CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 09/09
[2009] ZACC 3

WILLEM STEPHANUS RICHTER	Applicant
versus	
MINISTER FOR HOME AFFAIRS	First Respondent
ELECTORAL COMMISSION	Second Respondent
MINISTER FOR FOREIGN AFFAIRS	Third Respondent
together with	
THE DEMOCRATIC ALLIANCE	First Intervening Party
ROY HOWARD TIPPER	Second Intervening Party
THE INKATHA FREEDOM PARTY	Third Intervening Party
and	
AFRIFORUM	First Amicus Curiae
FREEDOM FRONT PLUS	Second Amicus Curiae

and

Case CCT 03/09

WILLEM STEPHANUS RICHTER	Applicant
versus	
MINISTER FOR HOME AFFAIRS	First Respondent
THE ELECTORAL COMMISSION	Second Respondent

MINISTER FOR FOREIGN AFFAIRS Third Respondent

Heard on : 4 March 2009

Decided on : 12 March 2009

JUDGMENT

O'REGAN J:

[1] Is the current legislative scheme which limits the right of South African citizens who are registered as voters but who will be out of the country when the elections take place on 22 April 2009 consistent with the Constitution? This is the question raised by the applications before us. Mr Willem Richter, the applicant in both these applications, is a South African citizen and registered voter who is working as a teacher in the United Kingdom. He intends to return to South Africa at the end of this year. He wishes to vote in the 2009 elections but is not permitted to do so because section 33 of the Electoral Act 73 of 1998 (the Electoral Act) restricts the classes of people absent from the country on polling day who may vote.

[2] In seeking to secure the right to vote in these elections, Mr Richter launched two applications – the first in the High Court in Pretoria on 26 January 2009 and the second in this Court the following day. In the High Court application, he sought an order declaring certain provisions of the Electoral Act and some of the regulations promulgated thereunder to be inconsistent with the Constitution and invalid. In the

application for direct access to this Court, he sought an order that the dispute in the High Court be brought directly to this Court and that the papers in the High Court be transferred to this Court. On 30 January the Chief Justice gave directions in relation to the application for direct access, affording the respondents until 9 February to lodge answering affidavits and requiring the applicant to lodge a further affidavit on the same day to inform the Court of the status of the High Court application on that date.

[3] On 9 February, Ebersohn AJ handed down a judgment in the High Court application declaring sections 33(1)(b) and 33(1)(e) of the Electoral Act to be inconsistent with the Constitution at least in part, as well as declaring regulations 6(b), 6(e), 9, 11 and 12 of the Election Regulations, 2004[1] (the Election Regulations) to be similarly inconsistent with the Constitution, again at least in part.[2] Ebersohn AJ also made certain mandatory orders requiring the Electoral Commission (the Commission) to ensure that those registered voters absent from the country on polling day be given an opportunity to vote by means of a special vote. Ebersohn AJ further ordered that the orders of invalidity be referred to this Court for confirmation. The day after the judgment was handed down Mr Richter launched a second application in this Court seeking confirmation of the order made by the High Court.

[4] This brief history explains why there are two applications by Mr Richter seeking the same relief contemporaneously. The first is the application for direct

[1] Published in GN R12 GG 25894 of 7 January 2004, as amended by GN R217 GG 26058 of 16 February 2004, GN R344 GG 26154 of 12 March 2004, GN R429 GG 26207 of 29 March 2004 and GN R1206 GG 31454 of 26 September 2008.

[2] *Richter v Minister of Home Affairs and Others*, Case No 4044/09, North Gauteng High Court, Pretoria, 9 February 2009, unreported. The full terms of the order made by Ebersohn AJ are set out below at [45]-[47].

access to this Court in terms of rule 18 lodged on 27 January (case number CCT 03/09); and the second is the application for confirmation of the order of constitutional invalidity made by the Pretoria High Court on 9 February and lodged in this Court on 10 February (case number CCT 09/09). As counsel for Mr Richter has conceded, the first application has been overtaken by the second and it is not necessary in this judgment to consider that application further. It must be dismissed. The only issue that arises in relation to it is costs, a matter to which I turn at the end of this judgment.

[5] It is important to stop here and record that by the time Mr Richter launched his application in the High Court in Pretoria, another application by the Democratic Alliance and Mr Roy Howard Tipper, seeking almost identical relief, had been launched in the High Court in Cape Town on 23 January 2009. And shortly after Mr Richter launched his first application in this Court, two further direct access applications were received by this Court, one launched by the AParty and another applicant on 5 February (case number CCT 06/09) and the other by Mr Moloko and eleven other applicants on 10 February (case number CCT 10/09). These two applications seek relief similar to that sought by Mr Richter, but in addition seek relief in relation to the right of South African citizens to register as voters abroad.[3] Argument in this matter and the AParty and Moloko matters was heard together on 4 March, but as the latter raise different issues, it proved convenient to write separate judgments, one in this matter and the other jointly in respect of the AParty and

[3] Judgment in the matter of *AParty and Another v Minister for Home Affairs and Others; Moloko and Others v Minister for Home Affairs and Others* [2009] ZACC 4 is handed down contemporaneously with this judgment.

Moloko matters. Finally, I should record that on 12 February, the President proclaimed that the elections would take place on 22 April.[4]

[6] The Electoral Commission, inevitably, was cited as a respondent in all these applications. Not surprisingly, it, working hard to ensure that the forthcoming elections are free, fair and orderly, was concerned about the flurry of litigation. On 30 January 2009, it wrote to the applicant in this matter as well as to the Democratic Alliance suggesting that both applications be consolidated and heard by the Constitutional Court as a matter of urgency.

[7] Once this Court received the application for confirmation, the Chief Justice issued directions on 11 February 2009 enrolling it for hearing, as well as enrolling Mr Richter's application for direct access for hearing on 4 March. Unusually the directions also invited any party or litigant in another court that wished to intervene in the confirmation proceedings to lodge an application for intervention by 18 February. The respondents, being the Minister for Home Affairs (the Minister), the Electoral Commission and the Minister for Foreign Affairs, were given until 23 February to lodge answering affidavits in the confirmation proceedings and in response to any application for intervention.

[8] Five parties lodged applications to intervene. Two sought to be admitted as amici curiae and three as parties in the confirmation proceedings. Each of those

[4] Published in GN 10 GG 31900 of 12 February 2009.

seeking leave to intervene supported in broad terms the relief granted by the Pretoria High Court. Afriforum was one of the parties which sought leave to intervene as amicus curiae. It is a section 21 company and a civil rights organisation that seeks to encourage and assist skilled South African expatriates to return to South Africa. Before seeking leave to intervene, it had approached both Dr Brigalia Bam, the chairperson of the Electoral Commission, as well as the President of the Republic of South Africa, Mr K P Motlanthe, to urge them to ensure that South Africans living abroad be permitted to vote.

[9] The Freedom Front Plus also sought leave to intervene as amicus curiae. It is a political party registered in terms of the Electoral Commission Act 51 of 1996. The Freedom Front Plus alleged in its application that it had supported Mr Richter's application in the High Court and this Court and that it supported the relief sought by Mr Richter. It also alleged that as a political party it had a direct interest in the proceedings, in particular because many of its members have, over the past years, spent time abroad and these members wish to be able to exercise their right to vote even if they are absent from the country on polling day.

[10] There was no opposition to the application of Afriforum and the Freedom Front Plus to be admitted as amici curiae. Both clearly have an interest in the proceedings and both lodged helpful written submissions which assisted the Court in its deliberations. In the circumstances their applications are granted.

[11] The Democratic Alliance and Mr Tipper lodged an application for leave to intervene as parties in the confirmation proceedings. As mentioned above, they were the first to launch an application to seek the relief in question in this case. They did so on 23 January 2009 in the Cape High Court. As a result of the directions given by this Court on 11 February, the Cape High Court proceedings were stayed. To their application for leave to intervene, they attached the papers lodged in their application in the Cape High Court. In the alternative to their application to intervene, the Democratic Alliance and Mr Tipper sought direct access to this Court, in the event that that the confirmation proceedings were aborted because of a technical flaw. The relief they seek is slightly broader than that sought by Mr Richter in that they challenge the provision of the Election Regulations which provides that those voters granted a special vote as contemplated in section 33 of the Electoral Act may only vote in national elections and not in provincial elections.

