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**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO.: 4044/09

In the matter between

RICHTER, WILLEM STEPHANUS

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE ELECTORAL COMMISSION
Respondent**

Second

THE MINISTER OF FOREIGN AFFAIRS

Third respondent

CORAM: EBERSOHN AJ

DATE HEARD 3rd FEBRUARY 2009

JUDGMENT HANDED DOWN ON 9th FEBRUARY 2009

JUDGMENT

EBERSOHN AJ.

[1] This is an application to declare as being unconstitutional, certain provisions of the legislation relating to elections.

[2] The personal facts relating to the applicant are not in dispute. He is an adult male citizen of the Republic of South Africa with identity number [number]. He is in possession of the bar coded identification document that entitles him to vote in the Republic of South Africa. He is temporarily residing at [address] Mitcham, Surrey, United Kingdom. He is domiciled in the Republic of South Africa with his place of abode to which he intends to return at the end of 2009 at [address], Swawelpoort, Pretoria, Gauteng.

[3] For the specific purpose of this application he reiterated that he is registered as a voter in accordance with the Electoral Act, No 73 1998 (*“the Electoral Act”*), in Voting District No 32951932, which is centred in Faerie Glen, Pretoria, Gauteng, and his name appears on the voters roll and he voted in the previous elections held on the 14th April 2004.

[4] The first respondent is the Minister of Home Affairs, The second respondent is the Electoral Commission and the third respondent is the Minister of Foreign Affairs. A copy of the founding papers was also served on the State President.

[5] The first respondent opposed the application, the second respondent filed a notice to the effect that it abided in the decision of the Court. The third respondent was cited nominally only and did not respond. The first respondent filed an answering affidavit. The first and second respondents applied for a postponement of the matter. The first respondent stated in this regard in an affidavit that he wished to gather factual information over a wide field to put before this Court so as to enable this Court to appreciate why there was a discrimination between certain classes of voters. In the affidavit some legal points which were not sustainable under the circumstances, namely that this case was about the interpretation of a statute only, were also raised. The respondents apparently wanted to put facts relating to expenses and how similar processes were handled by other countries where their citizens outside their respective countries could vote, before the Court. The application for a postponement was

opposed by the applicant. After hearing argument and considering the matter the application for a postponement was dismissed and the Court indicated that reasons would be furnished later.

[6] Urgency, having been disputed by the first respondent, was then argued together with the merits and judgment was reserved and the Court indicated that judgment would be handed down on the 9th February 2009.

[7] The first respondent, despite the Court's explicit directive in that regard, failed to file heads of argument.

[8] The notice of motion reads as follows:

"1. This application is declared to be urgent and non-compliance with the rules of court pertaining to time limits, form and service are condoned insofar as is necessary;

2. The following parts of section 33 of the Electoral Act, No 73 of 1998, is declared to be in conflict with sections 3(2)(a), 9(1), 10 and 19(3)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (and thus invalid):

2.1 Subsection (1)(b);

2.2 The words “*for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event*” in subsection (1)(e).

2.3 The words “*temporary*” and “*intended*” where they appear in subsection (1)(e).

3. The conflicts mentioned in paragraph 2 above arises from the unequal treatment in respect of the allowing of application for

**special votes to various categories
of citizens of the Republic of South Africa
who are absent from the Republic of South
Africa.**

4. **The first and second respondents are ordered to rectify the aforementioned unequal treatment by extending the right to special votes to all categories of citizens absent from the Republic of South Africa.**
5. **The first, second and third respondents are ordered to do all things necessary to ensure that all categories of citizens absent from the Republic of South Africa who are registered as voters will be entitled in terms of the Electoral Act, to vote by means of special votes in the forthcoming general elections.**
6. **The second respondent is ordered to amend the Election Regulations, 2004, made under the power vested in it by section 100 of the Electoral Act, 75 of 1998, as follows:**
 - 6.1 **By deleting Regulation 6(b) in totality;**
 - 6.2 **By deleting the words:**
 - 6.2.1 ***“temporary”****Error! Bookmark not defined.*
 - 6.2.2 ***for the purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event”***
 - 6.2.3 ***“intended”***
in Regulation 6(e).
 - 6.3 **By deleting Regulation 9 in totality;**
 - 6.4 **By deleting the following words in**

