

SOUTH AFRICA / JUDGMENT

Police and Prisons Civil Rights Union and Others v National Commissioner of the South African Police Service and Others (6163/06) [2006] ZAGPHC 67 (18 July 2006)

[2006] ZAGPHC 67

COURT

High Courts - Gauteng

BEFORE

N M Mavundla

CASE / FILE NUMBER

6163/06

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Source record

IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) REPORTABLE Case number 6163/06 IN THE MATTER BETWEEN: DELIVERED ON THE 18 July 2006 POLICE and PRISONS CIVIL RIGHTS UNION ("POPCRU") MBULELO LENNOX PIKA FIRST APPLICANT SECOND APPLICANT T S NCAPHAYI AND OTHERS THIRD TO FURTHER APPLICANTS And NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE ("SAPS") FIRST RESPONDENT INDEPENDENT ELECTORAL COMMISSION SECOND RESPONDENT TO ELEVENTH RESPONDENT JUDGMENT MAVUNDLA, J., 1. On the 27 February 2006 I dismissed the application brought by the Applicants and did not make an order as to cost. 2. The applicants approached this Court by way of urgency for a rule nisi calling upon the Respondents to show cause on a date to be determined by the registrar why the following order should not be made final: 2.1. Directing the first, third to eleventh respondents not to prohibit members of the South African Police Service who have been, or are to be, deployed to polling stations outside the districts in which they are registered to vote in the local government elections on 1 March 2006 ("the deployed members"), from leaving the polling stations at which they are posted, to cast their votes in the districts in which they are registered to vote. Directing the first, third to eleven respondents to make reasonable arrangements, including but not limited to the provision of official transportation, to enable the deployed members to leave the polling stations at which they are to be deployed, to cast their votes in the districts in which they are to vote. Declaring that section 33 of the Electoral Act, 73 of 1998 ("the Electoral Act") and the Regulations, permit the second respondent to allow the persons contemplated in section 33, who include the deployed members, to apply for special votes in respect of local government elections. Declaring that section 55 of the Local Government: Municipal Election Act, 27 of 2000 ("Municipal Election Act") is inconsistent

with the Constitution of the Republic of South Africa Act, 108 of 1996, and invalid, to the extent that it prohibits special vote (as contemplated in section 33 of the Electoral Act) in respect of local government elections. Alternatively to prayers 2.1 and 2.2 above, directing the second respondent to allow, accept and consider applications by the deployed members for special votes as contemplated in section 33 of the Electoral Act and the Regulations promulgated there under, on or before 1 March 2006; and directing the first, third to eleventh respondents to permit the deployed members an opportunity to apply for special votes.

2.6. Directing that the orders in prayers 2.1 and 2.2 above, alternatively prayer 2, 5 above, is to operate in the interim with immediate effect pending the return day.

2.7. Directing any of the respondents that oppose the application to pay the costs thereof.

2.8. Granting the applicants such further and/or alternative relief that this Court deems appropriate."

BACKGROUND FACTS

3. The founding affidavit which was signed by Mr. Abbey Witbooi, the general secretary of the first applicant, was deposed to on the 26 February 2006. The notice of motion was issued by the registrar of this Court on the 27 February 2006. The matter was enrolled on the urgent court for hearing on the 27 February 2006 at 14h00 or so soon as the matter may be heard.

4. The matter was opposed by second respondent. Having regard to the fact that the notice of motion was served upon the second respondent on that very morning, and having regard to the short period the respondents have been afforded time to prepare and file their answering affidavits, I allowed the second respondent to file an unsigned answering affidavit of Mr. Michael Andre Hendrickse, who described himself as the Electoral Democracy, Training and Legal Services, duly appointed in terms of section 12 of the Electoral Commission Act 51 of 1996, and in the employ of the second respondent.

5. According to the first applicant, the purposes of the application is to protect and enforce the right to vote of the second to all further applicants and all its members of the SAPS in all nine provinces, and whose right to vote in the local government election on the 1 March 2006 is threatened.

