Chapter 29
Elections

Glenda Fick

29.1 Introduction

In a representative democracy, elections provide the primary means through which citizens express the general will of the polity.[1] The Final Constitution vouchsafes free, fair and regular elections for every legislative body established in terms of the Constitution[2] and guarantees those political rights such elections require.[3]

While the Final Constitution and our electoral laws refer to free and fair elections, they do not tell us what free and fair actually means. The standard embraces several related concerns. An election is free and fair if *(a)* all candidates and voters have the opportunity to exercise all relevant rights; *(b)* each voter counts as one; and *(c)* all candidates and parties campaign on a formally equal basis.[4]

This chapter will canvass both the constitutional provisions and the enabling legislation designed to secure free and fair national, provincial and municipal elections.[5] This chapter will also engage those constitutional provisions and legislative enactments that govern the Electoral Commission.[6]

1 Sunstein makes the point that '[a] good constitution ensures democratic elections and a free press.' He goes on to say that the central goal of a constitution is to create the preconditions for a well functioning democratic order, one in which citizens are genuinely able to govern themselves. See C R Sunstein *Designing Democracy: What Constitutions Do* (2001) 6.

2 Constitution of South Africa Act 108 of 1996 (the 'Final Constitution' or 'FC'), s 1*(d)*, reads, in relevant part: The Republic of South Africa is one, sovereign, democratic state founded on the following values . . . [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.

3 FC s 19 reads, in relevant part: (1) Every citizen is free to make political choices, which includes the right to form a political party, to participate in the activities of, or recruit members for, a political party, and 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 to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret, and to stand for public office and, if elected, to hold office.

4 See P De Vos 'Free and Fair Campaigning in N Steytler et al (eds) *Free and Fair Elections* (1994) 119 (Free and fair elections form the bedrock of a democratic society, instilling popular confidence in the system of government and in the governors themselves as representing the will of the people.) See also J Elklit and P Svensson 'The Rise of Election Monitoring: What Makes Elections Free and Fair?' (1997) 8(3) *Journal of Democracy* 32-46. Free and fair elections is the internationally accepted standard. See Centre for Human Rights *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (1994); *SADC Principles and Guidelines Governing Democratic Elections* (2004) 3.

5 The provisions relating to the election of the national and provincial legislatures are set out in FC ss 46 and 105, respectively. FC s157 addresses the election of legislative structures in local government. The most important pieces of electoral legislation are the Electoral Commission Act 51 of 1996, the Electoral Act 73 of 1998 and the Municipal Electoral Act 27 of 2000. See also *Mketsu & others v African National Congress & others* 2003(2) SA 1 (SCA), 2002(4) All SA 205 (SCA). In *Mketsu*, the Supreme Court of Appeal pointed out that the Electoral Act was to be applicable to national, provincial and municipal elections under FC s 3. Parliament provided that the Act was to come into effect at a date to be proclaimed and that s 3*(c)*, which addressed municipal elections, would come into effect later than the rest of the Act. As it turned out, no such date making the Act applicable to municipal elections was proclaimed. Instead, Parliament passed the Municipal Electoral Act 27 of 2000. The provisions of this Act are similar to the Electoral Act. Indeed, s 78 of the former contains the same provisions as s 96 of the latter.

6 FC s 190(1)*(a)-(b)*.

29.2 Voting in national, provincial and municipal elections

The right to vote is qualified by the requirement that one must be a registered voter. Unlike the 1994 election, for which there was no voters' roll, the Final Constitution contemplates an electoral system based on the national common voters' roll for the election of the National Assembly.[7] Elections for the provincial legislatures and municipal councils are based on the province's segment and the municipality's segment of the national common voters' roll respectively.

The Electoral Act 73 of 1998 creates an environment for free and fair elections of the national and provincial legislatures. Although the Act does not define a free and fair election, compliance with its provisions results in elections that can be regarded as free and fair. The Electoral Act ensures that all South African citizens whose names appear on the voters' roll have the right to vote.

The compilation of the national common voters' roll by the chief electoral officer requires a voter registration process.[8] Any South African citizen in possession of an identity document may apply for registration as a voter. The required identity document is a bar-coded identity document that contains computerised information about a potential voter. The information contained in the barcode that is used to construct the voters' roll.

The necessity of possessing a bar-coded identity document as a prerequisite for registering as a voter proved controversial in the run-up to the 1999 national and provincial elections. Many South Africans citizens did not possess the required identity document.[9]

(a) Identity Documents and Voter Registration

In *New National Party of South Africa v Government of the Republic South Africa*,[10] the Constitutional Court recognised the significance of free and fair elections in relation to the right to vote.[11] The Court stated:

> The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.[12]

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7 FC ss 46, 105 and 157.

8 Section 6 of the Electoral Act.

9 For purposes of the general registration of voters prior to the 1999 elections, an identity document included a temporary certificate, issued by the Director-General of Home Affairs, to a South African citizen from particulars contained in the population register and who had applied for an identity document. . Therefore, citizens who had taken steps to apply for an identity document and who were in possession of a temporary registration certificates were eligible to register and once registered, qualified to vote in the second democratic election of the National Assembly and provincial legislatures.

10 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('NNP').

11 Ibid.

This broadly stated principle has two concrete implications. First, each citizen must be entitled to vote only once in an election. Secondly, only those persons

entitled to vote should be permitted to do so. In order to ensure the proper exercise of the right to vote, [t]he process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair.[13] The *NNP* Court held that the Electoral Act creates the appropriate mechanisms for voter registration, voting and the construction of the national common voters roll. In particular, the *NNP* Court was satisfied that a bar-coded identity document constituted a rational means of realizing the legitimate government purpose of enabling the effective exercise of the right to vote.

In *Democratic Party v Minister of Home Affairs* the constitutionality of the provisions of the Electoral Act that provide for the documents necessary for registration and voting were challenged.[14] Goldstone J, writing for the Court, took the view that the issues relating to the constitutionality of the Electoral Act in the present case were substantially similar to those addressed by the court in *New National Party*. In the Electoral Act, Parliament expressly excluded certain citizens from registering as voters. The Act provides that the chief electoral officer may not register a person as a voter if the person has not registered in the prescribed manner or has applied for registration fraudulently. Other bars to registration (and voting) are: being declared by the High Court to be of unsound mind or mentally disordered, detention under the Mental Health Act, and not being ordinarily resident in the voting district for which a person has applied for registration.[15]

(b) Voting Rights of Prisoners

The Interim Constitution contained provisions that permitted Parliament to qualify the right to vote.[16] Section 16*(d)* of the Electoral Act 202 of 1993 denied the right to vote to prisoners who had been convicted and sentenced without the option of a fine in respect of murder, robbery with aggravating circumstances and rape; or who had been convicted and sentenced without the option of a fine for any attempt to commit these offences. The Electoral Act 73 of 1998 did not expressly deny any category of prisoner the right to vote in a South African election.

Just prior to the 1999 elections, the Constitutional Court considered the voting rights of prisoners. In *August v Electoral Commission*, the Court held that prisoners were not excluded from voting by the provisions of s 8(2) of the Electoral Act, were entitled to register as voters and could not be disenfranchised.[17] Furthermore, all prisoners who had registered to vote were entitled to vote in the election of the national and provincial legislatures in 1999.

12 Ibid at para 12.

13 *NNP* supra at para 16.

14 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC).

15 Section 8(2) of the Electoral Act.

16 Section 6*(c)* and s 21(2) of the Constitution of the Republic of South Africa 200 of 1993 (the Interim Constitution or 'IC').

In its prefatory remarks in *August*, the The Constitutional Court quoted the following dictum from *Haig*:

> All forms of democratic government are founded on the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is the proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.[18]

After establishing that the Constitution did not disenfranchise prisoners, the *August* Court had to determine whether there was any basis in law to do so. According to the court, [r]ights may not be limited without justification, and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[19] Since Parliament had failed to limit the voting rights of prisoners in terms of a law of general application that was reasonable and justifiable under FC s 36, prisoners were entitled to the full and effective citizenship.[20] That includes the right to vote.

In *August*, the Court was also required to interpret the phrase 'ordinarily resident' in s 7(1) of the Electoral Act. It held that the phrase had to be interpreted to allow for the enfranchisement of voters. In the circumstances of the case, those prisoners

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17 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*').

18 *Haig v Canada* 105 DLR (4th) 577, 613 (SCC) cited in *August* (supra) at para 18. The textual argument in August had a number of different sources. FC s 1*(d)* recognises universal adult suffrage, a national common voters roll and a multi party system of democratic government to ensure accountability, responsiveness and openness. Under the Constitution, there is a common South African citizenship. All citizens are equally entitled to the rights privileges and benefits of citizenship, and equally subject to the duties and responsibilities of citizenship. FC ss 3(1) and (2). Section 3(3) requires legislation to determine the acquisition, loss and restoration of citizenship. The Constitution does not define citizenship, but states that [n]o citizen may be deprived of citizenship. FC s 20. In *August* the court was concerned with citizenship but offers no interpretation of the right to citizenship set out in s 20. Citizenship is a contested concept. TH Marshalls' influential conception of citizenship depicts it as a complex interplay of social, political and civil rights. T Marshall *Citizenship and Social Class* (1950) extract reprinted in P Clark (ed) *Citizenship* (1994) 173. These three components are adequately provided for in the Constitution. Under Marshalls' account of citizenship, the political element means the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. See R Lister *Citizenship: Feminist Perspectives* (1997) 15-16. The Constitution gives effect to this aspect of citizenship in s 19(3). It links all political rights, including the right to vote, to citizenship. FC s 19(3) grants the right to vote for all legislative bodies to all adult citizens. As the section stands, it must be read to include prisoners. To this end, the *August* Court stated:

> The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally it says that everybody counts.
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> *August* (supra) at para 16.

