CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 06/09
[2009] ZACC 4

THE APARTY	First Applicant
ANDREW PEPPERELL	Second Applicant
versus	
MINISTER FOR HOME AFFAIRS	First Respondent
ELECTORAL COMMISSION	Second Respondent
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Third Respondent

and

Case CCT 10/09

KWAME ONKGOPOTSE MOLOKO	First Applicant
LEBOHANG DUDUZILE MOLOKO	Second Applicant
ADRI RALL	Third Applicant
XOLANI BENSON XALA	Fourth Applicant
RESHMA INDERJEETH	Fifth Applicant
DALE MARC LUBBE	Sixth Applicant
KALIM MUHAMMAD RAJAB	Seventh Applicant
JACOBUS CILLIERS KRITZINGER	Eighth Applicant
HELENA ODENDAAL	Ninth Applicant
RUDI BASIL TALMAKKIES	Tenth Applicant

JOHANNA JACOBA MARAIS Eleventh Applicant

ALEXANDER ECKHARDT PAUW Twelfth Applicant

versus

MINISTER FOR HOME AFFAIRS First Respondent

ELECTORAL COMMISSION Second Respondent

Heard on : 4 March 2009

Decided on : 12 March 2009

JUDGMENT

NGCOBO J:

Introduction

[1] These two applications for direct access involve fundamental questions concerning the right of every citizen to vote in an election. At issue are matters of considerable importance concerning the right of those South African citizens who are abroad to register and vote in the upcoming fourth democratic elections. The elections are just over a month away. Ordinarily we would have preferred more time to consider these questions and formulate our views. Time is against us. Because of the urgency of the matter and its possible impact on the upcoming elections, there is a pressing need to announce our conclusions and basic reasoning within the shortest possible time

[2] There are two applications for direct access before us which were brought as a matter of urgency. They both concern the exclusion of certain categories of South African citizens who are living abroad, from voting. These applications for direct access are part of a flurry of applications that were brought in the various High Courts and in this Court as a matter of urgency. One came by way of an application for confirmation of an order of invalidity.[1] The others came by way of applications for intervention[2] and admissions as amici[3] in those confirmatory proceedings. The procedural history of these cases is set out in the judgment in *Richter v Minister for Home Affairs and Others* which is delivered contemporaneously with this judgment.[4] As these cases are concerned with the exclusion of South Africans who are abroad from voting, they were set down for hearing on 4 March 2009 and heard together. This judgment is concerned only with two of the applications for direct access. A separate judgment deals with the other cases.[5]

[3] These applications concern the exclusion of adult South African citizens who are abroad from voting. They concern both those South African citizens who are registered as voters and those who are not. Both cases involve challenges to sections 7, 8, 9, 60 and 33(1)(e) of the Electoral Act[6] as well as the regulations giving effect to

[1] *Richter v Minister for Home Affairs and Others* [2009] ZACC 3.

[2] The Democratic Alliance with Mr Tipper; and the Inkatha Freedom Party.

[3] Afriforum and the Freedom Front Plus.

[4] *Richter* above n 1.

[5] Id.

[6] Act 73 of 1998.

them. The applicants are seeking orders declaring these sections invalid so as to pave the way for them, and those who are in the same position, to cast their votes abroad in the 2009 election. But the hurdle they must surmount first is to make out a case for direct access to this Court.

[4] Before setting out the facts, it will be convenient to describe the constitutional and statutory context in which these applications for direct access are brought.

The constitutional context

[5] The foundational values of our constitutional democracy include "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[7] These values are given effect in section 19, which provides:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate 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."

[7] Section 1(d) of the Constitution.

[6] Parliament has the constitutional authority and duty to design an electoral scheme to regulate the exercise of the right to vote. This is apparent from sections 46(1),[8] 105(1)[9] and 157(5)[10] of the Constitution. In *New National Party*[11] this Court held:

> "The right to vote contemplated by section 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. The details of the system are left to Parliament. The national legislation which prescribes the electoral system is the Electoral Act. It repeats the requirements for voting as being South African citizenship, a minimum age of 18 years and enrolment on the national common voters roll. These are requirements set by the Constitution for the exercise of the franchise."[12] (Footnote omitted.)

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[8] Section 46(1) provides:

> "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."

[9] Section 105(1) provides:

> "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."

[10] Section 157(5) provides:

> "A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll."

[11] *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC).

[12] Id at para 14.

[7] The Electoral Act was enacted to give effect to the right to vote. It puts in place a scheme for the exercise of the right to vote. This electoral scheme involves compilation and maintenance of a common voters' roll;[13] registration of voters;[14] establishment of voting districts and voting stations[15] and management of elections.[16] A person must be registered as a voter in a voting district. A person who is not registered as a voter may not vote. Sections 5, 6, 7, 8, 9, 11 and 60 are intrinsic to this scheme because their combined effect is to restrict the registration as a voter to those South African citizens who are ordinarily resident in South Africa.

[8] Broadly speaking, the scheme designed by Parliament amounts to this: if you are a citizen who is in possession of a bar-coded identity document you may apply to be registered as a voter on the national voters' roll. Applications for registering as a voter are regulated by the Voter Registration Regulations, 1998 (the Voter Registration Regulations.)[17] You may do this at any of the 302 offices of the Electoral Commission (the Commission) which are located throughout the country. These offices are open throughout the year: the Commission tells us they have existed since 1998. Once you are registered, your name is entered in the voters' roll for the district in which you are ordinarily resident. If you should wish to change your place of ordinary residence, you may apply to do so and have the change recorded in the

[13] Section 5 of the Electoral Act provides:

> "The chief electoral officer must compile and maintain a national common voters' roll."

[14] Id at sections 6-8.

[15] Id at sections 60-7.

[16] Id at chapter 4.

[17] Promulgated under section 100 of the Electoral Act and published in GN R1340 GG 19388 of 16 October, 1998 as amended.

voters' roll. For the 2009 elections we are told that there are 23 112 936 voters who are registered.