6. The first respondent to eleven respondents have issued instructions in terms of which on or before 1 March 2006 certain members of the SAPS have been or are to be deployed to oversee elections at the polling stations in the districts that fall outside the voting districts in which they are registered to vote on the 1 March 2006, as contemplated in sections 24 and 24A of the Electoral Act.

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DELIVERED ON THE
18 July
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POLICE and PRISONS CIVIL RIGHTS UNION ("POPCRU")
MBULELO LENNOX PIKA
FIRST APPLICANT
SECOND APPLICANT
T S NCAPHAYI AND OTHERS
THIRD TO FURTHER APPLICANTS
And
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE ("SAPS")
FIRST RESPONDENT
INDEPENDENT ELECTORAL COMMISSION
SECOND RESPONDENT
TO ELEVENTH RESPONDENT

JUDGMENT

MAVUNDLA, J.,

1.

On the 27 February 2006 I dismissed the application brought by the Applicants and did not make an order as to cost.

2.

The applicants approached this Court by way of urgency for a rule nisi calling upon the Respondents to show cause on a date to be determined by the registrar why the following order should not be made final:

2.1.

Directing the first, third to eleventh respondents not to prohibit members of the South African Police Service who have been, or

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Directing the first, third to eleven respondents to make reasonable

arrangements, including but not limited to the provision of official

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ransportation, to enable the deployed members to leave the polling stations at which they are to be deployed, to cast their votes in the

districts in which they are to vote.

Declaring that section 33 of the Electoral Act, 73 of 1998 ('the Electoral Act') and the Regulations, permit the second respondent to allow the persons contemplated in section 33, who include the deployed members, to apply for special votes in respect of local government elections.

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section 33

Declaring that section 55 of the Local Government: Municipal Election Act, 27 of 2000 ('Municipal Election Act') is inconsistent with the Constitution of the Republic of South Africa Act, 108 of 1996, and invalid, to the extent that it prohibits special vote (as contemplated in section 33 of the Electoral Act) in respect of local government elections.

Declaring that section 55 of the Local Government: Municipal Election Act, 27 of 2000 ('Municipal Election Act') is inconsistent with the Constitution of the Republic of South Africa Act, 108 of 1996, and invalid, to the extent that it prohibits special vote (as contemplated in

section 33 of the Electoral Act

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Alternatively to prayers 2.1 and 2.2 above, directing the second respondent to allow, accept and consider applications by the

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of theElectoral Act.

Electoral Act.

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applicant is not able to place before the Court the names of all its members who are in the employ of the SAPS. The applicant has attached a list of names which it says are its members. The list contains various names of persons who it avers that they are its members. I need not refer to these names. However, it may be mentioned that these persons seem to be spread through out the country and through various units of the SAPS.

8.

In terms of the instructions, 'if a member is posted at a polling station and he cannot vote at this polling station he will not be allowed to leave his

post to cast his vote elsewhere.' The applicant attached to the papers a

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copy of such instruction issued at KwaZulu Natal Province, in respect of

SAPS KwaDukuza and averred that similar instructions have been issued in respect of some or all of the other provinces. Notwithstanding the instructions regarding the deployment, the SAPS and the IEC have not made any arrangements to enable the deployed members to cast their votes on the 1 March 2006. Their rights to vote in these elections will be completely denied, according to the applicant.

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AD LOCUS STANDI

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Maenetje who appeared on behalf of the applicants submitted, inter alia, that the deployed members cannot leave their assigned post in order for them to go exercise their votes at their voting stations and that this is an

infringement of their constitutional right as enshrined in section 19(3)(a) of

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(a) of

the Constitution of the Republic of South Africa Act 108 of 1996. He further states that, if there is an infringement of such right the Court must then grant the relief sought.

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It is apposite to cite the provisions of these sections.

10.1. 'Section 19(3) every citizen has the right

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(a) To vote in elections for any legislative body established in terms of the Constitution'

10.2. 'Section 38 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;

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(a)

anyone acting in their own interest;

(b)

anyone acting on behalf of another person who cannot act in their own interest anyone acting as a member of, or in the interest of, a group or class of persons;

(c)

(d)

anyone acting in the public interest; and

(e)

an association acting in the interest of its members.'

11.