19 *August* (supra) at para 17.

20 Ibid at para 16.

imprisoned during the period of voter registration would be considered ordinarily resident in prison.[21]

After the Constitutional Courts' decision in *August*, Parliament amended s 7 of the Electoral Act.[22] The amendment states that a person is regarded as 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. The amendment also states that a person is not regarded as 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.

The matter of the prisoners' franchise was revisited before the 2004 national and provincial elections. Parliament had amended the Electoral Act so as to rescind the right to vote from convicted prisoners who were in prison without the option of a fine.[23] In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*, the Constitutional Court held that these provisions that denied convicted prisoners serving sentences without the option of a fine of the right to register for and to vote in elections during the period of imprisonment were unconstitutional.[24]

In *NICRO,* the Constitutional Court, pointing out that in a justification analysis facts and policy are intertwined, required the Minister of Home Affairs to justify a legislative enactment limiting the right to vote.[25] In *NICRO* the Court heard from counsel that government had distinguished three classes of prisoners: (1) awaiting trial prisoners who were entitled to be presumed innocent, (2) prisoners who had been sentenced to a fine with the alternative of imprisonment, and who were in custody because they had not paid the fine; and (3) prisoners incarcerated without the option of a fine. Only the third group was to be excluded from registering and voting. The government argued that since there were law-abiding citizens who were, for various reasons, unable to get to registration and voting stations, then it was both reasonable and justifiable to prefer to allocate its scarce resources for the enfranchisement of such citizens to vote and rather than continued enfranchisement of the third group of prisoners.[26] Considerations of equity, and the perception that

21 Ibid at para 27.

22 See Schedule 2 to the Local Government: Municipal Electoral Act 27 of 2000.

23 Section 8(2) reads, in relevant part: 'The chief electoral officer may not register a person as a voter if that person:*(f)* is serving a sentence of imprisonment without the option of a fine.' Section 24B(1) reads, in relevant part: 'In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters roll for another voting district, is deemed for the for that election day to have been registered by his or her name having been entered on the voters roll for the district in which he or she is in prison.' Section 24B(2) reads, in relevant part: 'A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine.'

24 2004 (5) BCLR 445 (CC) ('*NICRO*').

25 *NICRO* (supra) at para 35.

26 Ibid at para 44.

the electorate would view the government as soft on crime were it to allow the prisoners to vote, were also said to have animated the government's decision.[27]

With respect to the structure of the government's argument for restricting the franchise of prisoners, the *NICRO* Court wrote:

> Where justification depends on factual material, the party must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate government concerns. If that be the case the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of the policy to limit a constitutional right.[28]

The Court then concluded that while resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote, the mere assertion by the government that it could not afford to reach out to non-incarcerated citizens at the same time as it continued to facilitate prisoner enfranchisement did not satisfy the aforementioned standard of justification. [29] So although the government had asserted that it would be costly and logistically difficult[30] to make the necessary electoral arrangements for prisoners, it had failed to provide the court with sufficient information on the actual costs of such an endeavour.[31]

With respect to policy, the Court rejected the governments desire to enhance its image and to correct a public misconception as to its true attitude to crime as grounds for the disenfranchisement of the third class of prisoners.[32] The Court assumed, for the sake of argument, that what the government actually intended to convey was that it is important for [it] to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens.[33] But even this argument, against the background of the the almost tangential manner in which the government justified its policy arguments for the disenfranchisement of the prisoners, could not save the challenged amendment. The Court ordered the Electoral Commission and the Minister of Correctional Services to ensure that all prisoners who were entitled to vote were

afforded the opportunity to register as voters and to vote in the 2004 national and provincial elections.[34]

27 Ibid at para 55.

28 *NICRO* (supra) at para 36.

29 Ibid at para 48.

30 Ibid at para 50

31 Ibid at para 49 (The factual basis for the justification based on cost and the lack of resources had not been established.)

32 Ibid at para 57.

29.3 Election of the national and provincial legislatures

(a) Calling for Elections

The National Assembly and provincial legislatures are elected for a period of five years.[35] If the National Assembly is dissolved or if National Assemblys term expires, the President must call for and set dates for an election that must be held within 90 days of the date of either the dissolution or term expiration. A proclamation calling and setting dates for an election may be issued either before or after the expiry of the term of the National Assembly. The election must take place on a single day announced by the President after consultation with the Electoral Commission.

FC s 109 sets out a set of similar provisions applicable to the election of provincial legislatures. The Premier calls for these elections.

The Electoral Commission may request that the person who called an election postpone the voting day if is satisfied that such postponement is necessary for the ensuring a free and fair election and that the voting day will still fall within the period required by the Constitution or by national or provincial legislation.[36] If the request is acceded to, the President or Premier, by proclamation or notice in the *Government Gazette*, must postpone an election to a day determined by the President or Premier. However, the new voting day must fall within the period required by the Constitution or national or provincial legislation.[37]

(b) Composition of the National Assembly and Provincial Legislatures

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution.[38] It consists of 400 elected women and men. They are elected in terms of an electoral system that is prescribed by national

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33 Ibid at para 57. These duties and obligations include at least an obligation to respect the rights of others and to comply with the law. Ibid at para 57. Embedded in the courts statement is a conception of citizenship that it does not elaborate on. The balancing of rights and obligations are essential to an understanding of the concept of citizenship. In relation to citizenship, Lister writes '[f]ew would dispute that responsibilities as well as rights enter the citizenship equation. The questions is what is the appropriate balance between the two and how does that balance reflect power relations.' R Lister *Citizenship: Feminist Perspectives* (1997) 21. Besides saying that the rights of citizenship under FC s 3 include the right to vote in elections and that the duties and responsibilities include at least an obligation to respect the rights of others and to comply with the law the court says nothing else about what citizenship under FC s 3 and FC s 20 might entail. *NICRO* (supra) at para 24.

34 *NICRO* also had a bearing on the 2005 municipal elections. Section 7 of the Municipal Electoral Act states that a person may vote only if registered as a voter on the certified segment of the voters roll for a voting district which falls within the municipality. The compilation of the voters roll takes place in accordance the provisions of s 8 of the Electoral Act. After *NICRO*, s 8(2)*(f)* was found to be unconstitutional. Prisoners are now allowed to register to vote and should be allowed to vote in the municipal elections.

35 FC ss 49(1) and 108(1).

36 Section 21(1) of the Electoral Act.

37 Ibid at s 21(2).

legislation[39]; is based on the national common voters roll; provides for a minimum voting age of 18 years and results, in general, in proportional

representation.[40] An Act of Parliament must provide a formula for determining the number of members of the National Assembly.[41] This formula is set out in schedule 3 to the Electoral Act.

A provincial legislature should be elected according to an electoral system based on the same principles applicable to the election of the National Assembly. It should have between 30 and 80 members.[42] Schedule 3 to the Electoral Act sets out the formula for determining the number of seats held by parties in the provincial legislatures.

In *Premier of the Province of the Western Cape v The Electoral Commission*, the Constitutional Court found the number of seats in a provincial legislature provided for in a provinces constitution would prevail over the number of provincial seats determined by the Electoral Commission in accordance with schedule 3 to Electoral Act.[43] The Constitutional Court held that FC s 105(2) has no application to the composition of a provincial legislature that is otherwise provided for in a provincial constitution. If FC s 105(2) did not apply to said composition, then neither would any legislation authorised by that section.[44]

The Constitution confers on a provincial legislature the power to make its own provincial constitution.[45] FC s 143(1) permits provincial legislatures to provide for different legislative structures and procedures to those provided for in the default provisions in chapter 6 of the Constitution.[46] In *Certification of the Constitution of the Province of Kwa-Zulu Natal,* the Constitutional Court had held that legislative and executive structures and procedures did not relate to the fundamental nature and

38 FC s 42(3).

39 See schedule A to the Electoral Act 73 of 1993. The schedule was introduced by the Electoral Laws Amendment Act 34 of 2003 and provides for a system of close-list proportional representation.

40 FC s 46(1).

41 See s 114 of the Electoral Act. The formulae referred to in sections 46(2) and 105(2) of the Constitution are set out in schedule 3 to the Electoral Act.

42 FC s 105.

43 1999 (11) BCLR 1209 (CC) ('*Premier of the Province of the Western Cape*'). The factual background of *Premier of the Province of the Western Cape v The Electoral Commission* is as follows. Before the June 1999 election, the Electoral Commission determined that there would be 39 seats allotted to the Western Cape legislature. However, the provinces constitution allowed for 42 seats. The parties were unsuccessful in resolving the dispute and on an urgent basis approached the court for a declaratory order. The respondents contended that the conflict between the provincial constitution and national legislation was to be resolved in accordance with s 147 of the Constitution.

