IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT number: 184/2023

SCA case number: 67/2022

North Gauteng case number: 48418/2018

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Respondent

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APPLICANT'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS

I. INTRODUCTION

1. This is an application for the confirmation of orders of constitutional invalidity and consequent relief granted by the Supreme Court of Appeal ("*SCA*") on 13 June 2023.[1]

2. In its judgment, the SCA declared:

    2.1. Section 6(1)(a) of the South African Citizenship Act 88 of 1995 ("*the Act*") to be inconsistent with the Constitution of the Republic of South Africa, 1996 ("*the Constitution*" or "*the 1996 Constitution*") and the Constitution of the Republic of South Africa Act 2000 of 1993 ("*the Interim Constitution*") and invalid from its promulgation on 6 October 1995;

    2.2. That those citizens who lost their citizenship by operation of section 6(1)(a) of the Act are deemed not to have lost their citizenship.

3. This matter must now come before this Court in terms of section 172(2)(a) of the Constitution read with Rule 16 of this Court's Rules.

4. The DA contends that the reasoning of the SCA ought to be upheld and confirmation of the invalidity of section 6(1)(a) granted.

5. Section 6 of the Act states:

[1] Vol 3: 182.

"(1) Subject to the provisions of subsection (2), a South African citizen shall cease to be a South African citizen if-

(a) he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic; or

(b) he or she in terms of the laws of any other country also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic.

(2) Any person referred to in subsection (1) may, prior to his or her loss of South African citizenship in terms of this section, apply to the Minister to retain his or her South African citizenship, and the Minister may, if he or she deems it fit, order such retention.

(3) Any person who obtained South African citizenship by naturalisation in terms of this Act shall cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic does not support."[2]

6. The effect of section 6(1)(a), read with section 6(2), is that a South African major citizen, without he/she or the Department of Home Affairs ("*the Department*") necessarily being aware of it, automatically loses South African citizenship if he or she voluntarily acquires the nationality of another country, save when:

6.1. The First Respondent ("*the Minister*"), on application, grants the citizen the right to retain his or her citizenship; or

6.2. When the acquisition of the second citizenship is by marriage.

[2] Emphasis added.

7. The Respondents are not opposing this application for confirmation of the SCA's orders of constitutional invalidity.[3]

8. In support of this application, these written submissions address:

   8.1. The procedural history of this matter;

   8.2. The judgment of the SCA ("*the Judgment*") and the grounds on which it struck down section 6(1)(a) of the Act, being:

      8.2.1. The infringement of, *inter alia*, the right to citizenship;

      8.2.2. The irrationality of section 6(1)(a);

      8.2.3. The appropriate remedy; and

   8.3. Concluding submissions by the Applicant ("*the DA*").

II. PROCEDURAL HISTORY TO THIS MATTER

9. The DA launched its challenge to section 6(1)(a) in the North Gauteng High Court, Pretoria ("*the High Court*") on 12 July 2018.[4]

[3] Vol 3: 198.
[4] Vol 1: 1.

10. The challenge was based both on:

    10.1. The irrationality of the section, in the sense that it served no legitimate government purpose and left both those affected and the Respondents unaware of who is and who is not a citizen; and

    10.2. It unjustifiably violated rights protected by, *inter alia*, section 20 of the Constitution and section 20 of the Interim Constitution.

11. The Respondents initially opposed the application,[5] though they accepted that dual citizenship is acceptable in South Africa.[6]

12. On 6 August 2021, the High Court (per Kollapen J) dismissed the DA's application.[7]

13. On 14 September 2021, the High Court dismissed the DA's application for leave to appeal to the SCA.[8]

14. On 1 December 2021, the SCA granted the DA's application for leave to appeal to it in terms of section 17(2)(b) of the Superior Courts Act 10 of 2013.[9]

[5] Vol 1: 61 para 3.
[6] Vol 1: 72 para 50.
[7] Vol 2: 121.
[8] Vol 2: 142.
[9] Vol 2: 150.

15. The appeal was heard by the SCA on 23 March 2023, and the Judgment was handed down electronically on 13 June 2023.[10]

16. The DA's application for confirmation of orders of constitutional invalidity was filed with this Court on or about 26 June 2023.[11]

17. On 7 February 2024, the Respondents filed their notice to abide the relief sought in this application.[12]

18. Notwithstanding the Respondents' withdrawal of their opposition to this matter, it is necessary for this Court to consider whether to confirm the orders granted by the SCA.[13]

III. THE JUDGMENT & REASONING OF THE SCA

19. It is submitted that the SCA was correct in all respects in its approach to this matter. Accordingly, these submissions shall avoid unnecessary elaboration and follow the structure and logic of the Judgment.

