mirrored those of the NNP and there is no need to repeat what has been said concerning them in the judgment given by Yacoob J in the *New National Party* case. The relevant arguments were considered and dismissed by Yacoob J for reasons set out in his judgment with which I am in full agreement.

[8] The DP contended that temporary identification certificates could not be, and were not, issued by the Department of Home Affairs (the Department). The judgment of Yacoob J does not depend on the ability of the Department to issue such documents, but to the extent that this may be relevant, I agree with the conclusion of O'Regan J [7] in her dissenting judgment in the *New National Party* case, where she demonstrates that there is no legal impediment to the issuing of such documents by the Department in terms of the Identification Act of 1997. There was also no evidence that such documents were not being issued by the Department.

[9] In the present case, the High Court held that the impugned provisions of the Electoral Act constituted a limitation of rights enshrined in the Constitution. It went on to find that such limitation was reasonable and justifiable in terms of section 36 of the Constitution. In the *New National Party* case, Yacoob J deals in his judgment with the constitutional framework relevant for the consideration of the issues before this Court,

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[7] *New National Party* above n 4 at para 114.

and concludes that the impugned provisions of the Electoral Act do not constitute limitations on the rights relied upon by the applicants in both cases. The High Court was accordingly wrong in holding that the Electoral Act limited the rights enshrined in the Constitution and therefore the limitations analysis undertaken by it was not necessary.

[10] The remaining issues raised in this case, which were not considered in the *New National Party* case, are the following:

a. the equality argument; and

b. the application for the referral for evidence.

The Equality Argument

[11] Mr Loxton, on behalf of the DP, submitted that it emerged from the surveys of the Human Sciences Research Council[8] (HSRC) and from *Opinion 1999: Voter Participation in the 1999 Elections*[9] that the effect of the challenged provisions of the Electoral Act, although facially neutral, constituted indirect discrimination against discrete vulnerable groups on the grounds of race, age, residence, belief, conscience or political affiliation. This submission is based on the finding that a greater proportion of white potential voters, rural potential voters, and younger potential voters are without green bar-coded identity documents. In particular, counsel relied on the finding in the report of *Opinion 99* to the

8 *New National Party* above n 4 at paras 29-30.

9 A survey released on 10 November 1998 which was conducted jointly by the South African Broadcasting Corporation, Institute for Democracy in South Africa and Markinor.

effect that:

> ". . . as a result of these claims, there are some important partisan implications. Higher proportions of likely ANC (82%), and IFP voters (84%) have the correct documents than PAC (73%), UDM (72%), NP (71%), or DP voters (65%). . . ."

Mr Loxton submitted that the discrimination was on one or more of the specified grounds contained in section 9(3)[10] of the Constitution and was therefore unfair. Mr Loxton did not seek to establish that the discrimination, which he alleged was brought about by the provisions of the Electoral Act, was intentional.

[12] The information relied upon by Mr Loxton was gathered in opinion polls conducted by the HSRC and the organisations which produced *Opinion 99* during the period between August and October 1998, prior to any of the periods during which potential voters were given the opportunity of registering on the national voters' roll. No more recent evidence of the effect of the provisions has been furnished. On the assumption that the opinions expressed in the HSRC and *Opinion 99* reports are correct, there is no evidence as to which category of persons referred to therein might be among the millions of South Africans who, after the promulgation of the Electoral Act, applied for and were issued with the necessary documents, and as a result were able to register on the national common voters' roll. In the absence of evidence showing that the impugned

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10 Section 9(3) provides :

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

provisions have had the effect suggested by the DP, it cannot be found that the provisions, on that account, were unconstitutional. I would add that:

a. there is no evidence to suggest that the persons in the categories identified have in fact registered in smaller numbers, proportionately, than those outside the categories. One should not overlook the fact that political parties might well have directed voter education drives to ensure that potential voters obtain the correct identification documents and that they register;

b. in any event, it must be accepted that there are very few laws of general application that will not, directly or indirectly, have the potential to affect different categories of people in different ways, whether for example, by reason of where they live, their standard of literacy or political beliefs. There is no evidence to show what the impact of the Electoral Act has in fact been on the various categories of persons referred to by the DP. Whatever the different impact, if any, might be, it is not possible to determine whether such impact constitutes unfair discrimination within the principles endorsed by this Court,[11] unless it is established that such different impact is caused by the impugned legislation, and is not the result

[11] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 53.

of some other cause.