The question of locus standi attracted the attention of the Constitutional Court in the matter of Independent Electoral Commission v Langenberg Municipality [2001] ZACC 23; 2001 (3) SA 925 CC at 933 where the Court

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"Standing" at paragraph 15 that:

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[15] In holding that Stilbaai did have locus standi to bring the application the High Court relied on ss19 (2) and 38(c) of the Constitution. Subsection (b)-(e) deal with the capacity of persons to bring challenges under the Bill of Rights in a representative capacity.

[15] In holding that Stilbaai did have

locus standi

to bring the application the High Court relied on ss19 (2) and 38(c) of the Constitution. Subsection (b)-(e) deal with the capacity of persons to bring challenges under the Bill of Rights in a representative capacity.

Some of the provisions manifestly go beyond common-law rules of standing in this regard. Such extension accords with constitutionalism. Beyond the broad proposition there is no clarity at present as to what the outer reaches of these subsections are. For example and with specific reference to s38(c), the following are by no means easy questions to answer:

Whether a person bringing a constitutional challenge as a member of, or in the interests of, a group or class of persons requires a mandate from members of the group or class.

What it is that constitutes a class or group-what should the nature of common thread or fact be. What entitles someone who is not a member of the group or class to act on behalf of those whose are:

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---must such person demonstrate some connection with

must such person demonstrate some connection with a member or some interest in the outcome of the litigation;

---What should the nature of such 'connection' or 'interest'

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or 'interest'

be;

---in what way, if at all, must the 'interest' differ from that

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12. In the matter Permanent Secretary, Development of Social Welfare, EC v Ngxuza 2001 (4) SA 1184 SCA at 1196A, Cameron JA states that although the Constitution expressly creates class action, it does not state how it is to be developed and implemented. He proceeds to state that section 39 (2) enjoins the Courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law. He further referred to the matter of Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (1996 (1) SA 984 (CC) where "the majority upheld that these provisions must be interpreted generously and expansively, consistently with the mandate given to the courts to uphold the Constitution, thus ensuring that the rights in the Constitution enjoy the full measure to which they are entitled.

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13.

In deciding the question of locus standi of the applicant in bringing an action on behalf of a group, I am of the view that the Court must look at the individual circumstances of the case, the wrong that is sought to be curbed, the group of persons in whose interest the applicant claims to be acting for, the location and the expanse thereof where the group is to be found. The list is not exhaustive, but these circumstances would be determined by the dictate of the particular case, vide Permanent Secretary, Department of Welfare, EC v Ngxuza (supra) at 1196B-C.

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14. Without attempting to answer the questions referred to in the Independent Electoral Commission v Langeberg, I am of the view that the "interest" and the "connection" will depend upon the circumstances of a particular case. However, the importance of the interest to the applicant and its members, the seriousness or gravity of the encroachment to such right, and the
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remedy sought are some of the factors that will guide the determination of the "interest" and "connection". The geographical spread of the members of the applicant, as in casu as pointed herein above, is also a factor to be considered. It is clear that the members of the applicant referred to herein above do have a right to participate in any election in the country, be it national or municipality elections, so that they can exercise their right to vote. Incasu, since the application concerns the threatened infringement of the right to vote in the local government election that are scheduled for the 1 March 2006, and the applicant is acting in the interest of those of its members whose rights are threatened, I am of the view that the applicant has established the interest and the connection to and of its members, so as to bring this action within the provisions of section 38(e) of the Constitution. I am of the view that the applicant has accordingly established locus standi to bring this action.

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to bring this action.

15. From the affidavit of the applicant it is common cause that:

15.1. The deployed members of the SAPS, once so deployed to a voting

station, if that voting station falls outside the voting station where

such member is registered, that member cannot leave the voting station to which he has been deployed to, to go and exercise his

such member is registered, that member cannot leave the voting station to

to which he has been deployed to

, to go and exercise his

right to vote.

15.2 The IEC and the SAPS have not made arrangements to enable

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the deployed members to cast their votes on the 1 March 2006.