[12] The Inkatha Freedom Party also sought leave to intervene as a party in these proceedings. Like the Democratic Alliance and the Freedom Front Plus, it is a registered political party that avers it has a direct interest in these proceedings. It should be added that the Inkatha Freedom Party had been admitted as amicus curiae in the proceedings launched in the High Court in Cape Town by the Democratic Alliance and Mr Tipper and had lodged an affidavit in those proceedings relating to the logistical difficulties, including affordability, that special votes for absent voters occasion.

[13] Again, there was no opposition to the joinder of the Democratic Alliance, Mr Tipper or the Inkatha Freedom Party as parties in the confirmation proceedings. Indeed, it should be noted that from an early stage the second respondent, the Electoral Commission, actively sought the consolidation of all the litigation relating to the rights of South Africans to vote abroad. In the circumstances, it is appropriate that all three be given leave to intervene in the confirmation proceedings as parties. Given however that the confirmation proceedings have not been derailed, the application for direct access, launched in the alternative by the Democratic Alliance and Mr Tipper, need not be granted.

[14] The Minister opposed the application for confirmation and launched an application for leave to appeal against other aspects of the judgment of the High Court in Pretoria. The Electoral Commission by and large abided the decision of the Court, but lodged a helpful affidavit dealing with the issues under consideration. The Commission did oppose two aspects of the relief sought in these proceedings,[5] a matter to which I shall return later. Both the Minister and the Commission opposed the application by Mr Richter for direct access. The third respondent, having abided the decision of the High Court, did not appear at all in this Court.

The electoral system

[5] The two issues on which the Electoral Commission opposed relief are the challenge to the 15-day notice period contained in section 33(1)(e), and the challenge concerning provincial votes for voters who vote abroad. Both these issues are dealt with at [80]-[84] and [85]-[91] below. The Electoral Commission also opposed the relief sought in the AParty case (above n 3), argued at the same time as the Richter matter, which is dealt with in a separate judgment handed down on the same day as this one. The relief opposed in that case related to the question whether voters should be permitted to register as voters outside South Africa.

[15] The Constitution requires that elections take place on the basis of a national common voters' roll. Section 1(d) of the Constitution provides that amongst the founding values of the Constitution are "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Section 46(1) of the Constitution then provides that—

> "Subject to Schedule 6A, the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—
>
> (a) is prescribed by national legislation;
>
> (b) is based on the national common voters' roll;
>
> (c) provides for a minimum voting age of 18 years; and
>
> (d) results, in general, in proportional representation."[6]

[16] The Electoral Act is the national legislation contemplated in section 46(1) which establishes the electoral system. Section 5 of the Electoral Act provides for a national common voters' roll and requires the Chief Electoral Officer[7] to compile and maintain it. All South African citizens in possession of a bar-coded identity document may apply for registration as a voter on the national common voters' roll.[8] According to Adv P Tlakula, the current Chief Electoral Officer, the Electoral Commission has

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[6] See also section 105(1) of the Constitution which, in relation to provincial legislatures, provides that—

> "Subject to Schedule 6A, a provincial legislature consists of women and men elected as members in terms of an electoral system that—
>
> (a) is prescribed by national legislation;
> (b) is based on that province's segment of the national common voters' roll;
> (c) provides for a minimum voting age of 18 years; and
> (d) results, in general, in proportional representation."

[7] The Chief Electoral Officer is appointed in terms of section 12(1) of the Electoral Commission Act 51 of 1996 and is the head of the administration of the Electoral Commission.

[8] Electoral Act, section 6(1).

302 offices located in local municipalities throughout the country and voters may register at these offices on any working day. These offices have been in existence since 1998.

[17] In addition, Adv Tlakula tells us, the Electoral Commission runs voter registration drives prior to national elections. Two weekend drives have been held in the run-up to the 2009 elections, one on the weekend of 8 and 9 November 2008 and the other on the weekend of 7 and 8 February 2009. Upon registration, a voter's name is entered in the voters' roll for that district in which he or she is ordinarily resident.[9] If a voter changes his or her place of ordinary residence, that voter must apply to have the change recorded in the voters' roll.

[18] The Chief Electoral Officer must deregister any voter that he or she is satisfied no longer qualifies for registration.[10] When a person is deregistered the Chief Electoral Officer must inform that voter[11] who may appeal against that decision.[12] The voters' roll must be available for inspection at the Electoral Commission's offices.[13] Objections to the inclusion (or exclusion) of names on the voters' roll may be lodged by any person and are determined by the Electoral Commission.[14]

[9] Id at section 8(3).

[10] Id at section 11(1)(b).

[11] Id at section 12(1)(c).

[12] Id at section 13.

[13] Id at section 16.

[14] Id at section 15.

[19] The voters' roll for any election is the voters' roll as it exists on the day that the election is proclaimed.[15] The voters' roll for the elections to be held on 22 April, therefore, is the voters' roll as it existed on 12 February when the election was declared. The Electoral Commission tells us that there are 23 112 936 voters included on the roll as at that date.

[20] The national common voters' roll is segmented into voting districts, and each voter is registered for a specific district. The Electoral Act provides for the Electoral Commission to establish voting districts for the whole of the territory of the Republic.[16] There are currently 19 726 voting districts. The Act provides guidelines for the determination of the boundaries of voting districts including the number and distribution of eligible voters, the availability of transport and any geographical features that may impede access.[17] The segmentation of the voters' roll in this way permits it to be used for national, provincial and local elections, including ward elections for local government.

[21] The general rule is that voters must vote at the electoral station in the voting district for which they are registered.[18] However, there is a provision for voters who cannot vote in the electoral district for which they are registered on polling day to apply to the presiding officer of a voting station in another district to vote in that

[15] Id at section 24.

[16] Id at section 60(1).

[17] See section 61 of the Electoral Act which provides guidelines for the determination of boundaries for voting districts, and section 64(3) of the Electoral Act which provides similar guidelines for the establishment of voting stations.

[18] Electoral Act, section 38(1).

district (section 24A).[19] This procedure will permit the voter to vote only in the national elections, unless the voting district in which the voter seeks to vote is in the same province in which the voter is registered. According to Adv Tlakula, in the 2004 national and provincial elections, nearly two million voters voted in terms of section 24A in voting districts other than those in which they were registered.

[22] The Constitution provides that the term of office of the National Assembly is five years[20] and that the President must call an election. It must take place within 90

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

> "(1) A person whose name does not appear on the certified segment of the voters' roll for a voting district and who applied for registration as a voter before the date the election was proclaimed may submit to the presiding officer of the voting station for that voting district—
>
> (a) his or her identity document;
>
> (b) a sworn or solemnly affirmed statement in the prescribed form containing—
>
> (i) his or her full name, identity number and date of birth;
>
> (ii) his or her finger print;
>
> (iii) the address where he or she ordinarily resides;
>
> (iv) a declaration that he or she applied for registration as a voter before the date of publication of the proclamation proclaiming the election;
>
> (v) a request that his or her name should be included in the certified segment of the voters' roll for that voting district for the purposes of the election for the National Assembly and also for the purposes of the election for the provincial legislature if he or she had so applied for registration in the province in which that voting district is situated; and
>
> (vi) a declaration that he or she is a South African citizen, is 18 years of age or older and is not disqualified from voting in the election in question; and
>
> (c) proof that he or she applied for registration as a voter before the date of publication of the proclamation.
>
> (2) If the presiding officer is satisfied that the contents of the statement are correct—
>
> (a) the presiding officer must make an endorsement to that effect on the statement; and
>
> (b) the person making the request contemplated in subsection (1)(b)(v) must be regarded as having been registered as a voter on the certified segment of the voters' roll for the voting district requested for the purposes of the election for the National Assembly and also for the purposes of the election for the provincial legislature if that person had applied for registration in the province where that voting station is situated."

Section 24A was inserted in the Act by the Electoral Laws Amendment Act 34 of 2003.