[9] Once you are so registered, you may vote only at the voting station in the voting district for which you are registered.[18] However, if you cannot vote in the voting district for which you are registered on the date of the election, you may apply to the presiding officer of the voting station in another district to vote in that district.[19] If you vote in another district, you may vote only in the national elections unless the voting district in which you seek to vote is in the same province in which you are registered. If you happen to fall into any of the categories of persons mentioned in section 33(1) of the Electoral Act, you may apply for a special vote. These categories include South African citizens who are outside the country. But it is restricted to the categories specified in the section.

[10] What emerges from the electoral scheme designed by Parliament is this: the scheme requires a voter to vote in the voting district for which he or she is registered.[20] The scheme, however, recognises two exceptions to this requirement. The first relates to a situation where a voter cannot vote in his or her voting district on election day. A voter may, on application to the presiding officer of a voting station in another district, be permitted to vote in that voting district. If this voting district happens to be outside the province in which the person is registered, the voter may

[18] Electoral Act, section 33(1).

[19] Id at section 24A.

[20] Id at section 38.

vote in the national elections only. Otherwise he or she may vote in both the national and provincial elections. Section 24A regulates this procedure.

[11] The second exception is for a voter who cannot vote at a voting station in the district in which the person is registered as a voter (the special vote exception). This exception is governed by section 33 of the Electoral Act. This section sets out the categories of voters who may apply for a special vote under it. These categories include people who are "physically infirm, disabled or pregnant";[21] those who are absent from the country on government service and their families;[22] those serving as officers in the elections;[23] those on duty as members of the security services in connection with the elections;[24] and those who are abroad on holiday, a business trip, attending tertiary institutions or on educational visits or participating in international sports.[25] These cases are concerned with this last category.

[12] Chapter 3 of the Election Regulations, 2004 (the Election Regulations) governs special votes.[26] The regulations set out the categories of people who may apply for a special vote and, in regulation 6(e), repeat section 33(1)(e). Regulations 11, 12 and 13 govern the procedure in applying for and casting a special vote. They provide the

[21] Id at section 33(1)(a).

[22] Id at section 33(1)(b).

[23] Id at section 33(1)(c).

[24] Id at section 33(1)(d).

[25] Id at section 33(1)(e).

[26] These regulations were promulgated in terms of section 100 of the Electoral Act and they are 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.

places where a voter may vote abroad (at any South African embassy, high commission or consulate.)[27] A person who has applied for a special vote may cast his or her vote before proceeding abroad. A voter who casts his or her special vote before proceeding abroad may vote in both the national and provincial elections. However, a person who is casting a special vote abroad under this provision may vote only in the national elections.[28]

[13] Against this background I now turn to the facts.

The AParty and Another v Minister for Home Affairs and Others CCT 06/09

[14] On 5 February 2009 the AParty and Mr Andrew Pepperell, the first and the second applicants respectively, launched an urgent application for direct access to this Court. The respondents are the Minister for Home Affairs (the Minister) and the Commission. The applicants seek an order declaring sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1) of the Electoral Act unconstitutional and invalid to the extent that they preclude South African citizens not ordinarily resident in South Africa from registering as voters in terms of the Electoral Act. They also challenge section 33(1) of the Electoral Act insofar as it makes no provision for South African citizens who are not ordinarily resident in the Republic who wish to apply for a special vote.

[15] In the alternative they are seeking an order declaring section 33(1)(e) of the Electoral Act unconstitutional to the extent that it infringes the right to vote of South

[27] Id at regulation 11(3).

[28] Id at regulation 12(4).

African citizens who are not present in the Republic of South Africa on polling day. In addition to these statutory provisions, they are also challenging regulations 2 (voter registration) and 11 (registration in voting district) of the Voter Registration Regulations[29] and regulations 12 (voting abroad), 13 (casting a special vote before proceeding abroad) and 17 (voting where a voter is not registered) of the Election Regulations.[30] They contend that the challenged provisions are inconsistent with sections 1(d),[31] 3(2)(a),[32] 9,[33] 10[34] and 19(3)(a)[35] of the Constitution. The AParty did not seek urgent relief requiring the Commission to register voters abroad for the

[29] Above n 17.

[30] Above n 26.

[31] Section 1(d) provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[32] Section 3(2)(a) provides:

> "All citizens are—
>
> (a) equally entitled to the rights, privileges and benefits of citizenship".

[33] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[34] Section 10 provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[35] Section 19(3)(a) provides:

> "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".

imminent elections. Although they sought an order of invalidity in relation to these provisions, they proposed that the order be suspended to afford Parliament the opportunity to rectify the matter.

[16] The AParty is a registered political party which was recently established to contest the 2009 general elections. Mr Pepperell is a South African citizen currently living in Dubai. He has been living in Dubai since March 2004 and intends returning to South Africa in about two years time. He is a registered voter and his voting district is in Somerset West. He has been a registered voter since 1994 and last cast his vote in the 1999 general elections. He wished to vote in 2004 but could not do so because, he claims, there were no facilities in Dubai.

[17] He desires to vote in the 2009 general elections. He thought that this would not be possible because he believed that he was not registered as a voter. He claims he cannot register while he remains ordinarily resident in Dubai, and that there are no facilities to enable him to cast his vote at the South African diplomatic mission in the United Arab Emirates. He is mistaken when he suggests that he is not a registered voter. Once you are registered as a voter you remain on the voters' roll until your name is removed. He is, therefore, a registered voter. Indeed, the Commission takes the view that he is a registered voter.

[18] Twelve individual applicants who are South African citizens are seeking direct access to this Court in this case. They have varying interests and backgrounds and are employed in a variety of fields, including economics, law, hospitality, education, finance, administration, child welfare and human resources. The common feature which they share is that they all reside abroad and will not be in South Africa on the date of the 2009 general elections for the National Assembly and the provincial legislatures.