Regulation 11:

6.4.1 “temporary”

6.4.2 “intended”

6.5 By deleting the following words in Regulation 12:

6.5.1 “temporary”

6.5.2 “for the purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event”

6.6 By deleting the “temporary” in Regulation 13;

6.7 By correcting the forms contained in appendix 1 thereto, to bring the same in accordance with the above relief.

7. The first respondent is ordered to pay the costs of the applicant.

8. Further and/or alternative relief."

[9] Section 33 of the Electoral Act reads as follows:

"33. Special votes.

(1) The Commission 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-

(a) physical infirmity or disability, or pregnancy;

(b) absence from the Republic on Government service or membership of the household of the person so being absent;

(c) absence from that voting district while serving as an officer in the election concerned; or

(d) being on duty as a member of the security services in connection with the election.

(e) temporary absence from the Republic for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event, if the person notifies the Commission within 15 days after the proclamation of the date of the election, of his or her intended absence from the Republic, his or her intention to vote, and the place where he or she will cast his or her vote.

(2) The Commission must prescribe-

- (a) the procedure for applying for special votes; and**
- (b) procedures, consistent in principle with Chapter 4, for the casting and counting of special votes."**

[10] Chapter 3 of the Regulations bears the heading "Special Votes" and contains regulations 6, 7, 8, 9, 10, 11 and 12.

[11] The applicant filed a supplementary affidavit , with attaché to it , a copy of the address the then Minister of Home Affairs, Dr. Mangasutho Buthelezi delivered in parliament on the 25th November 2003 at the time of the the Second Reading Debate of the Electoral Laws nSecond Amendment Bill. The respondents did not object to this. In his address the Honourable Minister is reported to have stated the following:

“Madam Speaker:

Subsequent to the passing of the Electoral Laws Amendment Act, 2003 (Act No. 34 of 2003) by Parliament, representations were made to the President and the Deputy President. Reportedly, a key promoter of such representation was our colleague Dr. C. Mulder MP who reportedly made them on behalf of South African citizens living abroad arguing that the Electoral Laws Amendment Act as it stands infringes upon their constitutional right to vote.

When I spoke to this House during my Department’s budget debate, I had committed myself to make provision to enable South Africans abroad to

vote. Accordingly, in the Electoral Law Amendment Bill which I brought to Cabinet provision was made for all South Africans abroad to vote, irrespective of their reasons to be abroad. However, Cabinet chose not to adopt my proposal. During its parliamentary process the Electoral Law Amendment Bill was amended by the Portfolio Committee to make provisions similar to the one now contained in the Electoral Law Second Amendment Bill which is before us. However, such provisions were then dropped.

After considering representations submitted to him, the President instructed that urgent amendments be prepared to provide for the casting of votes by South African citizens who are registered on the voters' roll and are temporarily absent from the Republic during the election, elsewhere than the voting district where they reside.

I am pleased that what I had originally proposed as the responsible line function Minister has now been partially accepted and is before us for approval. I have made many other proposals within my line functions responsibilities and as the leader of a minority Party in Cabinet, which proposals have not been embraced, ranging from civic affairs matters to HIV/AIDS, crime and unemployment. Because he seems to carry more credence than I do, I should have perhaps considered to ask Dr. Mulder to champion them.

I do not believe that the Electoral Law Amendment Act is as it stands, unconstitutional, for the right to vote of citizens abroad may be limited, as it is limited in many established democracies. However, I felt that as a matter of policy it was essential to allow all South Africans an opportunity to participate in the electoral process. However, what in my opinion was not constitutionally problematic, may become so as the Bill before us now only allows certain citizens who are abroad for certain temporary purposes to vote, while depriving others who are in a similar situation of the same opportunity.

For instance, a citizen who is abroad working on a temporary basis as an employee will not be able to take advantage of this opportunity. The same will apply to all South Africans who live abroad for an extended period of time. It may be problematic to justify for such differentiation of treatment. It may also be problematic to administer this Bill as it may become difficult to judge whether somebody is indeed abroad on a temporary basis and to give meaning to the expression "temporary" under the various real life

circumstances. As I have always spoken with candour to my colleagues, I felt I had to share these concerns.