[20] Section 49(1) of the Constitution.

days of the expiry of the term.[21] Provincial legislatures also enjoy five-year terms.[22] The current term of the National Assembly expires on 14 April 2009 with the result that the next national election must take place before 13 July. Once the election has been declared, as it has been, the Electoral Commission is under an obligation to prepare and publish an election timetable.[23] That timetable must, amongst other things, stipulate the date on which the voters' roll to be used for the election will be published and made available for inspection, the date by which registered parties must submit their list of candidates for the election to the Chief Electoral Officer, and provide for dates by which objections to candidates may be lodged, as well for the date by which appeals against decisions on objections must be lodged.

[23] The Electoral Act is therefore based on the principle that voters must vote in the voting districts for which they are registered. There are two important exceptions to this rule. The first is the procedure provided for in section 24A, discussed above, whereby a voter who cannot vote in his or her voting district on polling day, may, on that day, apply to the presiding officer at a voting station in another district for permission to vote in that district. If the voter is seeking to vote outside the province in which he or she is registered, the presiding officer may permit the voter to vote in the national elections only.

[21] Section 49(2) of the Constitution.

[22] Section 108(2) of the Constitution provides that the Premier of the province must call an election within 90 days of the expiry of the term of the provincial legislature.

[23] Section 20 of the Electoral Act, read with Schedule 1 to that Act.

[24] The second exception permits voters, in circumstances where they will not be able to vote at a voting station in the voting district for which they are registered on polling day, to apply for a special vote within the stipulated time which will permit them to vote before polling day. That exception is to be found in section 33 and it is the focus of the issues that arise in this case.

Section 33: special votes

[25] Section 33 provides as follows—

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

[26] Arrangements for special votes are provided in chapter 3 of the Election Regulations[24] promulgated in terms of section 100 of the Electoral Act. Regulation 6 provides that chapter 3 of the regulations will provide for the procedures to govern the application for and casting and counting of special votes as required by section 33(2) of the Electoral Act. Regulation 6(e) records, in terms identical to section 33(1)(e), that voters may obtain a special vote if they are unable, on polling day, to vote in their voting district due to their:

> "temporary absence from the Republic for the purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports events, if the person notifies the Commission within 15 days after the proclamation 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."

Special votes in terms of section 33(1)(a)

[27] Regulation 7 governs the special voting procedure that may, on application by those who are physically infirm, disabled or pregnant, be afforded. The procedure requires two voting officers to visit the voter at an address specified by the voter within the voting district in which he or she is registered.[25] The voting officers provide the voter with a voting paper which the voter then marks in secrecy and places in an envelope, which is in turn placed in another sealed envelope and returned to the presiding officer of the relevant voting district.[26]

[24] Above n 1.

[25] Regulation 7(5) of the Election Regulations provides for the voting officers to visit the voter "at an address within the voting district, specified in the application" for the special vote. Regulation 8 provides for a similar voting procedure for a physically infirm, disabled or pregnant voter who wishes to vote at an address in a voting district, which is not the voting district in which he or she is registered.

[26] Election Regulations, regulation 7(6).

Special votes in terms of section 33(1)(b)

[28] Regulation 9 governs the special voting procedure for voters who are, in terms of section 33(1)(b), absent from the Republic on government service. It again provides that the voter must make an application for a special vote to a special voting officer at the South African embassy, high commission or consulate on the dates specified in the election timetable. On the same day, the voter is then afforded an opportunity to vote. It should be noted that voters who fall within the terms of section 33(1)(b) may vote in both national and provincial elections – this is a matter to which I shall return later.

[29] Once the special votes have been received, the special voting officer will package and seal the votes and return them to the Chief Electoral Officer. The votes are then distributed to the presiding officers of the voting districts in which the voters are registered. In this regard, it should be noted that in terms of the Electoral Act, the ordinary residence of section 33(1)(b) voters for determining their voting district is the "head office in the Republic" of the government department for which the voter works.[27] This deeming provision also relates to all the members of the section 33(1)(b) voter's household.

Special votes in terms of section 33(1)(c) and (d)

[27] Electoral Act, section 7(2).

[30] Regulation 10 regulates the procedure for special votes for election officers and those on duty as members of the security services on polling day. It provides that application is to be made to the presiding officer for the voting district in which the voter is registered on times and dates to be specified in the election timetable. If the application is granted, the voter is permitted to vote there and then. The ballot paper is placed in an unmarked envelope and then sealed in another envelope and securely kept by the presiding officer until polling day.

Special votes in terms of section 33(1)(e)

[31] Regulations 11, 12 and 13 govern the procedure for special votes accorded to those voters who will be absent from the Republic on polling day. The voter must, within 15 days of the proclamation of the election date, give notice to the Chief Electoral Officer of his or her intention to apply for a special vote and the place where he or she intends to do so.[28] Regulation 11(3) provides that a voter may apply to vote at any South African embassy, high commission or consulate or at the office of the presiding officer of the voting station at which she or he is a registered voter, on the dates and times specified in the election timetable.

[32] Upon receipt of notification that a voter intends to apply for a special vote abroad, the Chief Electoral Officer will inform the head of the embassy, high commission or consulate abroad of the voter's intention.[29] On the date specified in the election timetable, the voter will then apply to the special voting officer at the relevant

[28] This time period is specified in section 33(1)(e) of the Electoral Act itself.

[29] Election Regulations, regulation 11(4)(a).

embassy, high commission or consulate.[30] If the application is approved, the voter will then be permitted to vote there and then but only in elections for the National Assembly, not for a provincial legislature. The voter will mark the ballot paper and place it in a sealed unmarked envelope.[31]

[33] The special voting officer will then place the unmarked envelope in another envelope marked with the applicant's name, identity number and voting district number.[32] All the marked envelopes will then be packaged together and sealed and returned to the Chief Electoral Officer who keeps them until polling day when they are counted.[33]

[34] Regulation 13 provides for voters contemplated in section 33(1)(e) to cast a special vote before proceeding abroad. A voter who wishes to do so should inform the Chief Electoral Officer of this within 15 days of the proclamation of the election date, just as if the voter wishes to vote abroad.[34] The Chief Electoral Officer will then inform the presiding officer of the voting district for which the voter is registered.[35] On the date specified in the election timetable, the voter must then make application to the presiding officer for the voting district in which he or she is registered.[36] If the application is granted, the applicant will be permitted to vote for both the national and

[30] Id at regulation 12(1).

[31] Id at regulation 12(5).

[32] Id at regulation 12(5).

[33] Id at regulation 12(6) and (7).

[34] Id at regulation 11(1).

[35] Id at regulation 11(4)(b).

[36] Id at regulation 13(1).

provincial elections[37] there and then and the vote will then be sealed, kept and counted with the other votes cast on polling day.[38]

[35] Regulation 14 then provides for the procedures for the counting of special votes.

Proceedings in the High Court

[36] In the High Court in Pretoria, the applicant's argument was that section 33(1)(e) and certain of the regulations promulgated under the Electoral Act infringe the right to vote of those South Africans who are registered as voters but who will not be in the country on polling day.[39] By restricting the classes of absent voters, those voters who do not fall within the prescribed classes are deprived of the right. This deprivation, the applicant argued, is an unjustifiable limitation of the right to vote.

[37] As mentioned above, the High Court proceedings were launched on 26 January 2009, a day before the application for direct access was launched in this Court. In the notice of motion in the High Court, the applicant gave the respondents only two days (till 28 January) to lodge their answering affidavits. Again as mentioned above, this Court gave directions on 30 January in the application for direct access calling on the respondents to lodge answering affidavits by 9 February, and the applicant to lodge an affidavit describing developments in the High Court by the same date.

[37] Id at regulation 13(4).

[38] Id at regulation 13(5) and (6).

[39] The applicant also argued that the section infringed the rights to dignity and equality

[38] The Minister lodged an answering affidavit in the High Court on 3 February, the day the matter was heard. The Minister complained that the time afforded for the lodging of answering affidavits was "wholly inadequate" given the issues raised by the application. She also opposed the relief on several bases: that the matter was not urgent; that the proceedings were flawed given the concurrent application for direct access in this Court; and that the proceedings were misconceived because the applicant should first have waited for the election to be proclaimed and then applied for a special vote in terms of the regulations and if the special vote was refused, have sought a review of that decision.