Section 33 of the Electoral Act, No 73 of 1998 provides that:

Section 33

Electoral Act, No 73 of 1998

"Special votes.-(1) The Commission must allow a person to apply for a special vote if that person cannot vote at the station in the voting district in which the person is registered as a voter, due to that person's---:

c)

Absence from that voting district while serving as an officer in the election concerned; or
Being on duty as a member of the security services in connection with the Election.

(2) The Commission must prescribe--

The procedure for applying for special votes; and

Procedures, consistent in principle with Chapter 4, for the casting and Counting of special votes."

17.

Regulation Gazette No 6497, published on the 14 April 1999 Vol 406 N019951 at Chapter 3 provides the procedure for applying for special votes and the procedure for casting and counting of special votes as required by section 33(2) of

the Act, for persons who cannot vote at a voting station in the district in which they are registered as voters due to

inter alia

while on duty as a member of the security services in connection with the election.

Section 3(2) of the Electoral Act provides that:

Section 3(2)

Electoral Act provides

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"This Act applies to an election of a municipal councilor by-election for such Council only to the extent stated in the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000)."

Section 3 of the Municipal Electoral Act, No. 27 of 2000 provides that:

Section 3

Municipal Electoral Act, No. 27 of 2000

(1)

(1

This Act applies to all municipal elections held after the date de

terminated in terms of section 93

section 93

(3) of the Municipal Electoral Act;

Municipal Electoral Act;

(2)

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The Electoral Act and the Regulations made in terms of that Act apply to municipal elections only to the extent as stated in this Act."

Section 55 of the Local Government;Municipal Electoral Act, no 27 of 2000 provides that:

Municipal Electoral Act, no 27 of 2000

'The Commission may not make any special arrangements whereby a person is allowed to vote on any day other than voting day or at

any place other than the voting station or mobile voting station

established for the voting district in which that person is registered as

a voter."

Mr. Maenetje has submitted that where as section 33(d) of the

Electoral Act makes provision for special votes in respect of inter alia

Electoral Act makes provision for special votes in respect of

members of the SAPS who are deployed in connection with the

election outside the districts in which they are registered to vote, section 55 of the Local Government;Municipal Electoral Act, No 7 of 2000 prevents the Commissioner of IEC from making any

Municipal Electoral Act, No 7 of 2000

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arrangements for special votes. He contends that since there has been no arrangements made for the deployed members to leave the stations to which they have been deployed to, so as to enable them to go to the stations where they are registered to exercise their right

to vote, their rights have been encroached upon. He has urged the

to

vote, their rights have been encroached upon. He has urged the

Court to declare the provision of section 55 of the Municipal Electoral Act unconstitutional.

section 55

Municipal Electoral Act unconstitutional

He has further submitted that section 19(3) of the Constitution of the

Republic of South Africa, Act No 10

8 of 1996 guarantees the right of

every adult citizen "to vote in elections for any legislative body established in terms of the Constitution". He submits that the case of

August v and Another v Electoral Commission and Others 1999 (3) SA 1 (CC)

1999 (3) SA 1

states that the Constitution must not be interpreted in

favour of disenfranchisement but rather in favour of enfranchisement. He has further pointed out that in the August matter (supra) the Constitutional Court has stated that:

"[21] The suggestion that prisoners otherwise eligible should be disqualified from enjoying their rights not by statute, but by the mere fact of their incarceration, was considered and firmly rejected by

the US Supreme Court in the case of O'Brien v Skinner [1974] USSC 11; [414 US 524

[1974] USSC 11

[414 US 524

(1973). Speaking for the Court, Burger CJ stated that the appellant

prisoners were 'not disqualified from voting except by reason of not being able to physically-in the real sense-to go to the polls on election day or to make the appropriate registration in advance by mail' [at 528]. He held that their voting right

was being infringed, although

under no legal disability impeding their right to render to

register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting

their vote although they are legally qualified to vote' [at 530].

