

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

## Minister of Home Affairs v NICRO and Others

Case CCT 03/04

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### MEDIA SUMMARY

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

The Constitutional Court today upholds an application by the National Institute for Crime Prevention and the Re-Integration of Offenders (Nicro) and two convicted prisoners serving sentences of imprisonment, for an order declaring certain provisions of the Electoral Act to be inconsistent with the Constitution and invalid. The provisions deprive prisoners serving a sentence of imprisonment without the option of a fine of the right to register and vote in the upcoming elections.

Chaskalson CJ, writing for the majority (Langa DCJ; Mokgoro J; Moseneke J; O'Regan J; Sachs J; Skweyiya J; Van der Westhuizen J and Yacoob J), highlights the fact that, given the history of disenfranchisement in our country, the right to vote occupies a special place in our democracy. Any limitation of this right must be supported by clear and convincing reasons. If the government seeks to disenfranchise a group of its citizens it must place sufficient information before the Court demonstrating what purpose the disenfranchisement is intended to serve and to evaluate the policy considerations on which such decision was based.

The Minister of Home Affairs advanced cost and logistical constraints as the rationale for limiting the right to vote of prisoners serving sentences of imprisonment without the option of a fine. This contention is, however, not supported on the facts. Arrangements for registering voters have been made at all prisons in order to accommodate awaiting trial prisoners and those serving sentences because they have not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. Thus the majority holds that there was nothing to suggest that expanding these arrangements to include prisoners sentenced to imprisonment without the option of a fine would in fact place an undue burden on the resources of the Electoral Commission.

It was also argued on behalf of the Minister that making special provision for convicted prisoners to vote would, in the context of the alarming level of crime in this country, send an incorrect message to the public that the government is "soft" on crime. The majority holds that a fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights.

In addition, the majority notes that no information was provided about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions.

Moreover, the provisions as formulated appear to disenfranchise prisoners whose convictions and sentences are under appeal. Another relevant factor is the fact that the Electoral Act prohibits all prisoners sentenced to imprisonment without the option of a fine from voting, while the Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for election. No explanation is given, and none is apparent, as to why a person who qualifies to be a candidate should be disqualified from voting.

The majority orders the Electoral Commission to ensure that all prisoners, who are entitled to vote, following the declaration of invalidity of the various sections of the Electoral Act, are afforded a reasonable opportunity to register as voters for, and to vote in, the forthcoming general election in April 2004. The Minister is ordered to pay the costs of the application including the costs of two counsel.

In a dissenting judgment, Ngcobo J finds that, although an important right in our Constitution, the right to vote is not absolute and can be limited if that limitation is proportionate. He holds that the government has an ascertainable policy behind the limitation, namely the wish to reinforce its zero-tolerance policy against crime and to promote a culture of observance of civic duties and obligations among citizens of the state. The limitation of the right is temporary because it only applies whilst prisoners are serving their sentence. For these reasons, the judgment finds the limitation legitimate and allows it to stand.

However, Ngcobo J further finds that the Electoral Act should have made a distinction between prisoners who had been finally sentenced, and those who were awaiting the outcome of an appeal. The latter could still have their convictions overturned and it was therefore unjustifiable to deprive them of their right to vote. To this extent alone, he finds the provisions unconstitutional. He remedies this by reading an exclusion of prisoners awaiting the outcome of an appeal into the relevant sections of the Electoral Act, and thereby allowing them to vote.

In another dissenting judgment, Madala J holds that the temporary suspension of some prisoners' right to vote is a justifiable limitation of their constitutional right. The government has a multi-pronged policy that should be viewed holistically. Its aim is to develop a caring and responsible society and to maintain the integrity of the voting process. Making special arrangements for prisoners sentenced without the option of a fine to vote is not in line with this scheme.

The temporary removal of the right is in keeping with the objective of balancing individual rights with the values of society. It is anomalous to afford the right and responsibility of voting to persons who have no respect for the law. Furthermore, many democratic societies limit the right to vote. It is for the government to choose where the line is drawn. Madala J therefore rules that although the right to vote is infringed, the limitation is reasonable and justifiable in an open democratic society based on dignity, equality and freedom.