[39] The time afforded the Minister and the Electoral Commission to respond to the application in the High Court was, indeed, inadequate. Where a litigant challenges the constitutionality of an Act of Parliament, it is important that the Minister responsible for the administration of that legislation be given a fair opportunity to respond to the challenge. This flows not only from the principle of fairness that should apply in all civil litigation and the useful information that may be so tendered,[40] but also from the respect that courts owe to the other branches of government. Of course, in determining the time that should be afforded respondents in a constitutional challenge, urgency will be a relevant consideration. In this case, it may well be that the High Court thought it needed to proceed urgently in the light of the directions issued by the Chief Justice on 30 January. Whether that is so, is not clear from the judgment. In

[40] See section 34 of the Constitution.

any event, in this Court, both the Minister and the Electoral Commission were given a further opportunity to lodge answering affidavits. The Minister lodged an answering affidavit in the direct access applications, but in the confirmation proceedings chose not to tender any further evidence. Nothing further need be said on this score.

[40] I pause now to consider the third argument raised by the Minister in the High Court. The proposition was that the application was not urgent because the applicant should have waited, applied for a special vote at the appropriate time and, when refused, sought to review the decision. I need immediately to say that this argument is misconceived for two reasons. The first is that the route proposed by the Minister would not provide appropriate relief to an aggrieved voter. It is clear from both section 33(1)(e) and regulations 11 to 13, that the decision to grant a special vote is made on the date allocated for special votes. Should that decision be reviewable, there would be no opportunity for effective relief to be obtained before the elections are held. It cannot be right, therefore, that a voter who has a reasonable apprehension that his or her right to vote will be infringed must wait till it actually is infringed to raise a challenge.[41] Indeed, section 38 of the Constitution makes plain that a person who fears that their rights are threatened may seek appropriate relief and does not have to wait till the infringement occurs.

[41] See *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 125 (per O'Regan J in dissent, but not on this point).

[41] The second is that the core of the complaint relates to the electoral scheme and not to the conduct of the Chief Electoral Officer. The applicant cannot be deprived of the right to challenge the constitutionality of the electoral scheme by requiring the applicant to exhaust other remedies before mounting a constitutional challenge. The Minister's argument was not pressed in this Court and I need say nothing further about it.

[42] The Electoral Commission lodged an affidavit in the High Court proceedings on 2 February 2009 in which it made clear that it would abide the decision of the High Court. Nevertheless the Commission sought a stay of the matter pending the decision by this Court on the direct access application, and, in the alternative, a postponement of the hearing of the High Court matter to afford the Commission an opportunity to provide the High Court with an explanatory affidavit setting out information relevant to the application and the relief sought by the applicant. The Electoral Commission did note that, in its view, Mr Richter was not entitled to a special vote in terms of section 33(1). The third respondent lodged a notice stating that it would abide the High Court decision.

[43] After hearing argument on 3 February, the High Court handed down judgment on 9 February. Noting that the election would be held before 12 July 2009, and that there was speculation that the polling day would be between 25 March and 6 May, Ebersohn AJ concluded that the matter was urgent.[42]

[42] *Richter* above n 2 at paras 24-7.

[44] The High Court then decided that, in restricting the classes of voters who will be afforded a special vote because they are absent from the country on polling day, section 33(1)(e) limits the right to vote. The High Court reasoned that any limitation of this right must be supported by clear and convincing reasons.[43] The High Court also noted that section 33(1)(b) of the Electoral Act permits citizens abroad on government service to vote. The Court considered this to create a "privileged group of citizens"[44] that constituted an unacceptable form of discrimination[45] in breach of section 9 of the Constitution.

[45] The High Court noted that the only explanation tendered on behalf of the respondents to justify the provisions related to the need to protect the integrity of the polling process and the financial and logistical strains that permitting a broader class of absentee voters to vote would entail.[46] However, the Court reasoned that given that those on government service would be permitted to vote at embassies, high commissions and consulates, the only additional cost would be the ferrying of additional ballot papers to and from these places. This, the Court decided, would not constitute an undue burden on the state's resources. The Court therefore concluded that the provisions constituted unfair discrimination and had to be declared inconsistent with the Constitution.

[43] Id at para 36.

[44] Id at para 60.

[45] Id at para 61.

[46] Id at para 77.

[46] The Court thus made an order granting the relief sought in paragraphs 1, 2, 2.1, 2.2, 2.3, 3, 4, 5, 6, 6.1, 6.2, 6.3, 6.4, 6.5 and 6.7 of the applicant's notice of motion and referring the matter to this Court for confirmation. The Court also ordered the Minister for Home Affairs to pay the applicant's costs including the costs of two counsel. The relevant paragraphs of the notice of motion are 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, are 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 arise 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, 73 of 1998, as follows:

6.1 By deleting Regulation 6(b) in totality;

6.2 By deleting the words:

6.2.1 'temporary'

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."

[47] The High Court thus ordered that the following provisions were inconsistent with the Constitution and therefore invalid:

- section 33(1)(b);
- the words "temporary", "intended" and "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 section 33(1)(e);

- Regulation 6(1)(b) which refers to section 33(1)(b) voters;
- the words "temporary", "intended" and "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 regulation 6(1)(e) which refers to section 33(1)(e) voters;
- Regulation 9;
- the words "temporary" and "intended" in regulation 11; and
- the words "temporary" and "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 regulation 12.

Proceedings in this Court

[48] The applicant now seeks confirmation of the order in this Court. The application is supported by the amici curiae, Afriforum and the Freedom Front Plus, as well as the intervening parties, the Democratic Alliance, Mr Tipper and the Inkatha Freedom Party. The primary issue before the Court is whether the High Court order should be confirmed.

[49] There are two related issues raised by the Democratic Alliance which need now briefly to be described. Both are based on a comparison between the manner in which the Election Regulations provide for section 33(1)(b) voters and the manner in which they provide for section 33(1)(e) voters. The first relates to the 15-day time limit for notifying the Chief Electoral Officer of an intention to apply for a special vote; and

the second relates to the rule that section 33(1)(e) voters are permitted to vote only in national elections, not provincial elections.

[50] The issues to be considered are therefore the following:

(a) To the extent that section 33(1)(e) of the Electoral Act restricts the classes of voters who, due to absence from the Republic on polling day, may apply for a special vote, is it inconsistent with the Constitution?

(b) To the extent that section 33(1)(e) requires voters to notify the Chief Electoral Officer within 15 days of the proclamation of the election of their intention to apply for a special vote, and affords no power of condonation to the Chief Electoral Officer, is it inconsistent with the Constitution?

(c) To the extent that regulation 12(4) permits voters afforded a special vote within the meaning of section 33(1)(e) to vote only in national and not provincial elections, is it inconsistent with the Constitution?

(d) If section 33(1)(e) is inconsistent with the Constitution for the reasons given in paragraph (a), are regulations 6, 11, 12 and 13, which are based on the provisions of section 33(1)(e) inconsistent with the Constitution for the same reason?

(e) What remedy, if any, should this Court order, which includes the question whether the relief granted by the High Court in terms of paragraphs 3, 4 and 5 of the notice of motion in the High Court should be confirmed?

(f) The appropriate order of costs to be made.

[51] Before dealing with each of these issues, it will be helpful to set out briefly the key constitutional principles relating to the right to vote.

The importance of the right to vote in our constitutional democracy

[52] On a number of previous occasions, this Court has had to consider the importance of the right to vote in our constitutional democracy.[47] Memorably, in *August v Electoral Commission*, Sachs J declared that the vote of each and every citizen is a "badge of dignity and personhood. Quite literally, it says that everybody counts."[48] The precious value of the vote in South Africa arises in no small measure from a history in which the right to vote was denied to the majority of our citizens. Sachs J went on to note that in a country of great inequality such as South Africa, the right to vote declares that we all belong to the same nation and that "our destinies are intertwined in a single interactive polity."[49]

[53] The right to vote is symbolic of our citizenship, as Sachs J declared. In entrenching the right of *every citizen* to vote, section 19 of our Constitution affirms

[47] *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC); *New National Party* above n 41; *Democratic Party v Minister of Home Affairs and Another* [1999] ZACC 4; 1999 (3) SA 254 (CC); 1999 (6) BCLR 607 (CC); *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

[48] *August* above n 47 at para 17.