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Marshall J was even more emphatic in his concurring judgment. He said: '[N]or can it be contended that denial of absentee ballot to

Marshall J was even more emphatic in his

concurring judgment. He said: '

[N]or can it be contended that denial of absentee ballot to

[prisoners] does not deprive them of their right to vote any more than

it

deprives others who may 'similarly' find it 'impracticable' to get to

the polls on election day..., here, it is the State which is both physically preventing [the prisoners] from going to the polls and denying them alternative means of casting their ballots. Denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these [prisoners], at 532-3] these views are directly applicable to the present case. In reality no provision has

been made either in the 1998 Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote: The Commission accordingly has not complied with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that. The applicants have made either in the

Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote: The Commission accordingly has not complied with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that. The applicants

have accordingly established a threatened breach of s 19 of the

,~

Constitution.

In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so'.

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Mr.Maenetje has submitted that the above expressed views are also applicable to the present case. He has further submitted that the validity of section 55 of the Municipality Electoral Act is of public importance. As long as it remains in the statute book it will continue

to adversely affect the rights of other categories of adult citizens

adversely affect the rights of other categories of adult citizens

(otherwise catered for by section 33 of the Electoral Act) to vote in the local government elections.

He has further submitted that the above mentioned deployment encroaches upon the rights of the deployed members of the applicant and it cannot be justified under section 36 of the Constitution. He has urged me in the main to interpret the provisions of section 55 liberally and direct the respondents to allow the deployed members to leave

He has further submitted that the above mentioned deployment encroaches upon the rights of the deployed members of the applicant and it cannot be justified under section 36 of th

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e in the main to interpret the provisions of section 55 liberally and direct the respondents to allow the deployed members to leave

the stations to which they have been deployed to the polling stations where they are registered to go and vote. He has also urged me to declare the provisions of section 55 invalid.

.Mr. Kennedy who appeared on behalf of the respondents has urged me to dismiss the application for the following reasons:

Lack of urgency because the applicants had been aware of

the Municipality Election of the 1 March 2006

The impossibility of effecting the relief that is sought almost at the door steps of the elections, coupled with the enormous task, both financially and logistically, of effectuating alternative arrangements. According to the replying affidavits, both the signed and the unsigned, there are 120

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URGENCY

000 deployed members of SAPS, and there are almost 19 000 polling stations through out the country, and

There is paucity of personnel, there are approximately 200 000 persons contracted by the second respondent to render services at the voting stations on the March 2006. These persons have not been trained in the procedure for the casting of special votes or the processing of the applications for special votes.

The order sought is final and no bases has been sought for a final order.

The declaration of the provisions of section 55 of the Municipal Electoral Act as invalid will be of no practical

Municipal Electoral Act as

effect,

having regard to section 172(2)

(a) and (b) of

the

Constitution, Act 108 of

The deployment as such is not attacked and therefore there

is no compliance with the provisions of section 7(2)(a) and

(c) of

The balance of convenience does not favour the granting of the relief sought.

The notice of motion was issued on the 27 February 2006. It calls upon the respondents to:

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notify the applicant's attorney of their intention to oppose, and to do so at or before 10h00 on Monday 27 February 2006, by telephone or telefax ...;

to file their answering affidavits, if any, at 12h00 on Monday, 27 February 2006; and

to file their answering affidavits, if any, at 12h00 on Monday, February 2006; and if no such notice of intention to oppose is given, the application will be made on Monday, 27 February 2006, at 14h00 or so soon thereafter as the matter may be heard.

Since the application was issued only on the 27 February 2006, I assume that the papers were only served upon the respondents that very morning of the 27 February 2006. Having regard to the short period the respondents were afforded, having regard to the exigency of the situation, namely the fact that the date of the elections was on the 1 March 2006, was a day away from the day of the hearing of the matter, I allowed the unsigned affidavit filed on behalf of the second respondent to be handed in. Mr Maenetje did not object to this. I do not think that the applicants have been prejudiced by this. Besides, the applicant chose the most extraordinary and the highest degree of urgency to approach the Court

and has abridged the time frames to an extent that the respondents virtually had no time to prepare.

The applicant states in paragraph 47 and 48 that the application is urgent. It says that until the 24 February 2006 the applicant would not have been justified in bringing this application. After the 24 February 2006 all reasonable attempts have been made to resolve the problem without success. Elections have been confirmed to take place on the 1 March

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2006, and that once the election has been held and finalized the deployed members will not be able to exercise their right to vote. The right would have been completely negated by the conduct of the respondents.