44 FC s 105(2) provides that a provincial legislature consists of between 30 and 80 members and that the number of members, which may differ among the provinces, must be determined in terms of national legislation.

substance of the democratic State created by the Interim Constitution nor to the substance of the legislative or executive powers of Parliament or government of the provinces. In *Certification of the Constitution of the Western Cape*, the Constitutional Court found that structures of the legislature or executive pertained to the component parts of the legislature or the executive. With respect to these component parts, a provincial constitution could depart from the default provisions. Hence,

a province could provide in its constitution that its legislative and executive component parts could operate quite differently from those provided for in the national Constitution. However, any difference would have to comply with FC s 143. Section 143(2)*(a)* requires compliance with the founding values and the principles of co-operative government. Section 143(2)*(b)* states that a provincial constitution may not confer on a province any powers beyond those conferred upon it by the Constitution. Read together *Certification of the Constitution of the Province of Kwa-Zulu Natal* and *Certification of the Constitution of the Western Cape* lead to the conclusion that the determination of the number of seats in a provincial legislature pertained to a legislative structure and could therefore be addressed by a provincial constitution.[47]

In *Ex Parte Speaker of the Western Cape Certification Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997*, the Constitution Court was asked to decide whether a provincial electoral system is a provincial structure contemplated by FC s 143(1)*(a)*.[48] An electoral system provides a mechanism for converting votes cast by the electorate to seats in an elected body. The degree of correspondence between the number of votes cast and the seats won is determined by the choice of electoral system. The system of proportional reprsentation provided for in the provincial constitution of the Western Cape was not consistent with the one provided for in Annexure A to Schedule 6 of the Final Constitution. The province argued that an electoral system related to the structure of the provincial legislature. Since it was allowed to provide for legislative structures different from those set out in Chapter 6 of the Final Constitution, then it was similarly allowed to alter the electoral system. The Constitutional Court dismissed this argument. The Court held that when FC s 143 permits a provincial legislative structure different to that provided for in FC Chapter 6, it envisages no more than a difference regarding the nature and the number of the elements constituting the legislative structure. An electoral system does not constitute one of these elements. It also has no effect on the nature or the number of such elements.[49] Hence, the provisions of the provincial constitution that allowed for an electoral system that was predominantly based on

45 The scope of the constitution-making powers of the provinces was considered by the Court in *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of Kwa-Zulu Natal 1996,* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) and *Ex Parte Speaker of the Western Cape Certification Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC) ('*Speaker of the Western Cape*').

46 *Premier of the Province of the Western Cape* (supra) at para 9.

47 Given that there was no conflict between national legislation and the provisions of the provincial constitution, the dispute resolution mechanism provided for in FC s 147(1)*(a)* did not apply.

48 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC).

representation in geographic multi-member constituencies were held to be inconsistent with the electoral scheme provided for in the Final Constitution

(c) The electoral system applicable to the national and provincial elections

Item 6(3) of Schedule 6 to the Final Constitution sets out a variety of transitional arrangements. It states that:

> Despite the repeal of the previous Constitution, schedule 2 to that Constitution, as amended by Annexure A to this schedule, applies:
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> *(a)* to the first election of the National Assembly under the new Constitution;
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> *(b)* to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution; and
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> *(c)* to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

Schedule 2 to the Interim Constitution (as amended by Annexure A to schedule 6 to the 1996 Constitution) sets out the details of the closed-list proportional representation system that applied to the 1994 and 1999 national and provincial elections. Item 11(1) of schedule 6 contains similar provisions relating to the election of the provincial legislatures.

During the 1994, 1999 and 2004, national and provincial elections in South Africa relied on a system of closed-list proportional representation (PR). Under this system, a political party receives a share of seats in a legislature in direct proportion to the number of votes cast for the party in the election.

There is no constitutional or legislative provision that extended the closed-list proportional representation system beyond 1999. After the 1999 elections, South Africa experienced the unusual situation of not having in place an electoral system applicable to national and provincial elections. An amendment to the Electoral Act in 2003 corrected the situation.[50] The Act constitutes the national legislation contemplated by ss 46(1) and 105(1). Schedule 1A of the Electoral Laws Amendment Act 34 of 2004 sets out the closed-list PR system applicable to future elections.

Under this system political parties compile lists containing the names of the candidates they have nominated. The parties rank their candidates in order of preference, with the leader of a party topping its list. The lists are closed. That is, a voter is not able to express with his or her vote any preference for a particular candidate on the list over another. The essence of the system is that the proportion of all the votes cast for a party is translated into a proportionate number of seats in the legislature. All votes are equally weighted and no votes are wasted. The system is valued for its simplicity. Voters make a mark next to the name and symbol of the party for which they wish to vote.

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49 *Speaker of the Western Cape* (supra) at para 48.

50 See Schedule 1A to the Electoral Act 73 of 1998 introduced by the Electoral Laws Amendment Act 34 of 2004.

An important feature of this system is that the seat held by a member of a legislature belongs to the party that nominated the candidate and not to an individual candidate.[51] Another feature of the electoral system is its inclusiveness. It

requires no minimum threshold of votes to secure representation in a legislative body. The system is capable of accommodating a wide spectrum of political parties representing a range of voters interests.[52]

Compared to constituency-based systems, closed-list PR more readily enables higher levels of womens representation in legislative bodies. One reason advanced for this outcome is that the electorate is required to vote for a party rather than for an individual. It is argued that voting in this manner allows voters and parties to overcome the negative stereotyping of women in politics. Of course, party lists only increase the chance of female representation in legislatures when women appear in winnable places on a partys list.[53]

South Africas closed-list PR electoral system is often criticised for falling short on accountability. According to one definition political accountability refers to the constraint placed on the behaviour of public officials by organisations and constituencies with the power to apply sanctions to them.[54] Lodge notes that under South Africa's electoral system, elected representatives are directly accountable to

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51 See *Speaker of the National Assembly v Makwetu* 2001 (3) BCLR 302, 308 (C)(Hlope JP and Davis J held that the amount of seats allocated to each party was dependent on the votes cast in favour of such party at the general election. Once a member of the National Assembly ceased to be a member of a particular political party, that party was entitled to fill the vacancy by nominating a person whose name appeared on the list of candidates from which the vacating member was originally nominated and who was the next qualified and available person on the list.)

52 See *United Democratic Movement v President of South Africa* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC) ('*United Democratic Movement*'). The Court wrote that a multi-party system of democratic government required by FC s 1*(d)*:

> . . . clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete a multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, would be invalid. What had to be decided, therefore, was whether the disputed legislation had this effect.

53 In South Africas 1994 and 1999 elections the percentage of women in the National Assembly was 27 per cent and 30 per cent respectively. High levels of womens representation are more likely to occur when closed-list PR is used along with a quota that favours women candidates. For example, the ANCs policy in 1994 and 1999 made women one third the candidates on its list. See J Ballington 'Political Parties, Gender Equality and Elections' in South Africa in G Fick, S Meintjes & M Simons (eds) *One Woman, One Vote*: *The Gender Politics of South African Elections* (2002) 75-102. In 2004, the ANC increased the number of women candidates on its lists to 40 per cent. After the 2004 elections women now hold 123 of the 400 seats (31 per cent) in the National Assembly. It is unclear how many women voters voted for parties which reflected their interests and which promoted gender equality and non-sexism. It is also worth noting that SADC Heads of State signed the Gender and Development Declaration in Blantyre, Malawi in 1997. The Declaration's provisions include a commitment on the part of Heads of State to ensure the equal representation of women and men in the decision-making of member states and SADC structures at all levels, and the achievement of at least 30 per cent target of women in political and decision-making structures by year 2005. The ANC has made a public commitment that by 2009 half of its members of parliament and other public representatives would be women.

their leaders, not the electorate.[55] PR lacks the responsiveness and accountability that exists in the constituency-based system.[56]

The electoral system received the attention of the government appointed Electoral Task Team (ETT) in 2002. In order to address the lacuna in South Africa's constitutional and electoral law mentioned earlier, the ETT's brief was to prepare draft legislation for an electoral system that would meet the requirements of FC ss 46(1)*(a)-(d)* and 105(1)*(a)-(d)*. These sections require that national legislation

prescribes an electoral system that is based on the national common voters' roll; that provides for a minimum voting age of 18 years; and that results, in general, in proportional representation. FC s 46(2) requires an act of Parliament to provide a formula for determining the number of members in the National Assembly. FC Section 105(2) governs membership in provincial legislatures.

The ETT reviewed the closed-list PR system that had applied to the 1994 and 1999 national and provincial elections. All members of the ETT recommended that this electoral system apply to the 2004 election.