[49] Id.

that symbolic value.[50] But the right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.

[54] Unlike many other civil and political guarantees, as this Court has remarked on previous occasions,[51] the right to vote imposes an obligation upon the state not merely

[50] Section 19 of the Constitution provides:

> "(1) Every citizen is free to make political choices, which includes the right—
> (a) to form a political party;
> (b) to participate freely in the activities of, or recruit members for, a political party; and
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (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."

[51] See *New National Party* above n 41 at paras 13-4 (per Yacoob J); *August* above n 47 at para 16 (per Sachs J); and *NICRO* above n 47 at para 28 (per Chaskalson CJ).

to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised. The right to vote necessitates an electoral system and the calling of elections. Running an election is a difficult task which calls for expertise and dedication. Section 190 of the Constitution recognises the need for an organisation to take responsibility for elections. It provides for an Electoral Commission which will manage elections, ensure that they are free and fair, and declare the result in a time to be provided for in national legislation that is "as short as reasonably possible."[52] As a nation, we have been fortunate indeed to have been served by an Electoral Commission which has taken this task seriously and developed an expertise and dedication to its task.

[55] In designing and establishing an electoral system, one of the crucial considerations is the need to foster enfranchisement. The electoral system should recognise that the right to vote has both symbolic and democratic value and that wherever possible the participation of citizens should be encouraged. There are of course other important constitutional considerations relevant to the design of an electoral system. Amongst them is the need to ensure that the election process will be free and fair[53] and that the results will be both credible and accurate.

[56] Just as the state bears a responsibility to take positive steps to enable elections to take place, the right to vote itself cannot be exercised by a citizen unless he or she takes the trouble to exercise it. The very process of regulating the elections which

[52] Section 190(1)(c) of the Constitution.

[53] Section 190(1)(b) of the Constitution.

requires the composition of a national voters' roll, the establishment of voting stations and voting times will impose burdens upon members of the public who wish to exercise their right to vote. First, they will have to register in good time. Then, on polling day, they may have to journey some distance to a voting station; they will have to be in possession of a bar-coded identity document; and they may have to stand in a long queue to vote. These burdens are largely unavoidable.

[57] In assessing whether the restrictions or burdens placed on a voter who wishes to exercise his or her right to vote are inconsistent with the constitutional protection of the right to vote, a court will accept that a voter may not complain if the burden imposed does not prevent the voter from voting, as long as the voter takes reasonable steps to do so. As the majority in this Court noted in *New National Party*:[54]

> "Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. 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."[55]

[58] In approaching each of the provisions in question in this case, therefore, I would suggest that to determine whether any provision constitutes an infringement of section 19 of the Constitution, we must establish whether the consequence of any of the challenged provisions is such that, were a voter to take reasonable steps to seek to

[54] Above n 41.

[55] Id at para 23.

exercise his or her right to vote, any of the provisions would prevent the voter from doing so. In determining what would constitute reasonable steps for the voter to take, we should bear in mind both the fact that the process of voting inevitably imposes burdens upon a citizen as well as the important democratic value of fostering participation in elections that I discussed above. Should it be found that the provision would prevent a voter from voting despite the voter's taking reasonable steps to do so, the provision will constitute an infringement of section 19. The next question that will arise is whether the infringement is justifiable in terms of section 36 of the Constitution.

[59] With this prelude, I turn now to consider each of the constitutional questions raised.

Section 33(1)(e) – the classes of absentee voters permitted a special vote

[60] Section 33(1)(e) provides that a registered voter who is unable to vote in his or her voting district on polling day must be allowed a special vote if the inability to vote is due to "temporary absence from the Republic for purposes of a holiday, a business trip, the attendance of a tertiary institution or an educational visit or participation in an international sports event."

[61] Counsel for the Minister argued that the classes identified in section 33(1)(e) were capable of being interpreted sufficiently broadly to include any citizen who is registered as a voter, and who is out of the country on polling day for whatever reason,

as long as he or she remains ordinarily resident in the country within the meaning of section 7 of the Electoral Act. Counsel argued that as section 2 of the Electoral Act requires the provisions of the Act to be interpreted in the light of the Constitution, it would be appropriate to read section 33(1)(e) to enhance enfranchisement in this way.

[62] There are two related difficulties with this argument. The first is that a court may only attribute a meaning to a provision which it is reasonably capable of bearing. As Langa CJ stated in *Hyundai*, "such an interpretation should not, however, be unduly strained."[56]

[63] To read section 33(1)(e) in the manner proposed would, in my view, unduly strain the text. The text lists classes of voters who are entitled to special votes. Those classes of voters are those who are absent because they are on a holiday, a business trip, attending a tertiary institution or on an educational visit or participating in an international sports event. On an ordinary reading of these categories, it is not possible to say that a person such as Mr Richter falls within them. Mr Richter is a teacher working on contract in an English school. He is certainly not on holiday. Nor is he on a business or educational trip or visit. Nor is he attending a tertiary institution. And he is not participating in an international sports event. It is not surprising then that the Electoral Commission concluded, as it confirmed in its affidavit before the High Court, that Mr Richter did not qualify for a special vote in

[56] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

terms of section 33(1)(e) and that it considered itself to be bound by the provision.[57] The meaning of section 33(1)(e) is clear: it sets a range of relatively clear categories within which a voter must fall to qualify for a special vote. It is not a provision which generally permits those absent from the Republic on voting day for whatever reason to a special vote.

[64] The second difficulty, driving the conclusion that the language of section 33(1)(e) is not reasonably capable of the meaning counsel wishes to attribute to it, arises from the principle that a law that regulates a fundamental right should be expressed in a manner which will enable citizens to determine with relative clarity what rights they have and do not have. Section 33(1)(e) on its ordinary reading identifies groups of people who have a right to a special vote. Were this Court to attribute an extended meaning to section 33(1)(e) in order to render it consistent with the Constitution, the section would continue to misinform those voters (probably very many of them) who remain in ignorance of this Court's judgment. A corollary of this principle is the following. Given that section 33(1)(e) requires the Chief Electoral Officer and voting officials to determine whether a voter who seeks to come within its ambit does so, it is important that as far as possible its meaning be clear. Were this not to be the case, similarly situated voters might be treated differently by different voting officers because the language of section 33(1)(e) would not provide accurate guidance to them in determining whether a voter did fall within the terms of the subsection.

[57] *Richter* above n 2 at paras 19-20.

[65] It is clear from the applications before us that there are many registered voters who will be absent from the Republic on polling day for reasons other than those mentioned in section 33(1)(e). Mr Richter is one. He is 27 years old, trained as a teacher at the University of the North-West and graduated at the end of 2006. He is registered as a voter and voted in the 2004 elections. He has since spent two years in the United Kingdom teaching on contract and he intends to return at the end of this year. As someone who is working abroad, he falls outside the categories mentioned in section 33(1)(e), yet he has not permanently left the country.

[66] Mr Tipper, the second intervening party, is another. He is a 47-year old registered voter who has voted in every national election since 1994. He is currently working as a teacher in South Korea on a year-long contract which began in April 2008. He considers himself to be a resident of South Africa who is abroad working. He too does not fall within the classes of voters permitted a special vote by section 33(1)(e).

[67] The application of Mr Kwame Moloko and eleven others argued at the same time as the Richter application gives further examples of ten other South Africans who are registered as voters who will be absent from the country on 22 April and who will not be afforded a special vote. Mr Moloko, the first applicant in that matter, is a 30-year old registered voter who is working as a financial adviser for an international accounting firm in Vancouver, Canada. He states that he intends to return to South

Africa once he has gained work experience and that he intends to raise his children in South Africa. He voted in the national elections in 1999 and 2004 but, again because he does not fall within the terms of section 33(1)(e), he will not be able to vote in 2009. His wife, Mrs Lebohang Moloko, a 30-year old South African, is in the same predicament as are eight of the other applicants in the Moloko application.