Objections were also raised against the use of the phrase: “assistance to handicapped voter” in the long title of the Act. Therefore, the amendments substitute the phrase: “assistance to handicapped voters” in the long title of the Act for “assistance to voters with disabilities”.

I hope that these amendments may be in the best interest of our fledgling democracy and may avert threats of legal action which could have the effect of disrupting our preparations for next year’s elections. I urge that this House accepts the Electoral Laws Second Amendment Bill.

I thank you.”

[12] From the above it is clear that the decision to disqualify certain classes of voters, like the applicant, from voting, was a political decision and not one of necessity.

[13] The nature of and the contents of the right of a South African citizen to vote must now be examined. In the case of **August and Another v Electoral Commission and Others** 1999 (3) SA 1 (CC) Yacoob J stated the following in paragraph [17] of the judgment:

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

[14] It is thus the case of the applicant that section 33, by allowing such classes of persons a special vote but denying him the same, infringes upon section 3 of the Constitution of the Republic of South Africa, Act 108 of 1996 (*“the Constitution”*) which provides:

“CITIZENSHIP

3(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)....”

(My underlining)

[15] It is also his case that it is in conflict with section 19 of the Constitution which provides *inter alia*”

“POLITICAL RIGHTS

19(1)..

(2)...

(3) Every adult citizen has the right -

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.”

(My underlining)

[16] During the argument the contents of sections 21, 22, 33, 36, 38 and 39 of the Constitution were also raised.

[17] With regard to locus standi the applicant relied on section 38(a) of the Constitution which provides for *locus standi* for a person in his position, and also section 38(d), as his application will indeed have the effect that he is acting in the public interest.

[18] The applicant also imparted the following particulars about himself, and in general, in his founding papers, which particulars and facts were not challenged:

- a) That he is presently earning an income which he intends to bring into the Republic of South Africa at the end of 2009 when he returns to South Africa.
- b) That he is obtaining experience in the workplace which experience will also be to the benefit of the Republic when he returns to South Africa at the end of 2009.
- c) He did not have such money or such experience when he left South Africa which he, in terms of the Bill of Rights of the Constitution (section 21(2)) was entitled to do.
- d) He did not regard it as being in the public interest that he be rejected and disowned by his fatherland and he stated that he verily believed that on the probabilities there were many other likeminded and patriotic South African citizens who were in a similar position, as he is.
- e) He stated that he believed that the State must respect, protect, promote and fulfil his rights listed in the Bill of Rights and that by treating him on an unequal footing, compared to other citizens, the State was infringing upon his dignity and personhood.
- f) That he is a loyal and patriotic South African and as proof thereof he related that he matriculated after the first democratic elections in 1994 and the Constitution came into effect in 1996 and that during 2004 whilst he was a

student at the Northwest University he responded to a call by the South African National Defence Force and enlisted. He did various training courses in his spare time during weekends and holidays. After a further period of three months training he served the country for four months in the Democratic Republic of the Congo.

g) After he completed his military service he returned to the Northwest University and obtained the B.Ed degree in December 2006.

h) For no other reason than “*wanderlust*” and in an attempt to further educate himself (in the widest sense of the word) he decided upon international exposure before commencing his career as a teacher in South Africa and he accepted a temporary post as a teacher in the United Kingdom.

i) 2009 would be his last year in the United Kingdom and he intended returning to the Republic of South Africa at the end of 2009.

[19] Regarding urgency he stated that on the 22nd November 2008 the second respondent communicated to the South African Press Association that the second respondent was considering a request from a leader of a political party in South Africa to allow people like himself to vote in the upcoming elections. As a follow-up to that he, during December 2008, instructed his mother to instruct a legal representative to enquire regarding his right to a special vote.

[20] On 26 December 2008 he was informed that he would not be able to vote if he was employed on the strength of a work permit in the United Kingdom. He stated that a work permit does not have any function other than regulating the work force of the United Kingdom and that one may not work in the United Kingdom unless one has a work permit *alternatively* unless you were on government service of some or other foreign government.

