

AUGUST AND ANOTHER v THE ELECTORAL COMMISSION AND OTHERS

CCT 8/99

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case concerned the voting rights of awaiting trial and sentenced prisoners. The Constitutional Court upheld an appeal against a judgment of Els J in the Transvaal High Court which in effect had held that the Electoral Commission (IEC) had no obligation to ensure that prisoners could register and vote in the coming general elections.

The judgment stated that in the first democratic elections held five years ago, Parliament had determined that all prisoners could vote, except for those convicted of murder, aggravated robbery and rape. The 1996 Constitution declared that South Africa was founded on universal adult suffrage and a national common voters' roll. The Constitution also guaranteed that every adult citizen had the right to vote in elections for any legislative body. While Parliament had disqualified certain classes of prisoners from voting in the 1994 elections, it had not sought in any way to do so since the coming into operation of the 1996 Constitution. Neither the IEC nor the Court had the power to disenfranchise prisoners. Only Parliament could do that, and Parliament had not done so. The result was that prisoners retained their constitutional right to vote, and the IEC was obliged to make all reasonable arrangements to enable them to do so.

The judgment pointed out that more than a third of persons in prison were awaiting-trial and that of these, thousands were locked up simply because they could not afford to pay low amounts of bail and small fines. These were not serious offenders. It also emphasized that Parliament was not prevented from disenfranchising certain categories of prisoners, for example, those convicted of serious offences. Examples were given of open and democratic societies that disqualified all or some classes of sentenced prisoners from voting, though none appeared to dis-enfranchise awaiting-trial prisoners.

The judgment gave guidance to the IEC as to how the phrase "ordinarily resident" in the Electoral Act of 1998 should be interpreted regarding prisoners, and expressed confidence that practical solutions would be found to deal with the practical problems involved, just as they would be for patients in hospital and diplomats abroad.

With the support of the Legal Resources Centre the prisoners had been trying in vain since the Electoral Act of 1998 was promulgated, to get on to the voters roll. The cut-off date for registration had now passed and they had been effectively disenfranchised. The IEC was accordingly ordered to make all reasonable arrangements to enable prisoners eligible for the vote, to register as voters and to vote. This order only applied to persons who were prisoners during each and every period of registration between November 1998 and March 1999. The IEC was required, by 16 April 1999, to serve on the applicants, the Minister of Home Affairs and the Minister of Correctional Services, an affidavit setting out the manner in which it would comply with the order. The IEC was ordered to pay costs.

The judgment of Sachs J was agreed to by all the judges who sat in the matter.

1 April 1999