[68] Apart from travelling back to South Africa from the United Kingdom, South Korea and Canada in order to be present in South Africa on polling day 2009, there are no steps that Mr Richter, Mr Tipper or Mr and Mrs Moloko can take to vote in the 2009 elections. Can it be said that in requiring them to return home to South Africa to vote, the election regulations are imposing an obligation of reasonable compliance upon them? I do not think so. It is acceptable to ask voters to travel some distances from their homes to a polling station. One cannot quibble, either, at the fact that delays in casting votes at a polling station may require voters to queue for considerable periods of time to vote. It cannot be said, however, that requiring a voter to travel thousands of kilometres across the globe to be in their voting district on voting day is exacting reasonable compliance from a voter. All the more so, given that section 33(1)(b) expressly does not require those working abroad on government service to return home to vote, but provides voting facilities for them at embassies, high commissions and consulates.

[69] In reaching this conclusion, I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South

African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit.

[70] I conclude therefore that section 33(1)(e) constitutes a limitation of section 19 of the Constitution by restricting the classes of voters who are absent from the Republic on polling day from participating in elections.

[71] The next question that arises is whether the limitation occasioned by section 33(1)(e) is reasonable and justifiable within the meaning of section 36 of the Constitution.[58] In determining this question, it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the

[58] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose.[59]

[72] The main thrust of both written and oral argument for the Minister in relation to justification addressed the question whether citizens absent from the country should be permitted to register to vote at foreign missions. This question does not arise in this case. There is nothing to be found either in the affidavit lodged by the Minister in the High Court, the affidavit opposing direct access to this Court or in the written argument submitted to this Court to constitute justification of the restrictive classes contained in section 33(1)(e). Indeed, during oral argument, counsel for the Minister conceded that restricting the class of registered voters who are abroad on polling day to obtain special votes was a limitation of section 19 of the Constitution and that he could proffer no justification for the limitation.

[73] In this regard, it should be noted that in its affidavit lodged in the High Court, the Ministry of Home Affairs stated that time was needed to respond to the applicant's challenge to section 33(1) of the Electoral Act. It was stated that time was needed in particular to deal with the question of the practicability of extending the categories of persons provided for in section 33. Despite the fact that over a month elapsed between the date on which the answering affidavit was lodged in the High Court and the date on which this Court heard the application, no further answering affidavit was filed.

[59] See *S v Manamela and Another* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 34 and 66. See also *NICRO* above n 47 at para 37.

[74] I should add for the sake of completeness that the record includes the affidavit lodged on behalf of the Minister in the Democratic Alliance matter in the High Court in Cape Town. In that affidavit, which is in similar terms to the affidavit lodged in this Court to oppose direct access, the deponent on behalf of the Minister points merely to the perceived difficulty that there would always be more categories that can be added to those provided in section 33(1)(e). Clearly this is correct, but no cogent reason is given for preventing any citizen from voting who wishes to vote in the election, is a registered voter and who makes the effort to make the necessary arrangements provided for in regulations 11 to 13.

[75] On the other hand, the Electoral Commission both in its affidavit before the High Court in Pretoria, and again in the affidavit lodged in this Court, took the position that if ordered to do so it would facilitate voting overseas by voters similarly situated to the applicant. It did not oppose relief in this regard. During oral argument, counsel for the Commission informed this Court that as long the Commission received the notifications contemplated in section 33(1)(e) and regulation 11 by the "end of the month", the integrity of the election would not be threatened.

[76] In deciding whether the limitation of section 19 occasioned by the under-inclusiveness of section 33(1)(e) is reasonable and justifiable, it is relevant to note that in addition to those voters who fall within the categories listed in section 33(1)(e), all

citizens in government service abroad and the members of their households are also permitted to vote abroad.[60]

[77] It is also important to bear in mind that in many other open and democratic societies, facilities are afforded to citizens who will be abroad on polling day. A useful survey of the electoral regulations of 214 countries and territories, compiled by the International Institute for Democracy and Electoral Assistance (IDEA), a non-governmental organisation based in Sweden whose objective is to facilitate democratic elections, was furnished to the Court.[61] That survey suggests that of the 214 countries and territories reviewed, 115 make provision for voting by absent voters. Only 14 of the 115 countries or territories restricted the entitlement to vote on the basis of the activity undertaken abroad by the absent voters.

[78] In the light of the above, I conclude that the limitation of the right to vote occasioned by section 33(1)(e) of the Electoral Act cannot be saved by section 36 of the Constitution. Government has not sought to point to any legitimate government purpose served by restricting the categories of registered voters who qualify for a special vote, and I can think of none. This conclusion renders it unnecessary to consider whether the High Court was correct when it concluded that section 33(1)(e) constituted unfair discrimination and/or arbitrary differentiation. I do not consider this matter further.

[60] Section 33(1)(b) of the Electoral Act.

[61] Ellis et al *Voting from Abroad: The International IDEA Handbook* (Stockholm, 2007). See generally 11-20.

[79] It will be necessary to consider the relief that should flow from this conclusion in a moment. First, I turn to consider the two arguments made by the Democratic Alliance: the first relating to the 15-day time limit provided in section 33(1)(e) and the second relating to provincial votes.

The 15-day time limit in section 33(1)(e)

[80] Section 33(1)(e) requires voters who wish to apply for a special vote to notify the Chief Electoral Officer of their intention with 15 days of the date of the proclamation of the election. Counsel for the Democratic Alliance argued that the 15-day period infringed section 19 of the Constitution. His argument was that the time period was a rigid one and did not afford the Chief Electoral Officer the power to condone a failure to comply with that time limit. This was one of the aspects of the relief opposed by the Electoral Commission.

[81] In my view, this argument must fail. It cannot be said that requiring voters who seek special votes in terms of section 33(1)(e) to notify the Chief Electoral Officer of that fact within 15 days of the date of proclamation of the election is to ask too much of a voter. In this regard, it should be noted that in addition to being annexed to the Election Regulations, the necessary forms are available on the Electoral Commission's website[62] and the duly completed forms may be submitted by post or fax.

[62] http://www.elections.org.za.

[82] Being notified of the number of voters who intend to apply for special votes enables the Electoral Commission to make the necessary arrangements to ensure that sufficient ballot papers are furnished to each embassy, high commission and consulate. Such notice also allows the Commission to ensure that an adequate number of voting officers are appointed to ensure that the casting of votes runs smoothly and to make adequate arrangements for counting.

[83] Were a discretion afforded to the Chief Electoral Officer (as counsel for the Democratic Alliance argued) to condone non-compliance with the 15-day period, the administrative burden placed on the Chief Electoral Officer might well be unbearable. It would raise the real prospect of administrative reviews of the decisions of the Chief Electoral Officer which would inevitably hamper the efficient performance of her duties. It is true that there may be voters who, for whatever reason, fail to notify the Chief Electoral Officer in time, just as there may well be voters who, due to accident or other misfortune, may not arrive at a voting station until after closing time and be denied the right to vote. Given the nature of elections, it is not possible to accommodate misfortunes of this kind. Were we to require the Electoral Act to do so, the work of the Electoral Commission would be undermined.

[84] This argument must therefore fail.

The right to vote in provincial elections

[85] The next question that arises is whether regulation 12(4), which provides that a voter afforded a special vote to vote abroad in terms of section 33(1)(e) of the Act may vote only in national elections and not in provincial elections, is unconstitutional. This is in contrast to regulation 9(4) which provides, in effect, that those in government service may vote in both national and provincial elections.[63]

[86] In considering whether this is a limitation of the right to vote, it is important to note that voters who fall within section 33(1)(e) are afforded a choice. They may vote abroad at an embassy, high commission or consulate in terms of regulation 12, or they may choose to vote in South Africa in their voting district before they leave the country in terms of regulation 13. In both cases, they must notify the Chief Electoral Officer of their intention to do so.[64] If the voters choose to vote before they leave, then in terms of regulation 13(4), they may vote in both the national and provincial elections. Thus the bar to voting in provincial elections is not complete. A voter who is in the country at the time the election is proclaimed and who will still be here by the time that special voting in voting districts takes place will be able to vote both in the provincial and national elections.[65] A voter, however, who is already abroad at the time the election is proclaimed will not be afforded that opportunity.