A minority of ETT members proposed no changes to the electoral system. Under this system, of the 400 members in the National Assembly, 200 are elected from the national lists and 200 from the regional lists submitted by political parties. The regional lists are derived from the nine provinces.[57]

The majority of ETT members proposed a change to the electoral system for the 2009 national and provincial elections. It took the view that under the 1994 and 1999 electoral system, each of the nine provinces could readily be regarded as a multi-member constituency. In its view, the number of multi-member constituencies could be increased if the each of the provinces was broken down into smaller constituencies.[58] It was proposed that the nine multi-member constituencies be increased to 69 multi-member constituencies countrywide. The number of representatives to be elected in each of these constituencies would vary from 3 to 7 depending on the number of registered voters in a constituency. Of the 400 members in the National Assembly, 300 would be elected from closed party lists applicable to the 69 multi-member constituencies and 100 members would be elected from the national lists. The national lists would be used to achieve overall proportionality.

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54 PIMS & The Right to Know Programme Regulation of Private Funding to Political Parties IDASA Position Paper (October 2003) 10.

55 T Lodge 'How the System Works' *Election Update (South Africa)* Number 1 (February 2004) 2.

56 Ibid.

57 Item 25 of schedule 2 to the Interim Constitution defines a region as the territorial area of a province and defines a regional list as a party's list of candidates for the election of the National Assembly.

58 The boundaries of the constituencies would be those of district councils and metro councils and the same outer boundaries wold apply for national, provincial municipal elections. No constituency boundary would transcend a provincial boundary and electoral demarcation would not be required. See *Report of the Electoral Task Team* (2003) 23.

This proposal for closed-list PR in multi-member constituencies was driven by concerns about accountability and a desire to establish a closer link between the voter and his or her representative. The majority of the ETT was of the opinion that [g]iven that the lists [would] be short and that candidates [would] have to campaign in their constituencies and represent them afterwards, there will clearly be a face to representation and a much closer link with the electorate than is presently the case.[59] The ETT's majority did not advocate a parallel system or a mixed member proportional (MMP) system. That is, it does not call for single-member constituencies in which members of the National Assembly would be elected on a first-past-the-post basis accompanied by a compensatory closed national list. It remains to be seen whether the recommendations of the majority of members of the ETT will be debated in Parliament at some point in the future.

(d) Floor-crossing and Electoral Systems

The Final Constitution now allows for floor crossing in legislatures in the three spheres of government.[60] A vexing question is whether there is a need for a move towards a PR system applicable to the election of representatives in the national and provincial legislatures that more readily accommodates floor-crossing than closed-list PR does. While not as responsive as a first-past-the-post single-member constituency system, closed-list PR in multi-member constituencies still require elected officials to answer to identifiable constituencies.[61]

In *United Democratic Movement v President of South Africa*[62] the court alluded to the awkwardness of allowing floor crossing under a (closed-list) proportional representation in the following terms:

> There is a closer link between the voter and party in proportional representation systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency-based elections, there is a close link between party membership and election to a Legislature. Floor-crossing, in the absence of a meaningful link between the voter and the political party he or she votes for under a closed list PR system, has the potential to make a relatively unresponsive system even less responsive.[63]

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59 Ibid at 25.

60 Constitution of the Republic of South Africa Amendment Act 2 of 2003.

61 *Report of the Electoral Task Team* (supra) at 26 (Closed-list PR in multi-member constituencies increase the the degree of accessibility and responsiveness between voter and representative.)

62 2003(1) SA 495 (CC), 2002 (11) BCLR 1213 (CC) ('*United Democratic Movement*').

63 *United Democratic Movement* (supra) at para 34. In this paragraph the Court was referring to a first-past-the-post or majoritarian constituency-based system in which there are single-member constituencies. See A Reynolds & B Reilly 'Proportional Representation Systems' in *The International IDEA Handbook of Electoral System Design* (1997) 66 (Of closed-list PR systems generally, the authors write: Voters have no ability to determine the identity of the persons who will represent them, and [have] no identifiable representative for their own town, district or village, nor do they have the ability to easily reject an individual if they feel that he or she has behaved poorly in office.')

(e) Membership in the national and provincial legislatures

Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly.[64] There are several exceptions to this

rule.[65] Any disqualification contemplated by FC s 47(1)*(e)* ends five years after the sentence has been completed.[66] In addition, a person who is not eligible for membership of the National Assembly on the grounds mentioned in s 47(1)*(a)* or *(b)* may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.[67] Similar qualifications and exceptions apply in relation to membership in provincial legislatures. [68]

A person loses membership of the National Assembly if he or she ceases to be eligible, or is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.[69] After a recent amendment to FC s 47(3*(c)*, a person loses membership of the National Assembly if he or she ceases to be a member of the party that nominated him or her as a member of the National Assembly, unless he or she has become a member of another party.[70] This scenario was made possible after the introduction of Schedule 6A to the Final Constitution and the lifting of the prohibition on floor crossing in the national and provincial legislatures. The provisions of Schedule 6A are discussed below.

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64 FC s 47(2). B Van Heerden, A Cockrell and R Keightley (eds) *Bobergs' Law of Persons and the Family* (2nd Edition 1999) (The authors point out that '[i]n as much as minors who have attained the age of 18 years are eligible for nomination as candidates for election to the National Assembly, the National Council of Provinces and a provincial legislature, it seems that such minors would have *locus standi* in proceedings relating to their candidacy'). See FC s 47(1) read with FC s 46(1) *(c)*, and FC s 62(1) read with FC s 106 (1).

65 See FC s 47(1)*(a)*-*(e)*.

66 FC s 47(1)*(e)*. Grounds for disqualification include anyone who is appointed by, or is in the service of the state and receives remuneration for that appointment or service other than the President, Deputy President, Ministers and Deputy Ministers. The exceptions to the rule include other office-bearers whose functions are compatible with those of a member of the Assembly, and have been declared compatible with those functions by national legislation, permanent delegates to the National Council of Provinces or members of a provincial legislature or Municipal Council and extend to un-rehabilitated insolvents, anyone declared to be unsound mind by a South African court or anyone who, after the coming into effect of the section, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either within or outside of South Africa if the conduct constituting the offence would have been an offence in South Africa. No one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired.

67 FC s 47(2).

68 FC s 106.

69 FC s 47(3)*(a)* and *(b)*.

70 Constitution of the Republic of South Africa Amendment Act 2 of 2003.

The Final Constitution requires that vacancies in the National Assembly and provincial legislatures be filled in terms of national legislation.[71] The filling of vacancies in both legislative bodies is now covered by item 23 of schedule 1A to the Electoral Act. In the event of a vacancy in a legislature, the party which the vacating member represented must fill the vacancy by nominating a person whose name appears on the list of candidates from which the party's members were originally nominated and who is the next qualified and available person the list.

(f) Floor-crossing in the national and provincial legislatures

Item 23(A) of Annexure A to schedule 6 to the Final Constitution provided:

(1) A person loses membership of a legislature to which this schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite sub-item (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in sub item (3) may also provide for:

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.

The constitutional framework created by the above provisions was altered after a series of political realignments in the Western Cape. The initial realignment was the result of the withdrawal of the NNP from the Democratic Alliance. Later on all parties seized upon the possibility of creating mechanisms for such realignments that might help them shift the political landscape in their own favour.

In June 2002 Parliament passed two amendments to the Constitution and two Acts of Parliament aimed at allowing members of national, provincial and local government legislatures to defect or to cross the floor. The Acts were:

(a) the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (the First Amendment Act);

(b) the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (the Second Amendment Act);

(c) the Local Government: Municipal Structures Amendment Act 20 of 2002 (the Local Government Amendment Act); and

(d) the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (the Membership Act).

In short, the four Acts allowed members of the National Assembly, the provincial legislatures and local government to cross the floor or to form new parties without loss of their membership. That is, a member of the National Assembly or a provincial

71 FC s 47(4).

legislature or local government could change parties while retaining his or her seat. The First Amendment Act and the Local Government Amendment Act both related to floor crossing in the local government sphere. The Second Amendment Act and the Membership Act related to floor crossing in the National Assembly and provincial legislatures. The Membership Act removed the constitutional prohibition on floor crossing. The United Democratic Movement and other parties challenged the suite of floor crossing legislation in *United Democratic Movement v President of South Africa*.[72]

One leg of the applicant's argument was that an anti-defection provision was an essential component of an electoral system based on proportional representation. This argument did not emphasise that South Africas electoral system was a closed-list system. There are other PR systems such as those that rely on open lists or have a majoritarian element which more readily accommodate floor crossing. The electoral system applicable to South Africas local government elections is an example of the latter.

The applicants regarded an anti-defection provision as necessary to ensure that the results of an election would not be affected by the defection of persons who gained their seats in a legislature solely because of their position on the party list. The applicants correctly pointed out that it is the party, and not the members, which is entitled to the seats. Addressing the relationship between voters and their elected representatives the *United Democratic Movement* Court observed that '[t]here is a tension between the expectation of voters and the conduct of members elected to represent them.'[73] It then quoted from its holding in the *First Certification Judgment*:

> Under a *list* system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not *inappropriate* to *ensure that the will of the electorate is honoured*. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.
>
> . . . An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate (emphasis added).[74]

The court recognised that requiring a member of a legislature to resign if he or she changes party allegiance during the life of the legislature though possibly desirable

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72 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC). See also *United Democratic Movement* (supra) and *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) (Addressed the issuing of interim orders by the High Court and Constitutional Court respectively.)