[19] On 5 February 2009 these applicants launched an urgent application in the High Court in Cape Town where they challenged the constitutionality of sections 7, 8(3) and 33(1) of the Electoral Act. In addition, they challenged regulation 12(4) of the Election Regulations.[36] They contended that these provisions violate sections 3(2)(a), 9(1), 10 and 19(3)(a) of the Constitution. That application was overtaken by events. The High Court in Pretoria handed down judgment in *Richter v Minister of Home Affairs and Others*[37] in which it declared invalid sections 33(1)(b) and 33(1)(e) of the Electoral Act and certain regulations. In view of the referral of the order of invalidity in *Richter* to this Court for confirmation, the applicants launched the present urgent

[36] Regulation 12(4) provides:

> "If the application is approved and—
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> (a) the applicant produces an identity document to the special voting officer, and
>
> (b) the special voting officer is satisfied that the applicant is the person described in that identity document,
>
> the applicant's identity document and hand is marked in the manner described in regulation 18 and he or she is handed a ballot paper only for an election for the National Assembly, marked on the back for that election."

[37] Case Number 4044/09, North Gauteng High Court, Pretoria, 9 February 2009, unreported.

application for direct access. Their application in the High Court has apparently been stayed pending the outcome of the present application.

[20] All the applicants except Ms Rall and Mr Xala are registered voters. Ms Rall has been outside this country for about 28 months while Mr Xala has been away for 6 years. Neither has furnished any explanation for not registering as a voter.

The attitude of the Minister and the Electoral Commission

[21] The Minister opposed the granting of direct access, maintaining that, first, it is not in the interests of justice that a constitutional attack directed at the electoral system should be brought directly to this Court in this manner; and, second, the applicants have not established any urgency in approaching this Court. On the merits the Minister contended that sections 7, 8, 9 and 60(1) form part of the electoral scheme designed by Parliament in order to regulate the right to vote. This scheme complies with the requirements prescribed by the Constitution, the Minister argues.

[22] For its part, the Commission does not oppose the relief sought by the applicants save insofar as the relief requires it to register voters outside the country; extend or shorten the 15-day notice period during which voters are required to notify the Commission of their intention to vote overseas; and facilitate overseas voters in casting a provincial vote. Its stance on direct access is that the applications do not in themselves justify direct access to this Court. However, it accepts that these matters are urgent and that this Court will in any event have to deal with the constitutionality

of section 33(1)(e) in the confirmatory proceedings. But it points out that urgency in these cases is self-created and could have been avoided.

[23] In addition, the Commission expresses concern about the implications of the relief sought in these cases, focusing as it does on the registration of voters abroad. In particular the Commission draws our attention to the following:

(a) The number of people in respect of whom the relief is sought is unknown. It is estimated there may be as many as two million in over 100 countries.

(b) Neither the Department of Home Affairs nor the South African Revenue Service keep accurate records of South Africans living abroad.

(c) It would be "extremely difficult" for it to register South Africans living abroad on short notice.

[24] The Commission also draws attention to the difficulties associated with registering voters abroad, arising from the fact that the voters are not physically in South Africa. In relation to voters who are ordinarily resident in a voting district in South Africa, each foreign mission would require a copy of the full voters' roll. In addition, when registering a voter abroad who asserts that he or she is ordinarily resident in a particular voting district, it will be difficult for the foreign mission to ascertain this and this may threaten the integrity of the voters' roll. The Commission expresses the view that "it is not inconceivable that South Africans wishing to influence provincial elections could state that they were ordinarily resident in a certain

province." Those citizens who are not ordinarily resident in a voting district in South Africa fall outside the scope of the electoral system.

[25] Finally, the Commission emphasises the fact that its activities have to run to an "incredibly tight schedule." It is required by the Electoral Act to develop the election timetable once the elections are proclaimed. It therefore has to ensure that a myriad of deadlines and complicated arrangements come together on time and in the correct sequence so that the elections are credible. As these applications have been brought at such a late stage, they could have negative implications for the timetable and ultimately for the elections. And this could endanger the right to vote of an estimated 23 million South Africans who wish to vote in the 2009 elections.

[26] The question which must be determined first in each of these applications is whether the applicants have made out a case for approaching this Court directly with their respective constitutional challenges.

Direct access

[27] Section 167(6)(a) of the Constitution provides for direct access and says in pertinent part:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court".

[28] Consistently with this provision, section 16(2) of the Constitutional Court Complementary Act[38] makes provision for matters to be brought directly to this Court, in terms similar to section 167(6)(a) of the Constitution.[39] And rule 18 of the rules of this Court sets out the procedure for bringing matters directly to this Court.

[29] This Court first considered the provisions of section 167(6) in *Bruce and Another v Fleecytex Johannesburg CC and Others*.[40] On that occasion, this Court considered the factors that are relevant to applications for direct access to it and said:

> "Whilst the prospects of success are clearly relevant to applications for direct access to this Court, there are other considerations which are at least of equal importance. This Court is the highest Court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other Courts having constitutional jurisdiction. These factors have been referred to in decisions given by this Court on applications for direct access under the interim Constitution, and are clearly relevant to the granting of direct access under the 1996 Constitution.
>
> It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of

[38] Act 13 of 1995.

[39] Section 16(2) provides:

> "(2) The rules shall, when it is in the interests of justice and with leave of the Court, allow a person—
>
> (a) to bring a matter directly to the Court; or
>
> (b) to appeal directly to the Court from any other court."

[40] [1998] ZACC 3; 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC).

> challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[41] (Footnotes omitted.)

[30] There is no suggestion in these applications that the High Court and the Supreme Court of Appeal do not have jurisdiction to entertain the constitutional challenges in issue in these cases. On the contrary, as pointed out above, the applicants in the Moloko matter first approached the High Court in Cape Town to pursue the relief they now seek to pursue in their application. This Court has emphasised the benefits that may be derived from the judgments of other courts. These courts should not, therefore, ordinarily be bypassed. Consequently "compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access."[42]

[31] With these principles in mind, we now turn to consider whether a case for direct access has been made out in these applications.

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[41] Id at paras 7-8.