[63] It may well be that such voters may also vote in local government elections. This matter does not arise in this case and therefore is not considered further.

[64] Regulation 11 of the Election Regulations.

[65] The timetable is published in GN 189 GG 31906 of 16 February 2009. In terms of the election timetable for 2009, it should be noted that special voting in voting districts takes place on two days only, 20 and 21 April 2009.

[87] In its affidavit, the Electoral Commission stated that it opposed relief granting provincial votes to those voting abroad in terms of regulation 12. The primary reason given for this by the Electoral Commission was that provincial votes would have to be counted in the voting district where the voter was registered; and that transporting provincial votes cast abroad to the 19 726 voting districts throughout the country would constitute a logistical burden on the Commission. The Commission points out that voters who qualify under section 33(1)(b) are deemed, in terms of section 7(2) of the Electoral Act, to be ordinarily resident in the voting district where the head office of the government department or institution for which they work is situated. As most if not all government departments have their head offices in Pretoria, the Commission says that dispersing the votes cast abroad of those on government service requires the provincial votes to be carried to one or two voting districts only.

[88] What was not clear from the submissions made on behalf of the Commission was why the votes had to be counted in the voting district in which the voter was registered. Section 33(2) of the Electoral Act confers a power upon the Electoral Commission to determine the procedures for the casting and counting of special votes. Moreover, section 76 of the Act grants wide powers to the Chief Electoral Officer to appoint counting officers for "each voting station and venue" where counting will take place.

[89] What is clear is that each special vote needs to be checked against the appropriate segment of the voters' roll before it is counted.[66] When each special vote is granted, it is recorded against the voters' roll and that must be checked when counting takes place. It is not clear why this cannot be done at a venue other than the voting station. The evidence tendered by the Commission shows that the special votes cast abroad in the national election are counted at one venue in Pretoria; and that the votes are tallied not only for the direct national list of 200 members of the National Assembly, but also used to determine the provincial proportional lists which determine the other 200 members of the National Assembly. However, it is not clear from the record before us how provincial votes cast in foreign missions would be counted in the 2009 election were this Court to order that such votes may be cast. It would not ordinarily be desirable so close to the election, to require the Commission to make urgent arrangements to provide for provincial voting abroad when the electoral scheme is not clear as to how those votes will be managed.

[90] Moreover, it appears from the affidavit lodged in this Court by Adv Tlakula, and from oral argument, that an important reason for the Commission's view lies in the fact that those who vote in voting districts other than those in which they are registered under section 24A on polling day may also not vote in provincial elections if the voting district in which they seek to vote is in a province different to the one in which they are registered. Adv Tlakula states that "[i]n the event that special votes and section 24A votes were, in all circumstances, to include the right to vote

[66] See regulation 14 of the Elections Regulations.

provincially, this would create very real logistical difficulties." This statement is made just after Adv Tlakula points out that in 2004, just under two million voters cast their votes in terms of section 24A.

[91] Counsel for both the Minister and the Commission were concerned that allowing section 33(1)(e) voters a provincial vote but not section 24A voters might be arbitrary and irrational and therefore infringe section 9 of the Constitution.[67] What is clear from this concern, is that the question whether voters granted special votes in terms of section 33(1)(e), read with regulation 12, should be permitted to vote provincially is a complex one. The practical implications of granting urgent relief now in relation to the 2009 elections are not clear from the record before us. Given that no satisfactory explanation has been given as to why this particular aspect has only been raised very late in the day in relation to legislation that has been on the statute books for years, and given that the provincial vote question raises complex constitutional issues for the first time in this Court, coupled with the potential for disruption to the elections, we do not think it is appropriate to order urgent relief which will affect the 2009 elections. The matter is raised in the proceedings pending before the High Court in Cape Town which have been stayed pending the outcome of this case. The Democratic Alliance and Mr Tipper would be entitled to pursue that matter once judgment has been handed down in this case should they wish to do so. Given that we are persuaded that it is not appropriate, in the light of the imminence of

[67] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

the 2009 elections, to grant the urgent relief sought by the Democratic Alliance and Mr Tipper, we need say nothing further about the matter.

Remedy

[92] I have reached the conclusion that section 33(1)(e) is inconsistent with the Constitution in that it deprives some registered voters who will be absent from the country on polling day of a special vote. The question that now arises is what order this Court should make.

[93] It is immediately clear that the High Court in Pretoria should not have declared section 33(1)(b) of the Electoral Act to be invalid and that order cannot be confirmed. The next question that arises is whether the severance ordered in relation to section 33(1)(e) is correct. There can be no doubt that it is necessary to sever the specific classes of voter from the section, so the High Court was correct to sever 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". The High Court also severed the word "temporary" from the section. In my view, this order is correct. If these words are severed, the section that will remain will read as follows:

> "(e) absence from the Republic, 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."

[94] The language of the section, thus rendered, will be easy to interpret and apply – an issue that was raised by the Electoral Commission in its comprehensive and helpful affidavit before this Court. The language of the section will now make clear that special votes should be accorded to any registered voter who will be absent from the Republic on polling day and who gives notice in the prescribed time to the Chief Electoral Officer. The High Court also severed the word "intended" from section 33(1)(e). No argument was addressed to the Court on this severance, and it does not seem to me to be one that is necessitated by the reasoning in this judgment. This severance is therefore not confirmed.

[95] This conclusion must now be applied to the Election Regulations promulgated under the Act. It follows that the High Court's declaration of invalidity in relation to regulation 6(1)(b) which relates to section 33(1)(b) voters cannot stand. Similarly, its declaration that regulation 9 was invalid cannot stand as that regulation, too, governs the procedure for special votes for section 33(1)(b) voters. Nothing in this judgment supports the High Court's conclusion that these provisions are invalid.

[96] On the other hand, the High Court's severance of the words "temporary" and "for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event" from regulation 6(e) should be confirmed, though its severance of the word "intended" from the same regulation cannot stand. Similarly, the High Court's severance in relation to regulations 11 and 12 should stand save for its decision to sever the word "intended"

from regulation 11. For consistency, the word "temporary" as well as 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" should also be severed from regulation 13, although the High Court did not make this order.

[97] The effect of these orders is that any registered voter who will not be in the country on polling day will be entitled to a special vote in terms of section 33(1)(e). However, the period for these voters to notify the Chief Electoral Officer of their intention to apply for a special vote and to indicate the place where they intend to apply has now elapsed. It elapsed on 27 February 2009, 15 days after the election was proclaimed.

[98] Counsel for the Minister and the Electoral Commission were asked during oral argument how this could be rectified. As mentioned above, counsel for the Commission, indicated that it would be possible for the Commission to accommodate special votes to be cast abroad as long as the Commission received notification from voters by "the end of the month". It seems to me that the just and equitable order to make for purposes of urgent relief in the imminent elections would be to issue an order stating that the period of 15 days contemplated in section 33(1)(e) of the Electoral Act shall commence to run on the date that this judgment is handed down. If this approach is adopted, those voters eligible for a special vote under section 33(1)(e) will get no more and no less time than is their due to give notice of their intention to apply for a special vote. As the judgment is handed down on 12 March, the 15 days

will expire on 27 March 2009. This remedy is least invasive of the scheme in the Act. Voters who wish to apply for special votes should therefore notify the Chief Electoral Officer of their intention to do so on the form provided for in the regulations and in the stipulated manner on or before 27 March.

[99] The final question that arises is whether this Court should confirm the orders sought in paragraphs 3, 4 and 5 of the applicant's notice of motion in the High Court.[68] It is against these orders that the Minister has sought leave to appeal.[69] That application should be granted. I will deal with each paragraph separately. In my view, the order granted by the High Court in terms of paragraph 3 of the applicant's notice of motion cannot be confirmed as it does not accord with the conclusions reached in this judgment. This judgment concludes that section 33(1)(e) is inconsistent with the Constitution on the ground that it unjustifiably infringes section 19. I do not conclude, as paragraph 3 states, that section 33(1)(e) is inconsistent with the Constitution as it constitutes "unequal treatment".