73 *United Democratic Movement* (supra) at para 31.

74 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (*First Certification Judgment)* at paras 186-187.

cannot be implied as a necessary adjunct to a proportional representation system [75] However, the Court's description of the electoral system as a proportional representation system is not sufficiently precise. The system in South Africa is, as we have seen, a closed-list proportional representation in which a party receives a number of seats in a legislature in proportion to the total number of votes it receives in an election. The Court correctly noted that '[a]lthough voters might have been influenced by the names of candidates, and possibly their place on the list, they voted for parties and not for particular candidates.'[76]

As we have already seen, South Africa's closed-list proportional representation system is but one of many systems of proportional representation. Moreover, a number of other proportional representation systems – for example, the mixed member proportional (MMP) representation system – that possess features of majoritarian and list proportional representation that more readily accommodate floor crossing.[77] In these other systems, lists compensate for any disproportionality in party support brought about by voting in constituencies or wards.

The Final Constitution itself implicitly recognises the variety of PR systems. IC s 46(1) of the Constitution requires a system that results, in general, in proportional representation. Reynolds and Reilly note that the rationale underpinning all proportional representation systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats.[78] The system relied on in South Africa's 1994 and 1999 elections results in pure proportional outcomes.[79] However, Parliament has a range of options under FC s 46(1). A closed list PR system with pure proportional outcomes would meet this requirement, but so would a system which had an overall (or general) outcome of proportionality.

In *United Democratic Movement*, the Constitutional Court did not emphasise the features of a closed-list PR system. In *United Democratic* it simply reiterated the view expressed in *First Certification Judgment* that it did not follow that a proportional representation system without an anti-defection clause is inconsistent with democracy.[80] To what aspect of democracy was the Court referring? At a minimum, the judgment should have engaged directly the coherence of allowing floor crossing in a closed list PR system in which representatives could not, at the time of their election, defect.

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75 *United Democratic Movement* (supra) at para 35.

76 Ibid at para 37.

77 Under the MMP system in Lesotho the 40 members on the compensatory seats (those coming from party lists) are not allowed to cross the floor while those members elected in constituencies can do so. See J Elklit 'Lesotho 2002: Africas first MMP elections' (2002) 1(2) *Journal of African Elections* 4.

78 Reynolds & Reilly (supra) at 19.

79 M Krennerich Electoral Systems: A Global Overview in J de Ville & N Steytler (eds) *Voting in 1999: Choosing an Electoral System* (2000) 12.

80 Ibid at para 34.

For reasons that are not entirely clear, the *United Democratic Movement* Court seemed less inclined to recognise the importance of the will of the electorate than in the *First Certification Judgment*. It was likewise uninterested in assessing the aptness of the provisions of the Membership Act for the existing closed list PR

system. It is true that item 23A granted Parliament the power to amend the provisions of the Final Constitution by an Act of Parliament (the Membership Act) under FC s 76(1). It is also true that the purpose of the legislation was to make provision for members of the national and provincial legislatures to change their political parties without losing their seats in the legislature. However legitimate the textual authority for this legislation may be, it creates an anomalous situation under a system of closed-list PR. So while the Constitutional Court could not take issue with Parliament's power to do what it did, it had an obligation to press down on the tension between floor-crossing and a closed-list PR system. Its lack of engagement with such issues is reflected in the following two remarks: :

> Where the law prohibits defection that is a lawful prohibition, which must be enforced by the courts. But where it does not do so, the courts cannot prohibit such conduct where the legislature has chosen to do so.[81]
>
> . . . .
>
> We were referred in argument to a number of democratic countries with proportional representation systems in which defection is not allowed. No case was cited to us, however, in which a court in any country has ever held that, absent a constitutional or legislative requirement to that effect, a member of the legislature is obliged to resign if he or she changes party allegiance during the life of a legislature.[82]

A deeply reasoned judgment on the electoral system offering an opinion on the relationship between voters and their representatives in South Africas democracy, even if obiter, would have provided valuable guidance to Parliament when it reconsidered the Membership Act after the Courts finding of unconstitutionality Such analysis might have deterred the raw political expediency which drove the legislature to turn the Membership Act into a constitutional amendment less than two years before the 2004 national and provincial elections.

Prior to 2002, and the run-up to the next elections, Parliament had showed little inclination to take up the Final Constitution's invitation to change our electoral system. In fact, a parliamentary committee appointed in 1997 had reported that floor-crossing in the context of the closed-list system was not fair or democratic and recommended that Parliament should not make use of the option given to it by the Constitution.[83] At the time, the ANC agreed. It took the view that:

> Parties are represented in the legislatures, on the basis of party lists, in proportion to the votes they had received in elections Our system does not provide scope for the role of an independent individual MP or of a group of MPs not directly elected by votes on the basis of a party list There are many difficulties with the qualified right to cross the floor The crucial problem here is that it is difficult to establish what constitutes a

81 *First Certification Judgment* (supra) at para 35.

82 Ibid.

83 See *Report of the Natinal Assembly's Ad hoc Committee on Membership of Legislatures* (25 May 1998).

significant shift in public opinion, when such shift has occurred and to what extent the desire of a group of MPs to defect, reflects this shift. More fundamentally, if there has been a significant shift, surely the answer is fresh elections?

By 2002, the ANC had changed its tune. Unfortunately for the party, the Constitutional Court concluded that the Membership Act, passed by Parliament more than five years after the Final Constitution came into effect and was not passed within a reasonable period. The *United Democratic Movement* Court held that the FC s 76 procedure was an option only during the reasonable period stated in item 23A, and that having expired, the amendment of the Final Constitution in a manner not contemplated or sanctioned by the Final Constitution itself, was invalid.[84]

29.4 The constitution amendment act 2 of 2003

After the Constitutional Court's decision in *United Democratic Movement,* Parliament passed the Constitution Amendment Act 2 of 2003. The Amendment Act repeals The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002. It introduces a new schedule 6A to the Final Constitution.

The schedule stipulates that a member of the legislature who becomes a member of a party other than the party which nominated that person remains a member of that legislature if the member on his or her own or together with one or more other members (who ceased to be members of a party that nominated them) represent not less than 10 per cent of the total number of seats held by the nominating party in the legislature.[85] (These provisions apply whether the party of which a person becomes a member participated in an election or not. The seat held by a member is regarded as having been allocated to the party that an individual joins (the party which did not nominate the member). Ceasing to be a member of the party that nominated an individual must take place in the time periods specified in item 4(1)*(a)* or *(b)* of the schedule. The provisions of item 2 apply for fifteen days from the first to the fifteenth day of September in the second year after an election of the legislature and for a period of fifteen days during the same period in September in the fourth year after an election of the legislature.

Any party represented in a legislature is permitted to merge with another party.[86] It does not matter whether the latter participated in an election or not. Furthermore, any party may subdivide into more than one party.[87] After a sub-division, any party may merge with another party whether the latter participated in an election or not. After a sub-division, members leaving their original party must represent not less than 10 per cent of the total number of seats held by the original party in any legislature. The time periods set out in item 4(1)*(a)* and *(b)* also apply to item 3.

84 *United Democratic Movement* (supra) at para 113.

85 Item 2(1).

86 Item 3(1)*(a)*.

87 Item 3(1)*(b)*.

If there is a merger of parties or a sub-division or subdivisions and merger of parties contemplated in items 3(1)*(a)* and *(b)*, the members retain membership of the legislature to which they were elected and the seats they held are regarded as having been allocated to the party which they represent after any merger, subdivision or subdivision and merger envisaged under item 3(1). During the periods referred to in items 4(1)*(a)* and *(b)* a member of the legislature may change membership of a party on one occasion only. Similarly, during the periods referred to in items 4(1)*(a)* and *(b)* a party may merge with another party, subdivide into more than one party or subdivide and merge with another party on one occasion only. Within seven days after the expiration of a period mentioned in item 4(1)*(a)* or *(b)* a party represented in the national Assembly or a provincial legislature must submit a list of its members to the secretary of the legislature.[88] The number of seats held by each party represented in that legislature and the name of and party represented by each member will be published in the *Government Gazette*.

The provisions of items 2 and 3 of schedule 6A allow parties representation in the national and provincial legislatures without requiring them to contest an election. Members of political parties who are elected under the aegis of one political party and after crossing the floor or after the merger and/or subdivision of parties may end up representing a different party. The result is that new parties may acquire representation between elections.

Who do the members of new parties represent? They would have been elected by voters supporting the party that nominated them as electoral candidates. The seats they retain would be seats that belonged to the party that nominated the member or members and which were allocated to a party based on the electorates support for that party. When a member ceases to be a member of the nominating party, the provisions in items 2 and 3 permit a member to transfer the seat of his or her original party to a different or new (non-elected) party in a legislature.