[42] Id at para 9. See also *Van der Spuy v General Council of the Bar of South Africa* [2002] ZACC 17; 2002 (10) BCLR 1092 (CC); 2002 (5) SA 392 (CC) at para 6; *National Gambling Board v Premier, KwaZulu-Natal and Others* [2001] ZACC 8; 2002 (2) BCLR 156 (CC); 2002 (2) SA 715 (CC) at para 29; *Moseneke and Others v The Master and Another* [2000] ZACC 27; 2001 (2) BCLR 103 (CC); 2001 (2) SA 18 at paras 18-9; *Dormehl v Minister of Justice and Others* [2000] ZACC 4; 2000 (5) BCLR 471 (CC); 2000 (2) SA 987 (CC) at para 5; *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1998 (12) BCLR 1449 (CC); 1999 (2) SA 83 (CC) at paras 3-4; *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (6) BCLR 677 (CC); 1997 (3) SA 772 (CC) at para 4; *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC) at para 16; *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC) at para 3; *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)* [1996] ZACC 8; 1996 (6) BCLR 745 (CC); 1996 (4) SA 331 (CC) at paras 4-6; *Luitingh v Minister of Defence* [1996] ZACC 5; 1996 (4) BCLR 581 (CC); 1996 (2) SA 909 (CC) at para 15; *S v Mbatha, S v Prinsloo* [1996] ZACC 1; 1996 (3) BCLR 293 (CC); 1996 (2) SA 464 (CC) at para 29; *Executive Council of Western Cape Legislature and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC) at paras 15-7; and *S v Zuma and Others* [1995] ZACC 1; 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) at para 11.

[32] As the background facts show, the applicants in these matters are challenging the constitutional validity of section 33(1)(e). However, they also challenge other provisions of the Electoral Act. In the Moloko matter the applicants are challenging sections 7 and 8(3), while the applicants in the AParty matter are challenging sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1). For reasons that will become apparent later in the judgment, it will be convenient to consider these challenges under two heads, namely,

(a) The challenge to section 33(1)(e); and

(b) The challenges to sections 7, 8(3), 9(1) and 60(1).

The challenge to section 33(1)(e)

[33] The applicants' challenge to section 33(1)(e) raises the same issues that were considered by the High Court in *Richter*.[43] And thus it raises the same issues as those that are before this Court in the confirmatory proceedings in the Richter matter. In considering the applicants' challenge to section 33(1)(e) this Court is therefore not sitting as the court of first and final instance. We have the benefit of the judgment of the High Court which traversed the issue of the constitutionality of section 33(1)(e). The similarities between the issues raised in relation to section 33(1)(e) require them to be dealt with together. In these exceptional circumstances we consider it appropriate to grant direct access to the applicants in both cases.

Constitutionality of section 33(1)

[43] Above n 37.

[34] Having granted direct access in relation to the question of the constitutionality of section 33(1)(e) of the Electoral Act, we should note that the submissions advanced on behalf of the applicants in the AParty and Moloko matters mirror the arguments made by the applicant, intervening parties and amici in the Richter matter in which the judgment is handed down at the same time as this judgment. The *Richter* judgment considers all the arguments made in relation to the constitutionality of section 33(1)(e). It is not necessary to repeat what is said there. Furthermore, the Court there declares certain portions of section 33(1)(e) and regulations 6(e), 11, 12 and 13 of the Election Regulations to be unconstitutional, and makes an order for further just and equitable relief. For the reasons given in the Richter matter, that is the relief to be afforded to the applicants in these cases. Accordingly an order to that effect will be given in each of these cases.

[35] The applicants have also challenged regulation 17 of the Election Regulations. This regulation provides for the form which a sworn statement referred to in section 24A(1)(b) of the Electoral Act must take. Section 24A in turn deals with a voter who casts his or her vote in a voting district where the voter is not registered. This provision applies to a vote cast within the Republic of South Africa. It is not clear why this regulation is said to be inconsistent with the Constitution. Neither the founding affidavit nor the written argument provides any substantiation. I can find no basis for the constitutional attack on this regulation. None was suggested. It follows that the constitutional attack on regulation 17 must be dismissed.

[36] To the extent, therefore, that the applicants' challenges relating to section 33(1)(e) and regulations 12 and 13 of the Election Regulations have been successful, they are entitled to an appropriate costs order. This is a matter to which we return later.

[37] The remaining issue in these cases is whether the applicants are entitled to come directly to this Court in relation to the constitutional challenges to sections 7, 8(3), 9(1) and 60(1).

The challenges to sections 7 and 8(3)

[38] Sections 7 and 8 of the Electoral Act provide:

> "7**(**1) A person applying for registration as a voter must do so in the prescribed manner.
>
> (2) The head office in the Republic of a person referred to in section 33(1)*(b)* is regarded as the ordinary place of residence of that person or a member of that person's household.
>
> (3) *(a)* A person is regarded to be ordinarily resident at the home or place where that person normally lives and to which that person regularly returns after any period of temporary absence.
>
> *(b)* For the purpose of registration on the voters' roll a person is not regarded to be ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained.
>
> 8(1) If satisfied that a person's application for registration complies with this Act, and that person is a South African citizen and is at least 18 years of age, the

chief electoral officer must register that person as a voter by making the requisite entries in the voters' roll.

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

(a) has applied for registration fraudulently or otherwise than in the prescribed manner;

(b) …

(c) has been declared by the High Court to be of unsound mind or mentally disordered;

(d) is detained under the Mental Health Act, 1973 (Act 18 of 1973); or

(e) …

(3) A person's name must be entered in the voters' roll only for the voting district in which that person is ordinarily resident and for no other voting district."

[39] The applicants in both these cases challenge the provisions of sections 7 and 8(3). While the arguments they advanced overlapped to a certain extent, they took different positions, in particular, on the relief they sought. For this reason, it would be convenient to deal with each application separately.

The Moloko Application

[40] The applicants sought to justify their application for direct access on the following grounds:

(a) after they had launched their application in the High Court in Cape Town, *Richter* was decided by the High Court in Pretoria and the order of that

court is before this Court for confirmation. They submitted that their situation is not dissimilar to that which arose in *Fourie*[44] and *Bhe.*[45]

(b) There are exceptional circumstances which militate in favour of direct access being granted. These circumstances were said to be the fact that the High Court in *Richter* has already traversed the relevant issues; that in view of the pending election, it will be impossible for them to obtain relief before the High Court if direct access were to be refused; that the issues raised are of considerable public importance; and there are no disputes of fact.