[100] Although the orders granted in terms of paragraphs 4 and 5 do accord with the reasoning in this judgment, I do not think it just and equitable that orders in these terms be made. In my view, the need to ensure that voters who will now qualify for a special vote in terms of section 33(1)(e) is adequately catered for by the proposed

[68] See [46] above where the prayers in the notice of motion are set out.

[69] The Minister also sought leave to appeal against the order of the High Court made in terms of paragraph 6 of the applicant's notice of motion. That paragraph sought to have the parts of the Election Regulations relevant to section 33(1)(e) of the Electoral Act invalidated. The order of the High Court in this regard has been upheld (see [97]-[98] above).

order discussed above.[70] The Chief Electoral Officer undertook in her affidavit which was confirmed in the written and oral submissions made on behalf of the Commission, that the Commission would take all steps necessary to comply with any order made by this Court. No further mandatory relief is therefore necessary.

Costs

[101] The ordinary rule in this Court is that a litigant, who has successfully vindicated constitutional rights against the state, should be awarded his or her costs. On that basis, the Minister who opposed the application should be ordered to pay the costs of Mr Richter in the High Court and this Court, such costs to include the costs of two counsel. I am not deterred from this conclusion by the fact that the Minister has succeeded in her application for leave to appeal, for that success is not substantial and relates to the proper form of the just and equitable order to be made by this Court. The Minister's application for leave to appeal and limited success in her appeal therefore had no material effect on the order made by the Court. The applicant has succeeded in all material respects and should therefore recover his costs in respect of that appeal. As the High Court has already ordered the Minister to pay the applicant's costs in that Court, it is not necessary for that order to be repeated in this Court.

[102] I have described above how Mr Richter launched a direct access application in this Court shortly after launching an application in the High Court. The direct access application was overtaken by events once the High Court made an order of

[70] At [95]-[98].

constitutional invalidity. It is necessary now to consider the appropriate order of costs that should be made in relation to that application.

[103] The Minister contended that she should be entitled to the costs she has incurred in connection with the application for direct access. In support of her contention she submitted that the application for direct access was not necessary as Mr Richter had already launched proceedings in the High Court and that Court was due to hear the matter in a relatively short space of time. The application has therefore caused her to incur unnecessary costs. These submissions are not without force.

[104] However, Mr Richter was entitled to approach this Court in order to vindicate his right to vote. Approaching this Court directly in the face of his application in the High Court may not have been advisable, but it cannot be said to have been vexatious. If anything, it was due to excessive caution in the light of the pending general elections. We consider that the just and fair order to make in these circumstances is that each party is to pay its own costs.

[105] The ordinary rule in this Court is that amici pay their own costs. There is no reason why that rule should not apply here as well. No order is therefore made in relation to the costs incurred by the amici curiae.

[106] Finally, the question arises as to the costs of the three intervening parties. The Democratic Alliance and Mr Tipper were the first to launch proceedings relating to

the constitutionality of section 33(1)(e). They did so in the High Court in Cape Town shortly before Mr Richter launched his application in Pretoria. That High Court application was overtaken by the order of invalidity made by the Pretoria High Court and was accordingly stayed by agreement between the parties. The result was that the Democratic Alliance and Mr Tipper sought leave to intervene as parties in this Court and were so admitted. Again, given that both the Democratic Alliance and Mr Tipper genuinely sought to vindicate constitutional rights against the Minister, the costs of their intervention in this Court should be paid by the Minister. The costs of the intervention in this Court shall include the costs of two counsel. We can make no order relating to the costs in the High Court in Cape Town. Those proceedings are not before us.

[107] The Inkatha Freedom Party is in a slightly different position. It has been admitted as a party in this Court having been previously admitted as amicus curiae in the Cape High Court in the litigation instituted by the Democratic Alliance and Mr Tipper. It did make a significant contribution in terms of both evidence tendered and argument submitted in relation to the issues before the Court. In the circumstances, and given that it has been admitted as a party in this Court, it should be awarded its costs in this Court. Thus the Minister will be ordered to pay the costs of the Inkatha Freedom Party in this Court, such costs to include the costs of two counsel. I should add, however, that it may not always be the case that a party who has been admitted as an amicus curiae in another court will, when that matter arrives at this Court, be admitted as a party rather than an amicus curiae.

[108] To recap, the effect of the order on the right to vote in the imminent elections will be as follows. All South African citizens who are registered voters and who will be abroad on polling day will be entitled to vote in the election for the National Assembly on 22 April 2009 provided they give notice of their intention to do so, in terms of the Election Regulations, on or before 27 March to the Chief Electoral Officer and identify the embassy, high commission or consulate where they intend to apply for the special vote.

Order

[109] The following order is made:

1. The application for direct access by the applicant in case CCT 03/09 is dismissed.
2. There is no order for costs in relation to the application dismissed in paragraph 1 of this order.
3. The applications of the first and second amici curiae to be admitted as amici curiae are granted.
4. The applications of the first, second and third intervening parties to intervene in these proceedings are granted.
5. The application by the Minister for Home Affairs for leave to appeal is granted.
6. The appeal of the Minister for Home Affairs succeeds in part and fails in part to the extent set out in this order.

7. Paragraph 1 of the order made by the High Court in Pretoria in case TPD 4044/09 is confirmed only to the extent set out in this order.

8. The words "temporary" and "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 section 33(1)(e) of the Electoral Act 73 of 1998 are declared to be inconsistent with the Constitution and invalid.

9. The words "temporary" and "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 regulation 6(e) of the Election Regulations, 2004 promulgated in terms of section 100 of the Electoral Act 73 of 1998 (published under GN R12 GG 25894 of 7 January 2004, as amended) are declared to be inconsistent with the Constitution and invalid.

10. The word "temporary" in the subtitle to regulation 11 of the Election Regulations, 2004 is declared to be inconsistent with the Constitution and invalid.

11. The word "temporary" as it appears in the subtitle to regulations 12 and 13 of the Election Regulations, 2004 is declared to be inconsistent with the Constitution and invalid.

12. The words "temporary" and "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 regulation 12(2) of the Election

Regulations, 2004 are declared to be inconsistent with the Constitution and invalid.

13. 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 regulation 13(2) of the Election Regulations, 2004 are declared to be inconsistent with the Constitution and invalid.

14. It is declared that any registered voter who, in terms of this order, qualifies for a special vote in terms of section 33(1)(e) of the Electoral Act 73 of 1998, may within fifteen (15) days of the date of this judgment notify the Chief Electoral Officer of his or her intention to apply for a special vote as contemplated in section 33(1)(e) of the Electoral Act 73 of 1998, read with regulation 11(1) of the Elections Regulations, 2004.

15. The Minister for Home Affairs is ordered to pay the costs of the applicant in this Court in relation to case CCT 09/09 (that is, the application for confirmation of the High Court order, the Minister's appeal against that order and application for leave to appeal), such costs to include the costs of two counsel.

16. The Minister for Home Affairs is ordered to pay the costs of the Democratic Alliance, Mr Roy Howard Tipper and the Inkatha Freedom Party in this Court in relation to their intervention in this Court in CCT

09/09, such costs in relation to each party to include the costs of two counsel.

17. Save for the orders in paragraphs 15 and 16, no other costs order is made.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Yacoob J concur in the judgment of O'Regan J.

For the applicant in CCT 03/09 and CCT 09/09:	Advocate Q Pelser SC and Advocate BS du Plessis instructed by Hurter & Spies Attorneys.
For the first respondent in CCT 03/09 and CCT 09/09:	Advocate PM Mtshaulana SC, Advocate H Maenetje and Advocate K Pillay instructed by the State Attorney.
For the second respondent in CCT 03/09 and CCT 09/09:	Advocate IAM Semenya SC, Advocate N Fourie and Advocate N Rajab-Budlender instructed by Bowman Gilfillan Inc.
For the first and second intervening parties:	Advocate S Rosenberg SC and Advocate A Katz instructed by Minde Schapiro & Smith.
For the third intervening party:	Advocate AM Stewart SC and Advocate M du Plessis instructed by Lourens de Klerk Attorneys.
For the first amicus curiae:	Advocate HP Higgins instructed by Nelson Borman & Partners Inc.
For the second amicus curiae:	Advocate Q Pelser SC and Advocate BS du Plessis instructed by Borman and Fen Incorporated.