[21] On the 19th January 2009, not accepting that he would not be able to vote by means of a special vote, he, through his attorney, addressed a letter to the principal election officer of the first respondent so as to enquire regarding the procedure to follow should he wish to vote.

[22] On the 21st January 2009 the principal election officer responded by letter advising his attorney that he did not fall in the 5 classes of people who were entitled to a special vote whilst being out of the country on election day and that the second respondent was bound by the legislation.

[23] On the 16th January 2009 the second respondent communicated draft procedures on special votes to all political parties and the applicant attached a copy thereof to his founding affidavit as annexure “3”. Therein an exposition of the legislation was given with examples. In this regard the applicant stated that if he had been on military service outside the country he would have been entitled to a special vote.

[24] Presently speculation is rife that the election day will be between 25 March and 6 May 2009. In terms of section 49 of the Constitution it must be held before or on the 12th July 2009.

[25] The applicant stated that it was not only in his own interest, but in the interest of all South Africans in his position that this application be dealt with on an urgent basis and he stated that by reason of the fact that the Constitutional Court must confirm an order of invalidity before that order has any force (as is provided for in section 167(5) of the Constitution), he had no option but to move this application on an urgent basis. It is so that, due to the vast amount of work in this Division, this application, if it was to be enrolled on the ordinary opposed motion court roll, would only have been heard after the elections have taken place. The applicant stated that if he was denied the vote due to the time constraints he would suffer irreparable harm.

[26] In refusing the application for a postponement the court took into consideration that although the election date has not yet been proclaimed all the political parties were already gearing up for the election and on the 7th and 8th February 2009 the last registration of voters would take place. The legal process takes its course and cannot decide the matter overnight and needed sufficient time and opportunity to study the papers, hear the matter and to pronounce judgment. This Court deemed it necessary to hear and finalize the matter as expeditiously as possible so that the Court could refer its judgment to the Constitutional Court to deal with the matter further.

[27] Urgency was also argued and this court finds that the matter is urgent enough to be dealt with as an urgent matter.

[28] Mr. Pelser, who appeared for the applicant, together with Mr. du Plessis, filed comprehensive heads of argument. Heads of argument were not filed on behalf of any of the other parties despite this Court's specific directive in this regard.

[29] After Hearing argument the Court reserved judgment and indicated that judgment would be handed down on the 9th February 2009.

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

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

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) ...

(c) ...

(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.”

[31] The right to political participation is a fundamental human right, which is set out in a number of international and regional human-rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. Thus art 25 of the International Covenant on Civil and Political Rights ("ICCPR") provides:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in art 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

(Para [90] of Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) 416 (CC))

[32]The African Charter on Human and Peoples' Rights (“African Charter”), adopted on 27 June 1981, which was acceded to by South Africa on 9 July 1996, is even more specific than the ICCPR in spelling out the obligations of State parties to ensure that people are well informed of the rights in the African Charter. The relevant articles are arts 9, 13 and 25 which provide:

“Article 9

- 1. Every individual shall have the right to receive information.**
- 2. Every individual shall have the right to express and disseminate his opinions within the law.**

Article 13

- 1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.**

Article 25

State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding

obligations and duties are understood.”

[33] Similarly, the American Convention on Human Rights provides in art 23 that all citizens shall enjoy the right and opportunity “***to take part in the conduct of public affairs, directly or through freely chosen representatives***”.

[34] The Harare Commonwealth Declaration proclaims “***the individual's inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives***”.

[35] The Inter-American Democratic Charter reaffirms that “***the participatory nature of democracy in [the American] countries in different aspects of public life contributes to the consolidation of democratic values and to freedom and solidarity in the Hemisphere***”. It further asserts that

“(i)t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition fo the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

[36] It seems to this Court that the history of denial to the vast majority of this country’s citizens of the vote is the context in which the right to vote must be interpreted. Given the history of disenfranchisement in our country, the right to vote occupies a special place in our democracy. Any limitation of this right must be supported by clear and convincing reasons. If the government seeks to disenfranchise a group of its citizens it must place sufficient information before the Court demonstrating what purpose the disenfranchisement is intended to serve and to evaluate the policy considerations on which such decision was based.