[41] Reduced to their essence, the applicants rely upon four grounds: First, the issues raised in their application are similar to those raised in the Richter matter which is before this Court for confirmation; second, the matter is one of extreme urgency; third, the issues raised are of considerable public importance; and fourth, there are no disputes of fact. To this must be added the suggestion that the Commission has consented to direct access being granted.

[42] We did not understand the Minister and the Commission to dispute that a matter that involves the right of a citizen to vote is of considerable importance. Nor can there be any question that the application involves fundamental questions of constitutional

[44] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others as Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

[45] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* [2004] ZACC 17; 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC).

law. This is even more so in a case where we are told that this may affect as many as two million people. But these are not the only considerations in determining whether direct access should be granted.

Reliance on Bhe and Fourie

[43] Counsel set much store by the decisions of this Court in *Fourie* and *Bhe*. In relation to *Fourie*, our attention was drawn to the passage in which it was said:

> "In the present matter, the appeal from the SCA decision in the *Fourie* matter is already before us. The direct access application fills a gap in the *Fourie* case referred to by the High Court, this Court and the SCA. The common law in relation to marriage has been overtaken by statute in a great number of respects. To deal with it as if the Marriage Act did not exist would be highly artificial and abstract. The overlap between the issues raised and their strong interconnectedness requires them to be dealt with in an integrated and comprehensive fashion. There would be grave disadvantages to all concerned if the issues raised were to be decided in a piecemeal way."[46]

[44] And in relation to *Bhe*, our attention was drawn to a statement to the effect that: "The application further adds fresh insights on difficult issues".[47] In line with these statements the applicants submitted that their application "proffer[s] fresh insights into issues that are already before this Court", and that it "fill[s] a gap" in relation to registration and provincial votes as well as the relief sought.

[46] *Fourie* above n 44 at para 42.

[47] *Bhe* above n 45 at para 33.

[45] The applicants' reliance on *Fourie* and *Bhe* is misplaced. The passages relied upon by the applicants must be understood in the context of the issues that this Court had to decide in those cases. In *Fourie*, the broad question presented was the right of same-sex couples to marry. In the High Court and the Supreme Court of Appeal, the couple sought an order developing the common law so as to recognise marriages of same-sex couples as valid in terms of the Marriage Act.[48] When the matter came to this Court on further appeal, the Lesbian and Gay Equality Project applied for direct access in order to challenge the constitutionality of section 30(1) of the Marriage Act. Its challenge was, at the time, pending in the High Court.

[46] There are three crucial factors which immediately distinguish *Fourie* from the present cases. First, we held that the common law as it relates to marriage had been "overtaken by statute in a great number of respects."[49] Second, we held that the enquiry into the common law definition of marriage and the constitutionality of section 30(1) was the same.[50] Third, although the challenge to section 30(1) was not before it, the Supreme Court of Appeal had "devoted considerable attention to interpreting its terms and evaluating its significance in relation to the common law."[51]

[47] None of these factors is present in this case. In particular, the High Court did not consider sections 7 and 8 of the Electoral Act at all.

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[48] Act 25 of 1961.

[49] *Fourie* above n 44 at para 42.

[50] Id at para 45.

[51] Id at para 40.

[48] It was against this background that this Court in *Fourie* held that "[t]o deal with [the common law] as if the Marriage Act did not exist would be highly artificial and abstract."[52] Similarly, our finding that there was an overlap between the issues raised in relation to the common law and section 30(1) of the Marriage Act, and that this required them to be dealt with together, must also be understood in that context. So too the statement that the application for direct access "fills a gap" must also be understood in this context.

[49] *Fourie* does not, therefore, assist the applicants.

[50] Nor does this Court's decision in *Bhe* assist the applicants. One of the main issues in that case concerned the constitutionality of section 23 of the Black Administration Act.[53] This section dealt with intestate succession in relation to the estates of deceased "black" people. The High Court had declared parts of section 23(10) which gave the President the power to make regulations governing the administration and distribution of estates of deceased "black" people, unconstitutional. When the matter came to this Court for confirmation, the South African Human Rights Commission and the Women's Legal Centre sought direct access to challenge the whole of section 23, alternatively subsections (1), (2) and (6) of section 23.

[51] The subsections of section 23, together with the regulations, constituted a scheme of intestate succession for "blacks". The applications for direct access

[52] Id at para 42.

[53] Act 38 of 1927.

therefore related to substantive issues that were already before the Court. It was in this context that the Court held that the application for direct access "helpfully broadens the scope of the constitutional investigation"[54] and "further adds fresh insights on difficult issues".[55]

[52] By contrast, the scope of the constitutional challenge in the Richter matter is limited. The question presented is whether a registered voter who is abroad should be permitted to vote. Section 33(1)(e), which makes provision for certain categories of registered voters who are abroad to vote on election day, would not permit Mr Richter to vote. Hence Mr Richter limited his challenge to section 33(1)(e). He did not seek to register abroad as a voter. Thus the question of the constitutionality of sections 7 and 8(3) did not enter the equation.

The scope of the challenge in the direct access application

[53] The challenge to sections 7 and 8(3) is fundamentally different to that based on section 33(1)(e). These provisions deal with the registration of voters. As the President has proclaimed the date for elections, the voters' roll is closed. The present challenge threatens the election timetable.[56]

[54] In answer to the constitutional challenge, the Minister contends that the Constitution entrusts to Parliament the task of designing an electoral scheme which

[54] *Bhe* above n 45 at para 33.

[55] Id.

[56] Section 20 of the Electoral Act, read with Schedule 1 of that Act. The election timetable was gazetted on 16 February 2009. See GN 189 GG 31906 of 16 February 2009.

complies with certain requirements of the Constitution. It includes an electoral system that is based on the national common voters' roll, provides a minimum voting age of 18 years and, results, in general, in proportional representation. The electoral scheme that has been designed provides for a district-based voters' roll which requires a voter to vote in a district where he or she is registered to vote. One of the requirements of registration is that a person be ordinarily resident where he or she intends to vote. The Minister contends that the legislative provisions that are challenged in these applications for direct access form part of the fundamental pillars of the district-based voters' roll envisaged by the electoral system.