Mr. Michael Andre Hendrickse, at paragraph 7, has stated that the date of

1 March 2006 for the holding of the municipal elections was proclaimed

on the 6 January 2006. On the same day the second respondent published the election time table from which it was clear that no provision is made for the application for special votes or the casting of special votes. Through the campaigns that commenced prior to 6 January 2006 and continued thereafter, the second respondent had made it clear that no provision exists for the casting of special votes. It is further stated therein that persons falling within the categories contemplated in section 33 of the Electoral Act, and who would in the case of national elections be entitled to apply for special vote, have accordingly been aware since no later than January

2006, that there is no provision made for the casting of special votes in the municipal elections.
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On a balance of probability the applicant and the affected members of the SAPS must have been aware much earlier of the provisions of section 55

of the Municipal Act as well as of the fact that there is no provision made

for special votes. This must be so since the applicants say that before the

24 February 2006 they would not have been justified in bringing this

24 February

2006 they would not have been justified in bringing this

application. They do not elaborate why could they not have brought it

earlier. In the premises I find that the applicants have long before the 24

February 2006 been aware of the provisions of section 55 of the Municipal Electoral Act and they did not take the necessary steps as may have been necessary. This conclusion is in my view correct when one has regard to what is contained in the answering affidavit of Lukas Cornelis Andre Pruis, which has been made on behalf of first and third to eleventh respondents. In paragraph 6 thereof it is stated "that the limitation that

February 2006 been aware of the provisions of section 55 of the Municipal Electoral Act and they did not take the necessary steps as may have

Municipal Electoral Act and

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affidavit of Lukas Cornel

is Andre Pruis, which has been made on behalf of first and third to eleventh respondents. In paragraph 6 thereof it is stated "that the limitation that

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exists or that may arise in respect of individual members of the SAPS who are deployed on the election day has existed and has been known to at least the Applicants and its members since the Local Government: Municipal Electoral Act was passed in 2000."

Municipal Electoral Act was

Mr. Pruis further states that he engaged extensively with many affected parties, including the First Applicant, on the consequences of the provisions of that Legislation for members of the SAPS deployed during the local elections in 2000. This affected many of the members of the SAPS during the local government elections during the year 2000.

In the light of the above mentioned finding, the applicant and its members ought to have brought this application much earlier, and not under such short abridged time frames, which are not in accordance with the provisions of Rule 6(5), vide *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992(3) SA 500 at 502E-503D. In that case the Court stated inter alia that "The mere existence of urgency cannot therefore justify an applicant not using form 2(a) of the First Schedule to the Uniform Rules. The Rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that the form of notice of motion may be jettisoned- and often that a rule nisi may be sought. The

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Rule 6(5)

1992(3) SA 500 at 502

E-503D.

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that "The mere existence of urgency cannot therefore justify an applicant not using form 2(a) of the First Schedule to the Uniform Rules. The Rules do not tolerate the illogical knee-jerk

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applicant must, in all respect, responsibly strike a balance between the

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in all respect, responsibly strike a balance between the

duty to obey Rule 6(5) and the entitlement to deviate, remembering that

the entitlement is dependent upon and is thus limited according to the urgency which prevails."

The following statement by the applicant is revealing: "Until 24 February 2006, the applicants would not have been justified to bring this application. After 24 February 2006 all reasonable attempts have been made to resolve the problem without success." It is clear that the applicants were aware of the situation created by section 55 of the Municipal Electoral Act much earlier than on the 24 February 2004.

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The following statement by the applicant is revealing: "Until 24 February 2006, the appl

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Municipal Electoral Act much

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They decided not to do anything then, until the last moment. I am of the view that the urgency is self created and the Court in the exercise of its

discretion should not come to their assistance. For this reason the relief sought should not be granted. But this is not the only reason for the relief

sought not

being granted.