[37] To limit the right to vote Parliament would have 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 of the Constitution (the limitations clause).

[38] Any limitation of the rights of citizens to vote would have to pass constitutional scrutiny:

“In a country of great disparities of wealth and power it [the right to vote] 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 policy. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”

(Para 17 of the August case)

[39] Universal suffrage is extended to all citizens of South Africa who are:

“(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.”

(my underlining)

[40] The Bill of Rights guarantees that every South African has the right to:

- a. freedom of movement; and
- b. leave the Republic;

[41] This Court is also of the opinion that citizenship, and the attendant right to vote, is not affected or diminished when a citizen exercises his or her right to freedom of movement or residence.

[42] The Electoral Act effectively denies all citizens working abroad (who are not employed by Government or fall within certain classes) their right to vote, while the Constitution, which is the overriding enactment, permits all citizens to stand for election. It is not clear why Parliament enacted provisions to the effect that a person who qualifies to be a candidate should be disqualified from voting just because he or she is working outside the country.

[43] The right of a citizen to vote clearly places a duty on the legislature and the executive to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. For this purpose the second respondent was established. The right to vote which is fundamental to democracy requires proper arrangements to be made for its effective exercise.

[44] It was highlighted by Yacoob J. in *New National Party of South Africa v Government of South Africa and Others* 1999 (3) SA 191 (CC) in para [11] that :

“The importance of the right to vote is self-evident and can never be overstated. There is, however, no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.”

and in paras [13] to [14]:

“The right to vote contemplated by s 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. The details of the system are left to Parliament. The national legislation which prescribes the

electoral system is the Electoral Act.”

[45] It must be noted that in terms of the then current legislation namely section 25 of the Electoral Act, No. 202 of 1993, South African citizens who were outside the country during the 1994 elections could vote at foreign voting stations without even having to apply for special votes. No distinction was drawn between different classes of citizens (i.e. government employees or privately employed citizens).

[46] Before its amendment, the 1998 Electoral Act provided that certain classes of voters (i.e. those absent from the Republic on government service) could apply for special votes, but section 33(1)(b) provided that the second Respondent could ***“prescribe other categories of persons who may apply for special votes”***.

[47] In 2003 section 33(1) was, however, amended to limit the class of citizens who may apply for special votes to

“temporary absence from the Republic for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event, if the person notifies the Commission within 15 days after the proclamation of the date of the election, of his or her intended absence from the Republic, his or her intention to vote, and the place where he or she will cast his or her vote.”

[48] The effect of the legislation referred to supra, watered down the right to vote which is inexplicable, arbitrary and inconsistent with the word and spirit of the fundamental right to vote contained in the Constitution.

[49] In order to assess section 33 of the Electoral Act and its place in the scheme of the Act it is necessary to refer to certain aspects.

[50] The constitution does not in any way deal with special votes. What the Constitution do is, in a nutshell, to:

- a) guarantee the right to vote to every adult citizen;
- b) lay down the principle that all citizens were equally entitled to

the rights and benefits and even privileges of citizenship;

(Section 3(2)(a))

c) oblige the State to respect, protect, promote and fulfill *inter alia* the right to vote;

(Section 7(2))

d) determine that everyone is equal before the law and has the right to equal protection and benefit of the law;

(Section 9(1))

e) determine that everyone has inherent dignity and the right to have their dignity respected and protected (patently, *inter alia* by the State)

(Section 10)

f) provide the basis and extent upon which the right to vote may be limited;

(Section 36)

g) provide the basis upon which *inter alia* the right to vote must be interpreted;

(Section 39)

[51] By enacting the general legislation to deal with the voting process namely the Electoral Act, 1998, of which section 2 stipulates:

***“Every person interpreting or applying this Act must –
do so in a manner that gives effect to the constitutional
declarations, guarantees and responsibilities contained in the Constitution”***

the legislature issued instructions to every person interpreting the Act.

[52] The legislature foresaw that every voter would not be in his voting district on polling day. In consequence and in order to extend the opportunity to exercise the right to vote (as the legislature was compelled to do) the legislature in section 33 provided a mechanism to accommodate persons that “*cannot vote at a voting station*

in the voting district in which the person is registered as a voter” on election day and the legislature called such mechanism “special votes”.