[55] The challenges to sections 7, 8, 9 and 60 therefore go to the very heart of the electoral scheme chosen by Parliament. It raises complex and difficult questions concerning the constitutional validity of this electoral scheme and the legislative choice made by Parliament, whose duty it is to design an electoral scheme. No party disputed that Parliament had a range of choices open to it in designing that scheme and that it was not for the courts to prescribe to Parliament which scheme should be chosen. The courts' function is to determine whether the scheme chosen complies with the Constitution. And, if the scheme is found to be unconstitutional, what electoral scheme should be put in place in the interim until Parliament prescribes another electoral scheme which will conform to the constitutional requirements. In particular, as the applicants point out in their founding affidavit when explaining the limited scope of the constitutional challenge in the Richter matter, the present challenge requires full consideration of the nature and effect of sections 7, 8, 9 and 60

of the Electoral Act. And a ruling on the constitutionality of these provisions may well be essential to the determination of issues raised by the applicants.

[56] These issues were neither raised nor traversed in the High Court in *Richter*. In determining these cases, this Court would therefore be sitting both as a court of first and last instance. In the past we have held that the importance and complexities of the issues raised in an application for direct access would weigh heavily against this Court being a court of first and last instance, from which no appeal will lie.[57] As we have explained, the jurisprudence of this Court is greatly enriched by being able to draw on the considered opinion of other courts. Issues that relate to substantive law and the appropriate relief are "crystallised out for focused research and attention."[58]

Urgency

[57] We cannot lose sight of the fact that this matter has been brought as a matter of extreme urgency. The respondents have had to work under pressure to gather and put together information on which they could lay their hands and thereafter prepare affidavits. Apart from this, the Commission has alluded to practical and logistical difficulties that may arise in effecting any change to the system including the extent to which this may undermine the conduct of the elections. It is not desirable that issues of such considerable importance and complexity be determined in haste. The parties, in particular the Minister and the Commission, must have a fair opportunity to collect

[57] *Fourie* above n 44 at para 39; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (2) BCLR 150 (CC); 2005 (1) SA 530 (CC) at para 11.

[58] *Fourie* above n 4444 at para 39.

and present evidence to support and defend the electoral scheme that is presently under challenge.

[58] The Moloko applicants have made much of the urgency of the matter. They submitted that if direct access were to be refused it would be impossible for them to obtain any relief before the elections. There are two answers to this submission. The first is that if they had gone to the High Court, and been successful, that court would have declared the provisions unconstitutional. Although that order would have been subject to confirmation by this Court, the High Court may, in addition to making an order of invalidity, have granted temporary relief under its just and equitable jurisdiction pending the decision of this Court.[59]

[59] The second answer is that the applicants are the authors of their own misfortune; they created the urgency. The registration provisions of the Electoral Act have been in place since 2003.[60] Voting by South African voters abroad in the 2004 elections was regulated by the amendment which was introduced in 2003. The applicants have known since then that they cannot vote. Their explanation for not approaching a court much earlier is utterly unsatisfactory.

[60] The Cape application was lodged on 5 February 2009. On their own version, the issue of the rights of litigants living abroad to register and to vote has been

[59] Section 172(2)(b) of the Constitution

[60] The Electoral Act was amended by the Electoral Laws Amendment Act 34 of 2003 and the Electoral Laws Second Amendment Act 40 of 2003.

dragging on for approximately 11 years. Two general elections have taken place and they have not challenged the Electoral Act. They advance as a reason for this inordinate delay their faith in a political solution. All along they had hoped that their plight would be alleviated politically. This faith in the political process has cost them, or some of them, the right to vote. In a somewhat faint tone they plead lack of funds, lack of organisation and lack of access to South African lawyers until they were offered pro bono assistance.

[61] All the applicants do is to point out to what they describe as "many political and popular initiatives attempting to convince Parliament and the [Commission] to extend the franchise to all categories of South Africans abroad." These initiatives, we are told, included demonstrations at South African missions abroad, the formation of various non-governmental organisations, electronic petitions, organisation on social networking sites, lobbying by and of politicians and discussions with the Commission. We are told that these initiatives were partially successful in 2003 when Parliament extended the franchise to certain South African citizens abroad but excluded those who fell within the applicants' category. Despite this, they still did not take any steps to vindicate their rights in any court of law. And apparently nothing happened after 2003 until, the applicants say, "political and popular attention returned to matters electoral towards the end of 2008" and "such initiatives were reinvigorated."

[62] There is no explanation why these initiatives were only "reinvigorated" towards the end of 2008. They would have us believe that they learned of their exclusion "at

various times in the months before the filing of the application." What they thought was happening in the interim is not explained. Despite the lateness of the hour they "continued to pin their hopes on the political processes under way." They then point to a media statement issued by the Commission referring to a meeting between it and the Democratic Alliance. They rely in particular on the paragraph in which it is stated:

> "The Chairperson of the commission indicated to the leader of the DA that the commission will consider the proposals presented by the DA, taking into account the practicalities and legal implications pertaining to this matter. The meeting further noted that the Electoral Commission is always open to suggestions that give opportunities to as many South Africans as possible to register and to vote."

[63] No attempt was made to put the Commission on terms given the fact that the elections were not very far away.

[64] Nor do the applicants set out the precise steps that they themselves took to assert their right to register and to vote. They tell us that "even though some of the Applicants became aware of the exclusions some time in advance of the filing of this application, [they] felt powerless to challenge the exclusions." This is so because they claim, by its very nature, "the community of South Africans abroad is a diffuse group which is politically relatively powerless, without ready access to legal and other resources in South Africa to pursue their rights." They claim that—

> "[I]t was only when [they] were brought together and were offered legal representation on a *pro bono* basis by [their] legal representatives that a challenge such as the present became viable."