[13] It follows, in my opinion, that this ground of attack cannot succeed.

The Referral for Evidence

[14] It was submitted on behalf of the DP that the court a quo erred in not referring the application for the hearing of oral evidence to enable more accurate information to be provided concerning the number of voters who had registered, and the number who had not yet received their bar-coded identity documents. It was submitted that this information was relevant to the capacity of the Department to issue the necessary documents to potential voters who require them for the purpose of registering and voting. The judgment does not give any reasons for the refusal of the application save for stating that, for the purposes of that application, the first respondent accepted the correctness of the findings of the HSRC. The implication appears to be that any dispute concerning the reliability of that information had been removed, and that there was no need for evidence on any other issue.

[15] In its judgment the court a quo had referred to information which had been provided by the Department as at 1 March 1999, approximately two weeks before registration closed, and stated that the Department's averment that it had the capacity to provide bar-coded identity documents to persons who had not yet obtained them, could

not be gainsaid. Mr Loxton referred to the inconsistencies in the information previously furnished by the Department as well as the absence of "source documents" to verify that information. He contended that oral evidence would have put the court a quo in possession of more accurate and verifiable information and that it erred in refusing to direct that oral evidence be heard.

[16] The DP's challenge was to the constitutionality of the impugned provisions of the Electoral Act. It sought no relief directed to the implementation or failure to implement the provisions of the Electoral Act, or with regard to the implementation by the Department of its obligation to do what was necessary to ensure that all persons who registered as voters would receive bar-coded identity documents timeously to enable them to vote. For the reasons given by Yacoob J in the *New National Party* case, the fact that a large number of persons eligible to vote had not registered to do so would not have been material to the challenge to the constitutionality of the impugned provisions of the Act.[12] The same applies to an enquiry into the ability of the Department as at 12 March 1999 when registration closed, to deliver bar-coded identity documents to those registered voters who had not yet received them.

12 *New National Party* above n 4 at paras 22-23 and 39-45.

[17] It is by no means clear that evidence of subsequent events is relevant to the question of the constitutionality of the impugned provisions of the Electoral Act. But, even if such evidence is admissible, to be of any value it would have had to traverse virtually every issue raised in the affidavits, including complex questions of causation and capacity relevant to the constitutionality of the electoral scheme. Even then, there is nothing to show that the evidence could or would have been decisive of the issues which had to be determined. The court a quo drew attention to the urgency of the matter, the need for a quick decision in the light of the pending elections, and the absence of any real evidence to contradict the Department's assertion that it would be able to deliver the outstanding documentation in time. In the circumstances, it has not been shown that the High Court erred in deciding that the matter should not be referred for evidence.[13]

Conclusion

[18] In conclusion, I would draw attention to the fact that the onus of establishing the unconstitutionality of the impugned provisions of the Electoral Act at the date it was promulgated rested upon the DP. This follows from the judgment of Yacoob J [14] that those provisions did not constitute a limitation of rights. The DP did not discharge this onus.

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13 *Cresto Machines (Edms) Bpk. v Die Afdeling Speuroffisier S.A. Polisie, Noord Transvaal* 1970 (4) SA 350 (T) at 365 D-G.

14 *New National Party* above n 4 at para 19.

[19] The appeal must thus be dismissed. The court a quo made no order as to costs. In my opinion that was a proper order in this case and a similar order should be made by this Court. In this regard it is relevant to take into account the unfortunately late promulgation of the Electoral Act, and the conduct of the government to which reference is made in the judgment of Langa DP in the *New National Party* case.

Order

[20] The following order is made:

a. The appeal is dismissed.

b. There is no order as to costs.

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

O'REGAN J :

[21] I have had the opportunity of reading the judgment prepared by Goldstone J, concurred in by my colleagues. I am unable to concur in that judgment or the order he

makes, for the reasons I give in my dissent in the judgment of *New National Party of South Africa v Government of the Republic of South Africa and others*[1] which is also delivered today.

Counsel for the Applicant:	C D A Loxton SC and DB Spitz instructed by Peter Horowitz Mendelsohn and Associates
Counsel for First Respondent:	I A M Semenya SC and M Naidoo instructed by the State Attorney

[1] CCT 9/99, as yet unreported judgment of this Court dated 13 April 1999.