[53] It stands to reason that the term “*special*” was not and could not have been intended to convey that such mechanism would be a privilege afforded to some and denied to others. That would of necessity be in conflict with the Constitution.

[54] Furthermore, Parliament is not entitled to re-determine the electorate because that was already done by the Constitution. It follows logically that special votes could not have been granted by Parliament at will to whosoever the legislature thought fit for such privilege.

[55] The Electoral Act of necessity had to comply with sections 7, 9 and 36 of the Constitution.

[56] In so far as the Electoral Act does not, as in this case, if offends against basic human dignity and equality of every affected citizen.

[57] By reason of the fact that section 33 of the Electoral Act respects, protects, promotes and fulfils the right to vote of some adult citizens but not the right to vote of others, section 33 must be adjudicated upon by taking into account section 36 of the Constitution which reads as follows:

“LIMITATION OF RIGHTS

(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 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 purposes*

(2). *Except as provided in subsection (1) or in all of any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights”*

[58] Section 33(1)(b) of the Electoral Act provides in clear and unqualified terms that an adult citizen who cannot vote at a voting station in the voting district in which such adult citizen is registered as a voter due to his or her

“absence from the Republic on Government service (or membership of the household of the person so being absent) is entitled to apply for a special vote”.

[59] “Government service” is not defined and may present problems with interpretation.

[60] The creation of a privileged group of citizens is contrary to the Constitution and is in conflict with the Bill of Rights and specifically sections 19 and 36 thereof.

[61] It is an unacceptable form of discrimination in that it affords a privilege to people on Government services as opposed to people in the private sector and amounts to totalitarianism on the part of the State.

[62] Persons on Government service are also favoured with the privilege that they need not even notify the Electoral Commission of the fact that they were out of the country.

[63] This Court must now look at how other courts in the country dealt with and regard the matter.

[64] *“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”.

(Last sentence of para [5] of August)

[65] There is an affirmative obligation on the second respondent to take reasonable steps to ensure that eligible voters are registered.

(Last sentence of para [16] of August)

[66] There is an equal affirmative obligation on the second respondent to take reasonable steps to ensure that voters who are registered are able to vote.

“Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement”.

(Last sentence of para [17] of August and also para (26))

[67] ***“As has been stated above, the right of every adult citizen to vote in elections for every legislative body is given in unqualified terms. The first and second respondents correctly conceded that prisoners retain the right to vote, since Parliament has not passed any law limiting that right”.***

(Para [20] of August)

[68] The same is true of adult citizens registered to vote whilst being absent from the Republic otherwise than on Government service.

“Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the Commission or this Court to decide which categories of prisoners, if any, should be deprived of the vote, and which should not. The Commission’s duty is to manage the elections, not to determine the Electorate. It must decide the how of voting, not the who.”

(Para [33] of August)

- [69] ***“Parliament must ensure that people that would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote. More cannot be expected of Parliament. It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so.”***

(Last three sentences of para [21] of New National Party of South Africa v the Government of RSA 1999 (3) SA 191 (CC))

- [70] ***“I conclude, therefore, that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right. Any scheme which is not sufficiently flexible to be reasonably capable of achieving the goal of ensuring that people who want to vote will be able to do so if they act reasonably in pursuit of the right, has the potential of infringing the right. That potential becomes apparent only when a concrete case is brought before a Court.”***

(Last three lines of para [23] of New National Party) ”

- [71] ***“Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution”***

(Para [23] of New National Party)

- [72] ***“However, the issue we have to determine is not whether the Department or other organs of State have performed their functions in a manner which has resulted in a denial of the vote to a substantial number of South Africans, but whether the measure itself constitutes such denial and is on that account an***

infringement of the right to vote.”

(Fifth sentence of para [37] of New National Party)

[73] **“What is more, the right cannot be exercised in the absence of a legislative framework. That framework should seek to enhance democracy, not limit it. To do so, it needs to draw all citizens into the political process. Regulation, which falls short of prohibiting voting by a specified class of voters, but which nevertheless has the effect of limiting the number of eligible voters needs to be in reasonable pursuance of an appropriate Government purpose. For a Court to require such a level of justification is not to trample on the terrain of Parliament but to provide protection for a right which is fundamental to democracy and which cannot be exercised at all unless Parliament enacts an appropriate legislative framework.”**

(The Minority judgment of O’Regan J in New National Party of South Africa para [122])

[74] Section 9 of the Constitution protects the right to equality. This entails that the law will protect and benefit people equally and not discriminate unfairly against people or categories of people.