[65] We should not be understood as suggesting that the applicants should not have sought a political solution. This is a desirable course to follow where possible. However, these initiatives should be pursued up to a certain point. They should not be pursued on the eve of the election leaving litigants with little or no time to approach a court for relief. Approaching courts at the eleventh hour puts extreme pressure on all involved including respondents and the courts, as these cases amply demonstrate. It results in courts having to deal with difficult issues of considerable importance under compressed time limits. The result is that courts which have jurisdiction to hear these matters are bypassed in order to obtain a final ruling on these issues from this Court. This is undesirable. As this Court pointed out in *Dormehl*:

> "It is not ordinarily in the interests of justice for a Court to sit as a Court of first and last instance, without there being any possibility of an appeal against its decisions. Nor is it in the interests of justice for 11 Judges of the highest Court in constitutional matters to hear matters at first instance which can conveniently be dealt with by a single Judge of a High Court."[61]

[66] Matters concerning elections should ordinarily be brought at the earliest available opportunity because of their potential impact on the elections. If they are brought too close to the elections, this might result in the postponement of the elections. This is not desirable in a democratic society. There may well be circumstances where bringing a challenge earlier is not possible having regard to the nature of the dispute. These circumstances would be very rare. Where the challenge

[61] *Dormehl* above n 42.

could and should have been brought earlier, a litigant must put out facts, covering the entire period of delay, explaining why the challenge could not have been brought earlier. Failure to do so may well result in the refusal of the relief.

[67] There is a further consideration which militates against direct access. Two of the applicants are not registered. These applicants have not provided any explanation for why they have not registered as voters. The Commission has 302 permanent offices throughout the Republic and these offices are open all year. Persons wishing to register as voters can do so at any time of the year during the Commission's office hours. Had Ms Rall and Mr Xala wished to register as voters, they could have done so.

[68] As is plain from section 3 of the Constitution, while "all citizens are equally entitled to the rights, privileges and benefits of citizenship",[62] they are "equally subject to the duties and responsibilities of citizenship."[63] Equally true, therefore, is that while all adult citizens are entitled to vote in elections,[64] this right carries with it the responsibility to register as a voter. Ms Rall and Mr Xala have this responsibility too. They could have applied for registration as voters before they left the country or at any time during their visit to this country as the other 10 of their co-applicants apparently did. We are not told why this could not be done. It would therefore take

[62] Section 3(2)(a) of the Constitution.

[63] Section 3(2)(b) of the Constitution.

[64] Section 19(3)(a) of the Constitution.

more than just the fact that they are not registered as voters, for this Court to come to their assistance and hear their case at this late stage.

[69] In these circumstances, the applicants have not established any urgency that does not arise from their own failure to act.

[70] As we have pointed out above, the challenge in these applications goes to the heart of the electoral scheme. As the Commission pointed out, the relief sought could have a negative impact on the election timetable and, ultimately on the elections themselves. On the facts and circumstances of this case, it cannot be in the interests of justice to come to the assistance of the two individual applicants at the expense of jeopardising the elections. Indeed, it is doubtful whether, even if the applicants were to be successful, they would have been entitled to any relief given the logistical and practical difficulties described by the Commission. It was in the light of these difficulties that the AParty sought declaratory relief only.

The attitude of the Commission

[71] Finally, the applicants sought to rely on the fact that the Commission suggested that they should approach this Court directly. First, an agreement between the parties to bring a matter directly to this Court is not decisive of whether direct access should be granted. The application must comply with the requirements for direct access. It must be established that there are exceptional circumstances justifying this Court in granting direct access. Second, the Commission takes the view that the application in

itself does not justify direct access to this Court. It was the urgency of the application and the fact that section 33(1)(e) was already before this Court for confirmation that led the Commission to express the view that it is appropriate for this Court to grant direct access. The Commission is correct in relation to section 33(1)(e). However, urgency is not the only consideration in an application for direct access.

[72] For all these reasons, the applicants in the Moloko matter have not established any exceptional circumstances justifying the grant of direct access in relation to their challenges to sections 7 and 8(3) of the Electoral Act. In the event, direct access must be refused in relation to the constitutional challenges to sections 7 and 8(3) of the Electoral Act.

The AParty and Mr Pepperell

[73] Like the applicants in the Moloko matter, the applicants' challenge goes beyond section 33(1)(e). They also challenge the constitutionality of sections 7(2), 7(3)(a), 8(3), 9(1)[65] and 60(1).[66] The considerations that militate against direct access being granted in the Moloko matter apply equally to this application.

[65] Section 9(1) provides:

> "A registered voter or person who has applied for registration as a voter and whose name or ordinary place of residence has changed, must apply in the prescribed manner to have that change recorded in the voters' roll or in that person's application."

[66] Section 60(1) provides:

> "The Commission must—
>
> (a) establish voting districts for the whole of the territory of the Republic;
>
> (b) determine the boundaries of each voting district in accordance with the factors mentioned in section 61; and
>
> (c) keep a map of each voting district."

[74] The applicants sought to motivate their application for direct access on the following grounds: the importance of the issues raised; that the matter is urgent; and that the relief sought is substantially similar to, or has, a direct impact on the relief sought by parties already before this Court.

[75] It is true the constitutional questions raised by the applicants are, as they put it, "of the highest importance." It is also true that urgency may afford grounds for engaging this Court directly.[67] These are not the only considerations in an application for direct access. The urgency relied upon must be such that securing a ruling of this Court would be in the interests of justice. And an applicant who contends that the requisite urgency exists has "an obligation of establishing such averment to the satisfaction of the Court."[68]

[76] In support of their argument on urgency, the applicants remind us that the AParty, the first applicant, was only registered as a party on 3 February 2009. It was contended that it would have lacked the capacity to sue had it not been registered. It was also contended that as a political party it would have a special interest in the relief sought and also that registration as a party would enable it to raise money to litigate. This may well be so, but there is an incontrovertible constitutional answer to these submissions. Section 38 of the Constitution affords a broad range of persons standing to protect the rights in the Bill of Rights.[69] The broad standing is there precisely to

[67] Above n 42 at para 19.

[68] Id.

[69] Section 38 of the Constitution provides:

deal with the difficulties faced by the AParty in this matter. The range of persons that are afforded standing includes persons who are acting in their own interest, persons acting in the interest of a group or class of persons, and anyone acting in the public interest. Thus, Mr Penderis, the chairperson of the AParty, could have brought the application earlier under the provisions of section 38. So could Mr Pepperell.

[77] The applicants also submitted that the relief they seek is substantially similar to the relief sought in the Richter matter. For the reasons that we have given in rejecting a similar argument by the applicants in the Moloko application, this argument must be rejected.