No party represented in a legislature may suspend or terminate the party membership of any one of its members representing it in that legislature without the written consent of the member concerned.[89] Furthermore, a party may not perform any act which causes a member to be disqualified from holding office as a member without the written consent of the member concerned.[90] A party that does not register as a political party under the Electoral Act 73 of 1998 may still be regarded as a party for purposes of schedule 6A. However, the party must register as a political party within the periods set out in items 4(1)*(a)* and *(b)*. If it fails to do so within four months after the expiration of these periods, the party will cease to exist. In these circumstances the affected seats are to be allocated to the remaining parties in accordance with applicable law.

During the first fifteen-day period following the date of the commencement of schedule 6A, members of the National Assembly and the provincial legislatures

were allowed to become members of political parties which had not nominated them while retaining their seats in a particular legislature. The schedule also allowed party

88 Item 5(2).

89 Item 4(3)*(c)*(i).

90 Item 4(3)*(c)*(ii).

mergers and the subdivision of parties. In these situations members were allowed to hold their seats and the seats were regarded as seats belonging to the members new party and not the one which, in the first place, had nominated the members.

Schedule 6A contains provisions which recognise the reality of party politics. Members of political parties become disgruntled with their parties. The provisions permit them to shift allegiance to a party whose policies are more aligned with their own. The provisions also accommodate situations in which a political party splits because of differences in opinion between groups or factions in a party. New parties may be formed through subdivisions and mergers. That said, the tension between floor-crossing and closed list PR remains. The will of the electorate expressed at the time of an election – for parties and their policies – morphs into the will of the individual representatives and the parties and policies for whom they express a preference.

29.5 Funding of political parties in the national and provincial legislatures

FC s 236 states that to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis. The national legislature passed the Public Funding of Represented Political Parties Act in accordance with this constitutional directive.[91] The Act established the Represented Political Parties Fund. The fund making provisions for already-elected political parties participating in Parliament and provincial legislatures rather than those who aspire to participate in the multi-party government envisaged by the Final Constitution.[92] The chief electoral officer of the Electoral Commission manages the Fund and serves as the accounting officer and chief executive officer of the Fund.[93] Allocations from the fund cover activities related to: developing of the popular will of the people; bringing a political party's influence to bear on the shaping of public opinion; inspiring and furthering political education; promoting active participation by individual citizens in political life; exercising and influence on political trends; and ensuring continuous, vital links between the people and organs of state.

Aspirant political parties and those who already have representation in South Africas legislative bodies may receive unlimited and unconditional funding from private sources. No legislative framework similar to that applicable to public funding is in place. There is therefore no mechanism to control the impact of

such funds on a political party's policies and on what they include in their manifestos. In the absence of any legislative framework the electorate cannot know or easily obtain information on where political parties derive their funding from. The electorate is unable to form an opinion on the measure of influence brought to bear upon a political party by a private donor. Such unregulated funding creates incentives for corruption.

91 Act 103 of 1997.

92 Section 2(1) of the Public Funding of Represented Political Parties Act 103 of 1997.

93 Ibid at s 4(1).

IDASA has launched a campaign to promote greater transparency by political parties. It uses the Promotion of Access to Information Act to elicit documentation about the source of their private political party funding. Political parties represented in the legislatures are required by the Act to provide details of any private funding over R50,000.00. IDASA makes the compelling argument that regulation of party funding will strengthen democracy, curb opportunities for corrupt practices and promote several constitutionally enshrined rights.[94]

29.6 Election of municipal councils

The Municipal Electoral Act 27 of 2000 regulates municipal elections. The Constitution and the Local Government: Municipal Structures Act 117 identify three categories of municipality[95]: A, B and C.[96] Municipal councils consist of members elected in accordance with the electoral options set out in FC s 157(2). They are elected for terms of five years.[97] Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice, call and set dates for an election of all municipal councils. The election must be held within 90 days of the date of the expiry of the term of municipal councils.[98]

(a) The electoral system applicable to municipal elections

The Constitution envisages an electoral system based on closed-list proportional representation and reliant upon that municipality's segment of the voters roll.[99] It also provides for an alternative of a semi-proportional system made up of a component of proportional representation and representation on a ward basis, based on that municipalitys segment of the voters roll.[100] The electoral system

applicable to local government elections must result, in general, in proportional representation.[101]

94 PIMS & The Right to Know Programme Regulation of Private Funding to Political Parties *IDASA Position Paper* (October 2003) 4.

95 Several sections of the Local Government: Municipal Structures Act 117 of 1998 were challenged in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development, Executive Council, Kwa Zulu- Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC).

96 Section 7 of the Municipal Structures Act lists several types of municipality.

97 Section 24 of the Municipal Structures Act.

98 Ibid.

99 FC s 157(2)*(a)*.

100 FC 157(2)*(b)*.

101 FC 157(3).

The Municipal Structures Act 117 of 1998 provides for a system that allows for semi-proportional representation. This type of semi-proportional system is often favoured in new democracies. It generally benefits from the broad representation of parties that accompanies voting under a closed-list proportional representation system. It possesses direct accountability.[102] A system that combined proportional representation (PR) and voting in wards on a first-past-the-post basis was employed in the local government elections in 1995 and 1996. In that election, voters cast their ballots for councillors on a 40% PR and 60% ward basis. In this parallel system the proportional representation and first-past-the post elements operated separately from each other. Currently these elements are combined in a mixed member proportional (MMP) system. Under this system, 50% of the councillors represent wards and the other 50% are elected by PR. The difference between a parallel system and a mixed member proportional system is that the latter allows for the adjustment of distortions to party representation brought about by voting in wards on a first-past-the-post basis. The former does not. This change to the system was necessary.[103] After the 1995-96 local government elections – for which there was no demarcation process – residents in the formerly White, Coloured and Indian areas were over-represented in the 843 transitional councils. The number of councils was reduced to 284 for the 2000 elections. The new demarcation process ensured that wards consisted of the roughly the same population size.[104] The introduction of the current system allows for an increase in the number of councillors elected by proportional representation.

The Municipal Structure Act provides that a metro council (a municipal council of a metropolitan municipality or category A municipality) and a local council (municipal council of a local municipality or category B municipality) with wards must be elected according to a system of proportional representation from party lists and direct representation from wards. In an election for a metropolitan or local council with wards, each registered voter has two votes, one for a party, by proportional representation, and one for a ward candidate. If a local council has no wards, all the councillors must be elected from the party lists according to a system of proportional representation. In an election for a local council that has no wards, each registered voter has two votes, one for the local council and one for the district council. If a local council has wards, councillors must be elected from the party list according to a system of proportional representation and direct representation for the wards.

Importantly, district councils (municipal councils of a district municipality or category C municipality) may be comprised of representatives elected from party lists by registered voters in local councils, with or without wards and voters registered in a district management area. Sparsely populated or mountainous areas and game parks would be classified as district management areas. If a voter is registered in a local council with wards he or she will have a third vote in respect of a

102 Ministry for Provincial Affairs and Constitutional Development *The White Paper on Local Government* (March 1998) 88. (This type of system has two excellent features, namely, an element of representivity – the proportional matching of council seats with votes cast, and an element of accountability – the identification of individual councillors to particular wards).

103 See T Lodge 'Local Government Reform' in *Politics in South Africa: From Mandela to Mbeki* (2002) 86-100.

104 See Local Government: Demarcation Act 27 of 1998.

40 per cent proportional representation election of the district council in which area the local council (with wards) is located. Registered voters in district management areas will have two votes, one for the representative in the district management area, and one for the district council.

Sixty per cent of the seats in district councils will be allocated on the basis of proportional representation to the candidates from the district management areas and representatives elected to the district council from the local councils. The Municipal Structures Act contemplates that local council elections will take place first. Thereafter representatives from these councils, in an internal election, will be nominated and elected to the district council. The remaining 40 per cent of the seats will be allocated to those proportional representation candidates voted onto the district council by registered voters.

Political parties who have complied with the registration requirements can contest an election by submitting a list of the names of candidates to stand as its representatives for the election of members of the council or by nominating ward candidates to stand a representatives of the party in a ward; or may comply with both of these requirements.[105] Item 11(3) of schedule 1 of the Municipal Structures Act that every party must seek to ensure that women and men candidates are evenly distributed throughout the list.

In this regard, item 11(3) is distinguishable from s 26 of the Electoral Act 73 of 1998. Each requires the submission of lists of candidates under an electoral system that relies on closed-list proportional representation. Item 11(3) does more than s 26 to ensure the participation of women in local government elections, but only just. It does not place a clear obligation on political parties to ensure that women candidates are included on party lists when it states [e]very party must seek to ensure that fifty per cent of the candidates on the party list are women and that women and men candidates are evenly distributed through the list, but encourages them to do so.' Had Parliament excluded the words seek to it could have been interpreted as introducing a statutory quota geared towards ensuring the equal distribution of women candidates on party lists and a consequent increase in the number of women councillors.[106] Section 26 of the Electoral Act leaves the decision to include women candidates entirely to political parties.