[75] Using the test into a violation of the equity clause tabulated in *Harksen v Lane 1998 (1) SA 300 (CC)* it is clear that the differentiation in section 33 of the Electoral Act is unconstitutional:

a) The provision differentiates between categories of people: government employees, students, businessmen, holidaymakers and athletes taking part in international sporting events are accommodated, but the rest (i.e. privately employed people, aid workers, lecturers, ministers of church etc.) are not. The differentiation does not bear a rational connection to any legitimate government purpose. The law will violate section 9(1) of the Constitution if there is no rational connection between the differentiation and the purpose. As the Constitutional Court said in para [25] of *Prinsloo v van der Linde 1997 (3) SA 1012(CC)*:

“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.”

b) The next question is whether the differentiation amounts to unfair discrimination: This entails a two-stage enquiry:

i) Firstly, does the differentiation amount to ‘discrimination’? The answer has to be “YES” – objectively, the differentiation is based on grounds which have the potential to impair the fundamental human dignity of persons, or to affect them adversely in a comparably serious manner. To disallow a class of citizens from exercising their right to vote just because those citizens are outside the country for different reasons than other classes of citizens also outside of the country, cannot be anything but “discrimination”.

ii) Is it ‘unfair discrimination’? Again the answer has to be in the affirmative. The discrimination amounts to favouritism of, most prominently, employees of the Government. They also need not even comply with the procedural requirements of notice. The discrimination impacts directly on the applicant’s right to vote, which is a fundamental right guaranteed by the Constitution, and to which the Electoral Act should give effect.

iii) Secondly, it has to be determined whether the provision can be justified under the
 iv) limitation clause. It cannot, although the right to vote may be limited by law of
 v) general application, that law must meet the requirements of reasonableness and
 vi) justifiability set out in section 36 of the Constitution. (Paras [22] and [23] of **August**). 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”

(S v Manamela and Another (Director-General of Justice intervening) 2000 (3) SA 1 (CC) quoted with approval in Minister of Home Affairs v Nicro and Others 2005 (3) SA 280 (CC) para [33])

[76] In a justification analysis facts and policy are often intertwined. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. If the [policy] 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.

“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 government 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”.

(Para [35] of Nicro)

[77] The only argument on behalf of the respondents can be risks to the integrity of the polling process, and a strain on financial and logistical resources available. Such argument, however, falls away when regard is had to the fact that the logistical arrangements have to be made for the classes of citizens abroad who are allowed to bring out special votes. The only issue can be financial namely the costs of transporting extra ballot papers to and from South African embassies, High Commissions and consulates which, however, would not place an undue burden on the respondents' resources. Any risks attendant to the bringing out of special votes will be the same as those existing for the special votes which are allowed in section 33 as it presently stands.

[78] It is clearly unfair discrimination to exclude certain classes of citizens from exercising their right to vote whilst allowing others (who have no distinguishing features other than their reason for being abroad) to vote. In *Larbi-Odam v MEC for Education (North-West Province 1998 (1) SA 745 (CC)* the exclusion of non-citizens from appointment in permanent teaching posts was held to be unfair discrimination. (See also *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC)*).

[79] It is clear that the application must succeed. During argument Mr. Pelsner indicated that prayer 6.6 was abandoned.

[80] Costs must follow the event.

[81] The following order is accordingly made:

1. An order is granted in terms of prayers 1, 2, 2.1, 2.2, 2.3, 3, 4.5, 6, 6.1, 6.2 6.3, 6.4, 6.5 , 6.7 of the notice of motion.

2.The matter is referred in terms of the provisions of section 167 of the Constitution to the Constitutional Court to confirm paragraph 1 of this order.

3.The first respondent must pay the costs of the applicant including the costs of two counsel.

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ACTING JUDGE OF THE HIGH COURT

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