The respondents have stated that it will be logistically and financially impossible to implement the order sought were it to be granted. In

his affidavit Mr. Pruis has stated that there will be 18,973 polling stations nationally, almost half of which are situated in Kwa-Zulu and Eastern Cape provinces There are in total approximately 120 000 members in the employ of the SAPS, of these approximately half (63,000) are to be deployed at the polling stations through out the polling stations country wide. It would be completely impossible for the SAPS to fulfill their constitutional and statutory responsibilities in relation to the election on the 1 March 2006 if SAPS members who have been deployed somewhere other than where they are registered to vote were entitled to travel away from their assigned post to go to and vote at their respective

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if SAPS members who have been deployed somewhere other than where they are registered to vote were entitled to travel away from their assigned post to go to and vote at their respective registered voting stations. He further states that were this to happen, this. would give rise to a serious security risk.

In Mr. Hendricks unsigned affidavit, it is stated that there are approximately 200 000 persons contracted by the second respondent and

have been trained to render services at the voting stations on the 1 March 2006. They have not been contracted to render any services prior to the voting day which is the 1 March 2006. Neither have they been trained in the procedure for the casting of special votes.

At paragraph 4.3 Mr. Hendickse states that the procedure to allow the casting of special votes is prescribed in Chapter 3 of the Election Regulations. This procedure entails that that the person who wants to cast

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a special vote must by not later than a relevant date stated in the election time-table make an application to the electoral officer of the voting district in which the person is registered. The application must be considered by the presiding officer for the district by not later than the date stated in the

electiontime-table. If the application is approved, a procedure to allow that election

time-table. If the application is approved, a procedure to allow that

person to cast a special vote in secret is then followed. The special vote

is then sealed in order to be opened and counted on the election date. The respondents state that there are no arrangements made for the casting of special vote. In my view, if there are no arrangements made for the casting of a special vote, and the Court were to grant the relief sought, it would be an exercise in futility since those deployed members would still not be in a position to cast the special vote. It further seem to be a mission impossible to have the necessary logistics made to prepare for the special votes under such a limited period, assuming that it was legally possible. This would also make the granting of the relief sought to be an academic exercise. The Courts should refrain from giving orders which are merely for scholastic purposes, if the orders would not achieve their import and

essence.

I am of the view that the scale on the balance of convenience tilts against the granting of the order sought. In arriving at this conclusion I

have taken into consideration the broader interest of the society to be

entitled to have free and fair elections and the statutory obligations of the

respondents to ensure that such elections are free and fair.

On a fundamental bases the application should be dismissed rather than it being struck off the roll. The fundamental basis for this proposition is premised on the fact the second respondent is in terms of section 181(1)(f) of the Constitution one of the institutions that are there to strengthen the constitutional democracy of the Republic. The second respondent, being a creation of statute is an organ of the State, and

On a fundamental bases the application should be dismissed rather than it being struck off the roll. The fundamental basis for this proposition is premised on the fact the second respondent is in terms of section 181(1

)(f) of the Constitution one of the institutions that are there to strengthen the constitutional democracy of the Republic. The second respondent, being a creation of statute is an organ of the State, and

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performs the functions which the government has created it for, vide Independent

Electoral Commission v Langenberg Municipality 2001 (3) SA

2001 (3) SA

926where the Court per Yacoob

J and Madlanga AJ

said at

936D [22]:

"The commission exercises public powers and performs public functions in terms of the Constitution and it is therefore an organ of the State as defined in s 239 of the Constitution. The question then is whether it is part of the government in that, as an organ of the State, it falls within the sphere of government contemplated by chapter 3 of the Constitution. It was created by chap. 9 of the Constitution which is headed;

"State institutions supporting constit

utional democracy.' Section 181

(1) provides that it is to strengthen constitutional democracy in the Republic.", and at 937C [24] the Court said:

"There is no doubt that the holding of free and fair elections for national, provincial and local legislatures is not a private function. It is public function and therefore a State function performed by the State institution. In the broad sense the Commission does perform a government function. More specifically, it implements national legislation concerning the conduct

of elections." This view is indeed correct when one has regard to the

provisions of section 190 of the Constitution which provide that:

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rovisions of section 190 of the Constitution which provide that:

"(1) The Electoral Commission must

Manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;

Ensure that those elections are free and fair."