[78] The relief that the AParty applicants seek is an order of constitutional invalidity coupled with a suspension order to give Parliament an opportunity to make provision for voters to register abroad. This is not the relief sought in the Richter matter. Although the relief, therefore, would not have the potential to disrupt the forthcoming elections, it nonetheless requires this Court to determine difficult issues relating to the electoral scheme in great haste and as a court of first and final instance. This is not desirable.

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

[79] Ordinarily urgency arises because immediate relief is required. It is not in the interests of justice to deal with constitutional challenges that involve the fundamental nature of the electoral system provided for in the Electoral Act on an urgent basis, particularly where no immediate relief is sought. The applicants have not shown exceptional circumstances justifying this Court in exercising its discretion to grant direct access. It follows therefore that direct access must be refused in relation to the challenges to sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1). The constitutional attack to regulations 2 and 11 of the Voter Registration Regulations must suffer the same fate.

[80] In relation to both applications, the key issue is the question of the constitutional validity of the electoral system – a matter that lies peculiarly with Parliament's constitutional remit. The fundamental basis for our refusal to grant direct access lies in this Court's reluctance to deal in undue haste with a matter of this sort as a court of first and last instance. For this reason, nothing in this decision should be read as prejudging the constitutionality of the challenged registration provisions, including those which may prevent South African citizens from registering while abroad.

[81] It now remains to consider the question of costs in these two applications, which is dealt with below.

Costs

[82] The Moloko and AParty applicants have been successful in relation to the challenge to section 33(1)(e) but not successful in relation to the challenges to sections 7, 8(3), 9(1) and 60(1). They should ordinarily be entitled to their costs in relation to the challenge to section 33(1)(e). They were, however, very late in bringing this challenge; they waited until the eleventh hour. Counsel for the AParty sought to attribute the delay to the fact that the AParty was registered as a party only last month. As pointed out above, this did not, however, prevent Mr Penderis who is the chairperson of the AParty from bringing the challenge earlier. Nor did this prevent Mr Pepperell from doing so. We know that he intended to vote in the 2004 elections but could not do so because he was in Dubai. He has had ample time since 2004 to bring the challenge.

[83] But we cannot ignore the stance taken by the Minister in opposing this relief. The Minister persisted in her opposition until well into the hearing. Section 33(1)(e) constitutes an unjustifiable limitation of the right to vote, as we find in the Richter matter. The government proffered no justification for the limitation. Government opposition to constitutional challenges must be consistent with its obligations under the Constitution. The opposition to the relief sought was without merit. In the circumstances, the Moloko and the AParty applicants are entitled to recover their costs insofar as they have been successful against the state in seeking to vindicate their constitutional rights. This, however, is not the end of the matter.

[84] Another important consideration is that the applicants collectively sought direct access to challenge sections 7, 8(3), 9(1) and 60(1) of the Electoral Act. On this, the applicants have failed. It is necessary therefore to determine a basis upon which to apportion costs. The applicants succeeded in relation to section 33(1)(e), the merits of which the government conceded well into the hearing and after considerable costs had been incurred throughout proceedings. On the other hand, they have failed on their constitutional attack relating to registration. Finally, we bear in mind that direct access was sought given the Commission's desire that all the matters be heard on an expedited basis in this Court.

[85] In the circumstances it is fair to award the Moloko and AParty applicants half of the costs incurred in the proceedings in this Court, such costs to include the costs of two counsel. It appears from the founding affidavit in the Moloko matter, that their attorneys represent the applicants on a pro bono basis. Accordingly, during argument, counsel for the Moloko applicants asked that costs be limited to disbursements only including the fees for counsel. It will be so ordered.

Order

[86] In the event, the following orders are made:

(a) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* in relation to the constitutional challenge to section 33(1)(e) of the Electoral Act 73 of 1998 is granted.

(b) The application for direct access in *Moloko and Others v Minister for Home Affairs and Another CCT 10/09* in relation to the constitutional challenge to section 33(1)(e) of the Electoral Act 73 of 1998 is granted.

(c) 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.

(d) 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 in GG 25894 of 7 January 2004, as amended) are declared to be inconsistent with the Constitution and invalid.

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

(f) 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.

(g) 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.

(h) 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.

(i) It is declared that any registered voter who, in terms of paragraphs (c)-(h) 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 order 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 Election Regulations, 2004.

(j) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* insofar as it relates to the challenges to sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1) of the Electoral Act 73 of 1998 is dismissed.

(k) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* insofar as it relates to the challenges to regulations 2 and 11 of the Voter Registration Regulations, 1998 promulgated in terms of section 100 of the Electoral Act 73 of 1998 (published under GN R1340 in GG 19388 of 16 October 1998, as amended) is dismissed.

(l) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* insofar as it relates to the challenge to regulation 17 of the Election Regulations, 2004 is dismissed.

(m) The application for direct access in *Moloko and Others v Minister for Home Affairs and Another CCT 10/09* insofar as it relates to the challenge to sections 7 and 8(3) of the Electoral Act 73 of 1998 is dismissed.

(n) The Minister for Home Affairs is directed to pay one half of the applicants' costs in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* including the costs of two counsel.

(o) The Minister for Home Affairs is directed to pay one half of the applicants' costs in *Moloko and Others v Minister for Home Affairs and Another CCT 10/09* in this Court including the costs of two counsel. These costs shall be limited to the disbursements, which shall include fees for counsel.

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

Counsel for the Applicants in CCT 06/09:	Advocate JC Heunis SC and Advocate MF Osborne and Advocate L Ferreira instructed by Frost Attorneys.
Counsel for the Applicants in CCT 10/09:	Advocate JJ Gauntlett SC and Advocate BL Makola instructed by Webber Wentzel Inc.
Counsel for the First Respondent in CCT 06/09 and 10/09:	Advocate PM Mtshaulana SC and Advocate H Maenetje and Advocate K Pillay instructed by the State Attorney, Pretoria.
Counsel for the Second Respondent in CCT 06/09 and 10/09:	Advocate IAM Semenya SC and Advocate N Fourie and Advocate N Rajab-Budlender instructed by Bowman Gilfillan Inc.