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[10] Vol 3: 160.
[11] Vol 3: 184.
[12] Vol 3: 198.
[13] *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC) at para 8:

> *"A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid."*

Quoted with approval in *Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others* [2023] ZACC 45 (12 December 2023) ("*Scalabrini 3*") at para 20.

20. The SCA noted the nature, history and importance of the right of the right to citizenship with reference to this Court's judgment in *Chisuse*.[14] The SCA further noted the statutory context in which section 6(1)(a) is located, including the availability under section 7 of the Act of a mechanism by which South African citizens can (should they choose) renounce their citizenship.[15]

21. After summarising the submissions of the parties and the findings of the High Court, the SCA turned to the first substantive question: Is section 6(1)(a) rational?

22. The SCA concluded not, particularly as "*counsel for the respondents were unable to point to a legitimate government purpose which s 6(1)(a) seeks to achieve*".[16]

23. Before the SCA, the Respondents sought to justify section 6(1)(a) by reference to section 6(2) of the Act, but this was appropriately dismissed:

> *"However, the respondents' counsel sought refuge in s 6(2), which allows citizens to retain their South African citizenship on application to the Minister. But s 6(2) merely underscores the arbitrariness and irrationality of s 6(1)(a).*

[14] Vol 3: 164 paras 8-12, referring to *Chisuse and Others v Director-General of Home Affairs and Another* 2020 (6) SA 14 (CC) ("*Chisuse*").

[15] Section 7 of the Act provides:

> *"(1) A South African citizen who intends to accept the citizenship or nationality of another country, or who also has the citizenship or nationality of a country other than the Republic, may make a declaration in the prescribed form renouncing his or her South African citizenship.*
>
> *(2) The Minister shall upon receipt of a declaration made under this section cause such declaration to be registered in the manner prescribed, and thereupon the person who made the declaration shall cease to be a South African citizen.*
>
> *(3) Whenever a person ceases under subsection (2) to be a South African citizen, his or her minor children who are under the age of 18 years shall also cease to be South African citizens if the other parent of such children is not, or does not remain, a South African citizen."*

[16] Vol 3: 170 para 25.

Section 6(2) authorises the retention of citizenship on application to the Minister. What then is the purpose of the automatic loss of citizenship in s 6(1)(a)? That remains unspecified. And it cannot be a legitimate object to threaten the deprivation of citizenship so as to invest the Minister with power to avoid that consequence. If that were so, every arbitrary deprivation would be transformed into the legitimate exercise of power simply because the Minister is given an untrammelled discretion to avoid that outcome. In sum, to deprive a citizen of their rights of citizenship for no reason is irrational."[17]

24. The SCA further (correctly) held that:

24.1. Section 6(1)(a) is arbitrary also because it treats South African citizens who already have dual citizenship differently from those who intend to acquire citizenship of another country;[18]

24.2. The purpose of section 6(1)(a) cannot be to regulate the renunciation of citizenship, because that would render section 7 of the Act redundant;[19]

24.3. There can be no reason to take away South African citizenship by automatic operation of law, without regard to a person's individual circumstances and the reasons they seek a dual citizenship;[20]

[17] Vol 3: 171 para 26.
[18] Vol 3: 172 para 28.
[19] Vol 3: 172 para 29, referring to *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) ("*Qwelane*").
[20] Vol 3: 172 para 30.

24.4. The discretion afforded to the Minister under section 6(2) of the Act is vague and overbroad, and furthermore cannot by itself create a purpose for section 6(1)(a) where none existed before.[21]

25. The SCA according concluded, on the question of rationality, that:

"What all of this shows is that there is no rationale for why an individual adult citizen who applies for citizenship of another country, must by operation of law lose their South African citizenship. The High Court's reasoning does not provide an explanation as to why the state may automatically strip its citizens of their citizenship merely because they acquired another citizenship. This is so more especially because the legislature has offered no clear basis why dual citizenship is a problem; indeed they say it is permissible but should be subject to ministerial discretion. But why? Also, simply to say that the retention or loss of citizenship is itself a legitimate use of power is to state the matter at such a high level of generality as to be meaningless. Rationality is tested against substantively legitimate objects and not by saying that because the power may be one that the state could exercise legitimately, its existence makes its exercise legitimate."[22]

26. Turning to the question of whether section 6(1)(a) infringes on constitutional rights, the SCA held that:

26.1. The right to citizenship is a gateway to other constitutional rights, and so section 6(1)(a) "*unjustifiably limits political rights, the right to enter and remain in the Republic, and the right to freedom of trade, occupation and profession, guaranteed by the Constitution"*;[23] and

[21] Vol 3: 173 paras 31-32, referring to *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) ("*Dawood*").
[22] Vol 3: 174 para 33.
[23] Vol 3: 175 paras 36-37.