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It brooks no argument that the SAPS is also an organ of the State and its primary function is, inter alia, to:

It brooks no argument that the SAPS is also an organ of the State and its primary function is, inter alia, to:

ensure the safety and security of all persons and property in the national territory;

uphold and safeguard the fundamental rights of every person as

guaranteed by Chapter 3 of the Constitution; See the Preamble of SAPS Act 68 of 1995.

As an organ of the State the SAPS is enjoined by the Constitution to perform these above stated functions. In this regard section 205 (3) of the Constitution provides that:

"The object of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

Indeed the deployed members of the first applicant have the right to vote as guaranteed by the Bill of Rights. Mr. Maenetja has further referred to section 36 of the Constitution and submitted there is no law passed of

general application that limits the right of the deployed members to vote.

I am of the view that this

submission by Mr. MAENET

JA is incorrect. In the case of prisoners, indeed there was no law of general application that proscribed against the prisoners voting. The Commission was therefore enjoined to ensure that facilities are provided so as to enable the prisoners to exercise their right to vote. In casu the legislature has specifically provided through section 3(2) of the Electoral Act that this Act "applies to an election of a municipal councilor by-elections for such council only to the extent stated in the Local Government: Municipal

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Electoral Act, 2000 (Act no 27 of 2000." Section 55 of the Local Government: Municipal Electoral Act is therefore a law of general application. Indeed, section 55 does not provide for special votes, unlike in the case of national votes, see 33(2) of Electoral Act. The

Municipal Electoral Act is

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consequence of this is that the rights of the deployed members are.

encroached upon since there is no mechanism for them to exercise their

right to vote if they are deployed outside the districts where they are registered to vote. However, section 36 provides that:

right to vote if

they are deployed outside the districts where they are registered to vote. However, section 36 provides that:

(1)

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

The nature of the right;

The importance of the purpose of the limitation;

The nature and extent of the limitation and its purpose; and

The relation between the limitation and its purpose;

Less restrictive means to achieve the purpose.

except as provided in subsection (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Section 7(3) of the Constitution provides that:

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"The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

In my view, the foundation and the source of our democracy is in the

Election machinery that has been created to ensure that there are

regular free and fair elections conducted through out the country. The

democracy itself is sacrosanct. The national elections rein supreme in relation to the local government elections. However both processes of elections are of national importance. The encroachment of the rights to vote of the deployed members of the SAPS, particular those who have been deployed outside the areas where they are registered, is a necessary and reasonable limitation since it is to ensure that the elections are conducted in a free and fair environment for the benefit of the broader society. The SAPS and its members are a necessary component of the organ of the State that must ensure that the elections are conducted in an atmosphere of tranquility. If the right to vote of those few deployed members of SAPS, upon whom the rest of society depends,

must be encroached, I am of the view that it is a necessary sacrifice on their part that they must suffer such encroachment. It cannot be said that section 55 of the Local Government:Municipal Electoral Act is invalid.

I do not think that the applicant has made a case for this Court to intervene and direct the Commission how to conduct its function.

Having regard to the nature of the matter and the importance of the issues that pertain in this matter, I am of the view that this is not a case where the general principle of cost having to follow the "loosing" party applies. I

say so because our democratic Constitution is still very young and it is

going to require much testing and redefining by the Courts. It is only after such process has extensively been embarked upon by those who have

the means and courage to bring to the fore such constitutional issues to

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the testing forum, being the Courts, that after some time we shall have a well defined Constitution. It will be wrong, if people were to be penalized with costs orders when they challenge what they believe to be inconsistency in some of the statutes. Otherwise the process of testing the

correctness of our noble Constitution might take too long. This is of cause

not to be regarded as a general principle in such matters, since each

case has to be judged on its own merits.

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It is for the above reasons that I dismissed the application for lack of urgency and made no order for costs.

N M MAVUNDLA

HEARD ON THE: 08/05/06DATE OF JUDGMENT:

18/07/06 APPLICANT'S

ADV: Mr MAENET

JE

APPLICANT'S ATT:

DEFENDANT'S ADV: Mr. P KENNEDY SC DEFENDANT'S ATT:

JUDGE OF THE HIGH COURT

It is ordered

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