(b) Membership of municipal councils

In *United Democratic Movement*, the Constitutional Court upheld the Constitution of the Republic South Africa Amendment Act 18 of 2002 that amended FC s 157 and the Local Government: Municipal Structures Amendment Act 20 of 2002. The amendments permitted floor crossing in the sphere of local government. The court held that the wording of the amended FC s 157(1) – subject to schedule 6A, a Municipal Council consists of members elected in accordance with subsections (2) and (3) – did not subordinate the Final Constitution to the schedule.[107] FC s 157(3)

105 Local Government: Municipal Electoral Act 27 of 2000.

106 After the 2000 local government elections 20% of all the councillors elected were women. Twenty-nine per cent of the councillors elected by proportional representation were women, while only 11% of councillors elected to ward seats were women.

107 *United Democratic Movement* (supra) at para 84.

states that '[a]n electoral system in terms of FC s 157(2) must result, in general, in proportional representation.' According to the *United Democratic Movement* Court, FC s 157(3) is to be harmonized with FC s 157(1) and the schedule.[108] In its effort to harmonise the relevant provisions, the Court wrote:

> In the light of the reference to schedule 6A, the reference in subsection 3 to the need for the electoral system to result, in general, in proportional representation must be construed as reference to the voting system and not to the conduct of elected members after the election.[109]

The *United Democratic Movement* Court draws a distinction between the voting system and the conduct of elected members after the election. The conduct of elected members refers to a situation in which an individual ceases to be a member of the party that nominated him or her to the legislative body in favour of another party. Such conduct (giving up membership of the nominating party and joining another) might well affect the overall support for the members original party if the member is allowed to retain his or her seat after changing parties. So while it is correct that, in general, proportional representation refers directly to the electoral system, a member's conduct might well affect the overall result of an election determined by the voting system.

Concerns about floor-crossing still arise in relation to the PR segment of a mixed member proportional system. Floor-crossing under the municipal electoral system is less objectionable when it occurs in terms of first-past-the-post wards. In these wards, voters express support for individual candidates to whom seats in the municipal council are assigned. The seats belong to the candidate no matter what his or her party affiliation.

(c) Floor-crossing in the municipal councils

Every citizen who is qualified to vote for a municipal council is eligible to be a member of the council.[110] The Final Constitution lists a number of persons who would not be eligible for membership in a municipal council.[111] Anyone

disqualified from voting for the National Assembly or disqualified in terms of s 47(1) *(c)*, *(d)* or *(e)* may not be a member of the council.

The participation of traditional leaders in municipal councils is addressed by the Municipal Structures Act.[112] Traditional leaders are allowed to participate in the meetings of a municipal council, but have no voting rights.[113] The number of traditional leaders participating in a council is restricted to no more than 10% of the total number of councillors in the council. If there are fewer than 10 councillors, only

108 Ibid at para 83.

109 Ibid at para 84.

110 FC 158(1).

111 FC 158(1)*(a)*-*(e)*.

112 Section 81. The identification of traditional leaders for the purposes of s 81 is addressed in schedule 6 of the Act.

one traditional leader is allowed to participate. A traditional leader must be allowed to express a view on any matter directly affecting the areas under his or her rule. In the light of these sections traditional leaders have lost some of the status and power on municipal councils that they enjoyed under IC s 182. They now fulfil a largely consultative and advisory function. As a result, the new local government dispensation set out in the Municipal Structures Act was not well received by traditional leaders. Lodge reminds us that opposition from this quarter resulted in the postponement of the second local government election in 2000.[114]

29.7 The Electoral Commission

(a) Establishment of the Commission

The Electoral Commission has the role of ensuring that all elections will be free and fair.[115] The Electoral Commission is established by FC s 181 and, unlike the Independent Electoral Commission set up to oversee the 1994 national and provincial elections, it is a permanent institution. It is also one of the Chapter 9 institutions strengthening constitutional democracy.

The Electoral Commission Act 51 of 1996 lists the functions of the Electoral Commission. They embrace the promotion of democratic electoral processes,[116] the managing of elections of national, provincial and municipal legislative bodies, compiling a national common voters roll and declaring the results of an election.[117] The Final Constitution grants Parliament the power to prescribe any additional powers and functions of the Electoral Commission.[118] In *New National Party of South Africa v Government of the Republic of South Africa* the Constitutional Court noted that the provisions of the Electoral Commission Act accord the Commission a role that was never intended to merely supervisory[119]. Its management functions are active, involved and detailed.[120]

(b) Composition of the Commission

113 See Lodge (supra) at 94 ('[W]ithin the rural areas 800-odd chiefs and some 10 000 headmen would sit on councils *ex officio*, the law giving them no voting rights.')

114 Ibid at 95.

115 FC s 190(1)*(b)*.

116 Section 4 of the Electoral Commission Act.

117 FC s 190. See also s 5 of the Electoral Commission Act.

118 FC s 190(2).

119 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) (*New National Party*).

120 Ibid at para 76.

The Electoral Commission must be composed of at least three persons.[121] The exact number of commissioners and their terms of office is provided for by the Electoral Commission Act. It allows for the establishment of a commission made up of five members. One of the members of the Commission must be a judge.[122] South African citizenship is a requirement for appointment to the Commission.[123] A further requirement is that an appointee must not have a high party-political profile.[124]

Recommendations for appointment are made from a list of candidates prepared by a panel of representatives from the Human Rights Commission, the Commission on Gender Equality and the Public Protector. The Chief Justice is a member and chairperson of the panel.[125] The panel is required to submit a list of no fewer than eight recommended candidates to a committee of the National Assembly.[126] In preparing the list, the panel must act in accordance with the principles of transparency and openness. The panel must make its recommendations to the committee after taking into account a person's suitability, qualifications and experience.[127] The committee proportionally composed of members of all parties represented in the National Assembly, in turn, forwards a list of nominated candidates to the National Assembly, which after the adoption of a resolution a majority of its members, recommends candidates for appointment by the President.[128]

The President appoints commissioners to seven-year[129] terms in either a full-time or a part-time capacity.[130] Commissioners appointed in a full-time capacity are not allowed to perform any duty or obligation arising out of other employment unless the President authorizes such employment.[131] The President designates a chairperson and vice-chairperson from among the commissioners. Commissioners

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121 FC s 191.

122 Section 6 of the Electoral Commission Act (ECA).

123 Ibid.

124 ECA, s 6(2).

125 ECA, s 6(3)*(a)*.

126 ECA, s 6(4).

127 ECA, s 6(5).

128 ECA, s 6(20)*(c)*.

129 ECA, s 7(1).

130 ECA, s 7(2).

131 ECA, s 9(1)*(b)*.

terms of appointment can be cut short by resignation or death, or by removal from office on grounds of misconduct, incapacity or incompetence.[132]

Commissioners may be removed from office by the President after a finding of misconduct, incapacity or incompetence by a committee of the National Assembly upon the recommendation of the Electoral Court.[133] A majority of the

members of the National Assembly of must adopt a resolution calling for a commissioner's removal from office. A commissioner may be suspended from office by the President at any time after the start of the proceedings of the committee and may be re-appointed, but only for one further term of office.[134]

The Commission must appoint a suitably qualified and experienced person as the chief electoral officer.[135] The chief electoral officer heads the administration of the Commission.[136]

(c) Independence of the Electoral Commission

The Electoral Commission, like the other Chapter 9 institutions, is independent, and subject only to the Constitution and the law.[137] It is required to be impartial and to exercise its powers and perform its functions without fear, favour or prejudice.[138] Every member of the Commission must serve impartially and independently.[139] The income necessary for the Commissions functioning is derived from Parliament. The Commission may receive funds from other sources. The Electoral Commission is accountable to the National Assembly and is required to report on its activities and performance of its functions and funding to the National Assembly at least once a year.[140]

In *New National Party*, the Constitutional Court recognised the creation of an Electoral Commission as an essential component of managing a free and fair election. The appellant alleged that the government had not acknowledged the

132 FC s 194. Section 7(3) of the Electoral Commission Act reiterates these grounds.

133 The Electoral Court is established in terms of s 18 of the Electoral Commission Act. See also the definition of Electoral Court in s 1 of the Electoral Act.

134 ECA, s 7(3)*(c)*.

135 ECA, s 12(1).

136 ECA, s 12(2)*(c)*.

137 FC s 181(2). Section 3 of the Electoral Commission Act 51 of 1996 provides for a Commission that is independent and subject only to the Final Constitution and the law.

138 ECA, s 3(2).

139 ECA, s 9(1).

140 FC s 181(5).

independence of the Commission and had thereby undermined its capacity to run free and fair elections. First, the government refused to accept the advice of the Commission that bar-coded identity documents should not be the only means of identification acceptable for registering as a voter and for voting. Second, insufficient funding had been made available to the Commission. As a consequence, it had not been unable to appoint the necessary officials to attend to the registration of voters prior to the 1999 elections. The government had assumed this function.

Addressing the relationship between the government and the Commission, the Court asked whether the conduct of government had been demonstrated to have impinged on the affairs of the Commission in a manner which affected its independence in the carrying out of its functions, or whether such conduct constitute[d] a threat to do so.[141] When considering this question, the Court highlighted three areas: the responsibility for elections, the system of financial accounting and problems in relation to the engagement of the staff of the Commission.

With respect to responsibility for the elections, the Court noted that Parliament had the competence to pass the Electoral Act. Parliament's decision to provide for bar-coded identity documents did not impair the independence of the Electoral Commission.