26.2. The High Court was wrong to justify the infringement of these rights by reference to the national legislation referenced in section 3(3) of the Constitution. As succinctly put by the SCA:

> *"First, the national legislation referenced in s 3(3) is subject to the Bill of Rights, as s 8 of the Constitution makes clear. In other words, if legislation is passed in terms of s 3(3) of the Constitution that legislation may not infringe the rights in the Bill of Rights unless the legislation is justified in terms of s 36 of the Constitution. Second, s 3(3) of the Constitution cannot be read as authorising legislation that limits a right in the Bill of Rights. Third, the high court's interpretation disregards the fact that any form of deprivation of citizenship under any circumstances may constitute an infringement of s 20. Finally, legislation passed pursuant to s 3 (3) of the Constitution providing for the loss of citizenship is subject to the constitutional conformity with s 20 of the Constitution. The loss of citizenship is one type of deprivation of citizenship."*

27. It was unnecessary for the SCA to engage in a limitations analysis under section 36 of the Constitution, because provisions that have been found to be irrational cannot be justified.[24]

28. The sole remaining question is then that of remedy.

29. It follows from the above that the SCA was correct in striking down section 6(1)(a) of the Act as being unconstitutional and invalid.

[24] *Scalabrini 3* at para 47; *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at para 35.

30. No application for the suspension or non-retrospectivity of any declaration of invalidity was sought by any party, nor was one deemed necessary by the SCA.[25] The default position under the 1996 Constitution is that the section is invalid from the date of coming into effect of the 1996 Constitution (4 February 1997).[26]

31. The SCA correctly held that section 6(1)(a) of the Act was inconsistent, too, with the Interim Constitution,[27] and thus it was possible and appropriate to grant an order of "*full retrospective force*", which would—

> *"[R]estore South African citizenship to all persons who had lost their South African citizenship in terms of s 6(1)(a) of the Act between 6 October 1995 when the Interim Constitution was operative and 4 February 1997 when the current Constitution came into effect. In other words, those citizens who lost their citizenship by reason of s 6(1)(a) are deemed not to have lost their citizenship. This restoration remedy, which is a consequential relief under our fair and equitable remedial jurisdiction, is necessary to ensure that those citizens, such as Mr Plaatjes, who have had their citizenship revoked by some formal administrative action, taken in reliance upon s 6(1)(a), will enjoy the benefit of restoration, without the need for any further litigation."*

32. The DA submits that this Court should uphold and confirm the findings of the SCA.

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[25] Vol 3: 179 paras 44-45.
[26] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) ("*Estate Agency Affairs Board*") at para 47; *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) ("*Gory*") at para 39; *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC) at para 48.
[27] Vol 3: 177 para 41.

IV. CONCLUSION

33. On the grounds set out above and the logic of the SCA, it is submitted that this Court should grant orders confirming that:

33.1. Section 6(1)(a) of the South African Citizenship Act 88 of 1995 is inconsistent with the Constitution of the Republic of South Africa, 1996, as well as the Constitution of the Republic of South Africa Act 2000 of 1993, and is thus invalid from its promulgation on 6 October 1995; and

33.2. Those citizens who lost their citizenship by operation of section 6(1)(a) of the South African Citizenship Act 88 of 1995 are deemed not to have lost their citizenship; and

33.3. The DA is entitled to its costs of suit, including the costs of two counsel where so employed.

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DAVID SIMONSZ

Counsel for the Applicant

Chambers, Cape Town

8 March 2024

LIST OF AUTHORITIES

Statutory authorities

1) Constitution of the Republic of South Africa, 1996
2) Constitution of the Republic of South Africa Act 2000 of 1993
3) South African Citizenship Act 88 of 1995
4) Superior Courts Act 10 of 2013

Case authorities

5) *Chisuse and Others v Director-General of Home Affairs and Another* 2020 (6) SA 14 (CC)
6) *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)
7) *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC)
8) *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC)
9) *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC)
10) *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC)
11) *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC)
12) *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC)
13) *Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others* [2023] ZACC 45 (12 December 2023)

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DEPARTMENT OF HOME AFFAIRS Second Respondent

RESPONDENTS' WRITTEN SUBMISSIONS

Introduction

1. The respondents have filed a notice to abide the decision of this Honourable Court in this confirmation application. These written submissions must not be construed as an opposition to the application. They are filed to assist the court on the interpretation of the law in a constitutional litigation. The respondents, especially the Minister, to whom the administration of the Citizenship Act resides, is duty bound even when he has elected to abide, to still make legal

submissions to court on points of law in order to assist the Court. These written submissions must be understood in that context.

Brief background to the matter

2. On or about the 18th of July 2018, the applicant filed an application in the Gauteng Division of the High Court, Pretoria. The gravamen of the application was the constitutional challenge to section 6(1)(a) of the South African Citizenship Act 88 of 1995 ("the Act"). The order sought in the notice of motion reads as follows:

> *"1. Declaring that section 6(1)(a) of the South African Citizenship Act 88 of 1995 (the Act) is inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution) and invalid from the date of 6 October 1995.*
>
> *2. Declaring that all persons who had lost their South African citizenship in terms of section 6(1)(a) of the Act on or after 6 October 1995, are South African citizens.*
>
> *3. Declaring that all persons referred to in paragraph 3 may apply to the first respondent in terms of section 15 of the Act for the appropriate certificate of citizenship.*
>
> *4. Directing that the applicant's costs are to be paid by the respondents, jointly and severally, the one paying the other to be absolved, such cost to include the costs of three counsel; and*
>
> *5. Further and/or alternative relief."*

3. The application was opposed by the respondents who filed an answering affidavit.[1] The applicant filed a replying affidavit,[2] and the matter was set down for hearing. The application was heard on 10 May 2021 and judgment

[1] Volume 1 at pages 60 to 74.
[2] Volume 2 at pages 75 to 107.

delivered by Kollapen J (as he then was) on 6 August 2021[3]. In the judgment aforesaid, the applicant's application was dismissed with no order as to costs.

4. The applicant lodged an application for leave to appeal with the High Court, which was dismissed with costs, including costs of two counsel on 14 September 2021.[4] The applicant approached the Supreme Court of Appeal by way of petition, and leave was granted to that Court.[5]

5. The record in the appeal consisted of only one volume. The evidence in support of the application was contained in the founding affidavit deposed to by Mr James Selfe,[6] a former member of the National Assembly of the Parliament of the Republic of South Africa, and the former Chairperson of the Democratic Alliance Federal Council.

Respondents' submissions before the SCA

6. The central issue at the SCA was the proper interpretation of section 6(1)(a) of the Act. The respondents' contention was that section 6(1)(a) cannot be read in isolation. It must be read with section 6(2) in order to appreciate its legitimate purpose. Such interpretation is purposive and in line with the import of the Act.

7. What makes section 6(1) constitutionally permissive is the opening words of sub-section (1) which read: 'subject to the provisions of subsection (2),…'

8. The High Court applied a purposive approach to interpret the provision, and correctly found that it is constitutional.

[3] Volume 2, at pages 120 to 140: Judgment by his Lordship, the Honourable Judge Kollapen (as he then was).
[4] Volume 2, at pages 142-148.
[5] Volume 2, at page 150
[6] Volume 1 at pages 5 to 45, where Mr J Selfe's founding affidavit is contained.

9. This court is to determine whether the High Court was correct, and if it was correct, it follows that the judgment of the SCA was wrong and cannot stand.

10. Although the respondents abide, the submissions on points of law are good points.

11. To this end, we submit that the reasoning, and the legal conclusions reached by the High Court arising from the factual analysis of the matter is completely unassailable, this, notwithstanding the judgment and the reasoning by the SCA. In the premises, we submit that, in considering the constitutionality of the provisions of section 6 (1) (a), the above Honourable Court ought to prefer the approach, interpretation and conclusion adopted by the High Court as per Kollapen J (as he then was), as opposed to that adopted by the SCA.

12. Although the confirmation application is unopposed, a case still has to be made out for it. This court still has to be satisfied that the unconstitutionality of the impugned provision has been established. This court would not be bound by the approach of the SCA.