The court then distinguished financial independence from administrative independence.[142] It held that financial independence related to the Commission having access to funds reasonably required by it to enable it to discharge the functions it is required to perform constitutionally and legislatively. Parliament – and not the executive – ought to assess what is reasonably required by the Electoral Commission to enable it to perform its functions. Administrative independence related to those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act.[143]

The court observed that the establishment of the institutions supporting constitutional democracy is a new development on the South African scene and that other organs of state needed to assist and protect the chapter 9 institutions to ensure their independence, impartiality, dignity and effectiveness.[144] The Court held that a government department ought not to instruct the Commission on how to conduct voter registration or whom to employ. However, if the Commission required the governments assistance to provide staff to participate in the voter registration process, the government was under an obligation to assist in so far as possible. If not, the Commission was to receive the financial assistance to enable it to do what was necessary. In the instant case, the Department of Home Affairs, the Department of State Expenditure and the Minister of Finance did not fully appreciate the independence the Commission required. However, since these were not the issues canvassed by the appellant in its application, the Court held that the appellant had

141 *New National Party* (supra) para 79.

142 *New National Party* (supra) at para 98.

143 Ibid at para 99.

144 Ibid at para 78.

failed to show that the independence of the Electoral Commission had been infringed.

The independence of the Electoral Commission arose again in *Independent Electoral Commission v Langeberg Municipality.*[145] This time the independence of the Commission engaged the principles of co-operative government delineated in Chapter 3.[146] The dispute related to the Commission's decision to allocate a single voting station to the residents of the town of Stilbaai. The municipality argued that many voters would be deterred by the distance they would have to travel in order to exercise their right to vote.

The appeal brought before the Constitutional Court addressed the issue of whether the municipality had to comply with those provisions of FC ss 40 and 41 that required parties in intergovernmental disputes to make every effort to settle the dispute before approaching a court. The Court noted that both the

municipality of Stilbaai and the IEC were organs of state.[147] The more difficult question was whether Commission could, for the purposes of Chapter 3 analysis, be located within the national sphere of government. The Court concluded that could not. It is simply a state institution supporting democracy. The Court reasoned that since 'state' is a broader term than 'national government' and embraces all spheres of government,[148] then Chapter 9 of the Final Constitution must make a distinction between the state and the government, whether local, provincial or national.[149] Moreover, the Court found that the Commission is established as *independent* and subject only to the Constitution and the law.[150] The independence accorded the Electoral Commission by the Constitution would be undermined if it were viewed as part of any sphere of government.

Since the Commission is not an organ of state within the national sphere of government, the dispute between the Commission and the Stilbaai municipality could not be classified as an intergovernmental dispute. The upshot of the judgment is that when another organ of state seeks to bring an action against the Electoral Commission it can do so without having to comply with FC s 41(3).

29.8 The electoral court

145 2001 (3) 925 (CC), 2001 (9) BCLR 883 (CC)(*Langeberg*).

146 For a detailed discussion of this case, please see S Woolman and T Roux 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

147 *Langeberg* (supra) at 27.

148 Ibid.

149 Ibid.

150 FC s 181.

The Electoral Court is established under the Electoral Commission Act.[151] It possesses the status of a High Court.[152] The President on the recommendation of the Judicial Service Commission appoints the members of the court. They are: the chairperson, a judge of the Supreme Court of Appeal; two High Court judges and two other members. All members of the Electoral Court must be South African citizens.[153]

The Court has the power to review any decision of the Commission. It can hear appeals against decisions of the Commission provided that the decision relates to the interpretation of any law or matter for which an appeal is provided by law. The Court has the power to investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission. The Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct made by the Electoral Court, in terms of s 20(4) of the Electoral Commission Act, stipulate that the High Courts and Magistrates Courts have jurisdiction to hear any electoral dispute or complaint about an infringement of the Code.[154]

The Electoral Court has jurisdiction to impose all of the s 96(2) listed penalties. The High Court may impose all penalties except those penalties that result in the

disqualification of a person's candidature or that result in an order cancelling the registration of a political party. The Magistrates' Courts may impose all penalties except those that result in the disqualification of a persons candidature or that result in an order cancelling the registration of a political party. The Magistrates' Courts may also not prohibit the receipt of any funds from the state or foreign sources.[155] Only in circumstances when an order that results in the disqualification of a person's candidature, or in an order cancelling the registration of a political party is sought, may a party approach the Electoral Court directly. Direct access is granted with leave of the chairperson and at least two members of the Electoral Court. Rules 3, 4 and 5 set out the procedures for bringing an electoral dispute or complaint about a breach of the Electoral Code of Conduct before the courts.[156]

The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints pertaining to the infringement of the Code.[157] No decision or order of the Electoral Court is subject to appeal or review.[158] Section 96(2) of the Electoral Act must be read in conjunction with s 20(4) *(b)* of the Electoral Commission Act. The latter section states that the Electoral Court shall have the power to determine which courts of law have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.

In *Mketsu v African National Congress* the appellants, members of the African National Congress (ANC) challenged the selection processes of the party's list and

151 Act 51 of 1996.

152 FC s 18 of the Electoral Commissions Act.

153 ECA, s 19.

154 *Government Gazette* No 19572 (4 December 1998).

155 Rule 2(2) and 2(3) of the Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct.

ward candidates for the 2000 local government elections.[159] They claimed that these processes were flawed and did not comply with the party's procedures. They sought an order in the Eastern Cape Division of the High Court. The respondents opposed the application on a number of bases – one being that the High Court lacked jurisdiction to hear the application. The High Court upheld this defence.

On appeal the appellants again argued that the High Court had jurisdiction to hear and resolve the objection to the ANC selection process. The Supreme Court of Appeal considered the meaning of s 65 of the Municipal Electoral Act. The section deals with objections concerning any aspect of an election that is material to the declared result. It found that such objections would occur only after an election. It also considered the provisions of s 78(1) of the Municipal Electoral Act. The section reads: 'the Electoral Court has jurisdiction in respect of all electoral disputes and complaints about infringements of the Code subject to s 20(4) of the Electoral Commission Act'. The court found that these disputes and complaints would typically, but not necessarily, be heard and resolved prior to the declaration of an election result.

After considering these statutory provisions the court came to the conclusion that s 65 was concerned with objections concerning any aspect of an election that is material to the result. The jurisdiction conferred on the Electoral Court by s 78(1), on the other hand, was intended to be exclusive. That exclusivity is only subject to the power of the Electoral Court to determine which courts of law would exercise concurrent or exclusive jurisdiction to hear particular electoral disputes and complaints about infringements of the Code.[160] The court observed that the language in s 78(1) was similar to that in s 20(4). Both sections referred to electoral

156 Rule 2(4) stipulates that the offences in Part 1 of chapter 7 and in s 107, 108, 109 of the Act are to be dealt with in accordance with the legislation applicable to criminal matters. These offences will be heard in a court with criminal jurisdiction. In terms of s 98 *(a)*, a court may, upon conviction of an offence mentioned in s 87(1)*(b)*, *(c)*, or *(d)*, 89(2), 90, 91, 93 or 94, impose a penalty of a fine or term imprisonment not exceeding 10 years. According to s 98*(b)* a court may, upon conviction of an offence mentioned in s 87(1)*(a)*, *(e)*, or *(f)*, (2), 3, or 4, 88, 89(1), 92, 107(4), 108 or 109, impose a penalty of a fine or term imprisonment not exceeding 10 years. According to s 96(3), a penalty imposed in terms of s 96(2), in certain cases, will be in addition to any penalty imposed in terms of ss 97 and 98 of the Act. Section 98*(a)* specifies that if a person is convicted of an offence in terms of s 94 (breaching the Code), the possible penalties are a fine or term of imprisonment not exceeding 10 years. The latter penalty would be in addition to an appropriate penalty in terms of s 96(2)*(a)*-(i).

157 Section 96(1) of the Electoral Act ('EA').

158 FC s 167(6) states:

'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 —

(b) to appeal directly to the Constitutional Court from any other court.'

Decisions reached under section 96(1) of the EA are therefore susceptible to constitutional challenge under this section of the Final Constitution.

159 2003 (2) SA 1 (SCA), 2002 (4) All SA 205 (SCA) (*Mketsu*).

160 *Mketsu* (supra) at para 11.

disputes and complaints about infringements of the Code. However, s 78(1) is subject to s 20(4). The Electoral Court therefore retains the power to determine which courts have jurisdiction to hear disputes under both s 20(4) and s 78(1).

The court held that s 78(1) addressed matters that were not referred to in s 65 of the Municipal Electoral Act. Objections under s 65 were not addressed by s 20(4) of the Electoral Commission Act. The court held that the process relied on to choose candidates was one concerning any aspect that is material to the declared result and that the Electoral Court and not the High Court had the jurisdiction to hear such an objection.[161] Although the inherent jurisdiction of the High Court is not readily ousted, the Court observed that the process set out in s 65 of the Municipal Electoral Act was intended by the legislature to be mandatory. It rejected the appellant's principal argument that the High Court retained its jurisdiction to hear the applications and dismissed the appeal.

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161 Ibid at para 9.