13. This is especially so because, not only is the above Honourable Court an apex Court, but it is the ultimate arbiter on matters pertaining to the constitutionality of any piece of legislation and it is enjoined by the constitution to have a final say on matters of constitutionality. This Court still has an obligation, even on own accord, to give a proper and rational interpretation to any impugned provisions of any particular piece of legislation and pronounce on the constitutionality thereof, regardless of whether there is any opposition

to an application for the confirmation of invalidity of a legislative provision such as the application before this Court.

The juxtaposition between the SCA and the high court judgments concomitant with the analysis of the reasoning on both judgments

14. The above subject requires an inquiry into a fundamental issue of whether the SCA or the High Court was correct, and which of the two judgments provide a sound and correct interpretation of the constitution in so far as the impugned provisions of section 6 (1) (a) of the Act is concerned.

15. The relevant passages of the High Court judgment merit consideration.[7]

16. We quote with approval at page 132 of the record, the High Court judgment when the learned Judge remarked as follows:

"*In challenging the rationality of the impugned provision, the applicant raises a number of issues that it says advances its argument that the provision is irrational, and it includes that section 6 (1) (a): ''serves no legitimate public purpose; operates automatically; unlawfully operates without notice to those affected and that it is impermissibly vague".*

17. At paragraph 47 of the judgment, the learned Judge stated as follows:

"'in this regard the constitutional design refers to the acquisition of citizenship which can be acquired by birth, descent or naturalization. It recognizes that citizenship can be lost and so the loss of citizenship is not constitutionally offensive but constitutionally permissible and sanctioned".

[7] See Judgment as per Kollapen J (as he then was) as per footnote 3 supra.

18. At paragraph 48 of the judgment, the learned Judge, observed that the test for rationality has been described as follows in ***Zuma v Democratic Alliance 2018 (1) SA 200 (SCA) 674 (CC):***

"Rationality review is concerned with evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred". [8]

19. In dealing with what the learned Judge terms, "the violation of rights" as well as "the argument that other rights are limited", the learned Judge succinctly dealt with such arguments.[9] For these reasons, we submit that, this is the proper approach and interpretation to the impugned provisions of section 6 (1) (a), read with the provisions of section 6 (2) of the Citizenship Act, that ought to be adopted and preferred over that of the SCA.

20. This is particularly so because, it is a trite and well-established principle of our law, that words and phrases in a statute ought to be given their plain literal and grammatical meaning, unless such meaning leads to absurdity. We submit that, when given their literal and grammatical meaning, the provisions of section 6 (1) (a), read with the provisions of section 6 (2), do not lead to any absurdity at all. Also, despite the proviso in the opening sentence of section 6(1), section 6(1) serves a legitimate governmental purpose.

[8] Volume 2, page 132, paras 46-48. See also the subsequent pages at 133-134, where the reasoning of learned Judge continues in so far as what ought to be a proper approach to the interpretation of the provisions of section 6 (1) (a), read within proper context with the provisions of section 6 (2) of the Citizenship Act.
[9] See Volume 2 at pages: 134-136, at paras 58-68.

For that reason, the SCA, in its interpretation sought to depart from this well-established principle of our jurisprudence.

Conclusion

21. In the final analysis, it is our submission that, on a proper conspectus, section 6 (1) (a) serves a legitimate purpose in regulating citizenship, be it the renunciation or the retention thereof, especially, when read in a proper context with section 6 (2), as to read it in isolation, completely out of context, would yield such an undesirable outcome as it transpired at the SCA. For this reason, we submit that, section 6 (1) (a), read with section 6 (2), does not offend against the constitution.

22. In the premises, it seems to us that the High Court's interpretation is in sync with our jurisprudence.

23. Notwithstanding the contents of paragraph 22 above, the respondents have nonetheless elected to abide the decision of this Court.

24. These are our submissions in assisting the court in a constitutional matter of the declaration of invalidity of a provision in legislation which reverts under the Minister of Home Affairs.

W R Mokhare SC
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Respondents Counsel
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27 March 2024

LIST OF AUTHORITIES

Statutory authorities

1. Constitution of the Republic of South Africa, Act 108 of 1996
2. The interim Constitution of the Republic of South Africa, Act 2000 of 1993
3. South African Citizenship Act 88 of 1995
4. Superior Court Act 10 of 2013

Case Authorities

5. *Zuma v Democratic Alliance (2018) (1) SA 200 (SCA) 674 (CC)*
6. *Chisuse and others v Director-General of Home Affairs and Another 2020 (6) SA 14 (CC)*
7. *Azanian People's Organization (AZAPO) and others v President of the Republic of South Africa and others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996)*
8. *August and others v Electoral Commission and others (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999)*