



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Reportable

Case no: 004/2024EC

In the matter between:

DEMOCRATIC ALLIANCE

FIRST APPLICANT

JEROME SEARLL SWERSKY

SECOND APPLICANT

and

ELECTORAL COMMISSION OF SOUTH AFRICA

FIRST RESPONDENT

THE CHIEF ELECTORAL OFFICER:

ELECTORAL COMMISSION OF SOUTH AFRICA

SECOND RESPONDENT

MINISTER OF THE DEPARTMENT OF

INTERNATIONAL RELATIONS AND COOPERATION

THIRD RESPONDENT

Neutral citation: *Democratic Alliance and Another v Electoral Commission of South Africa and Others* (004/2024EC) [2024] ZAEC 06 (26 April 2024)

Coram: ZONDI JA and ADAMS and YACOOB AJJ and PROFESSOR PHOOKO
(Additional member)

Heard: 26 March 2024

Delivered: 26 April 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 26 April 2024.

Summary: Interpretation – section 33 of Electoral Act 73 of 1998 – whether the word 'consulate' appearing in the section and regulation 10(3) of the Election Regulations,

2004 published under GN R12 in GG 25894 of 7 January 2004 excludes a consulate headed by honorary consul – principles of statutory interpretation restated.

ORDER

- 1 The application for condonation for the late filing of the review application is hereby granted.
 - 2 It is declared that the word 'consulate' in s 33(3) of the Electoral Act 73 of 1998 includes a consulate headed by an honorary consul.
 - 3 To the extent that the Electoral Commission of South Africa made a decision not to allow the casting of special votes at consulates headed by honorary consuls, the decision is reviewed and set aside.
 - 4 No order is made as to costs.
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JUDGMENT

Zondi JA (Adams and Yacoob AJJ and Professor Phooko (Additional member) concurring):

[1] In order to comply with the timelines of the election timetable published by the Electoral Commission on 24 February 2024, we issued an order, without reasons, on 9 April 2024 and indicated that reasons therefor would be provided in due course. These are the reasons for the order we granted.

[2] The issue in this matter concerns the interpretation of s 33 of the Electoral Act 73 of 1998 (the Electoral Act), read with regulation 10(3) of the Election Regulations, 2004 published under GN R12 in GG 25894 of 7 January 2004 (Election Regulations), which provides that certain voters may cast special votes at a South African embassy, high commission, or consulate abroad. It turns on the meaning to be ascribed to the word 'consulate' and whether it includes a consulate headed by an honorary consul. The interpretation of this word is important for many eligible South African voters who will be outside the Republic of South Africa on voting day and to whom the only accessible consular posts may be those headed by honorary consular officers.

[3] The first applicant is the Democratic Alliance (the DA), a political party registered in terms of s 15 of the Electoral Commission Act 51 of 1996. The second applicant is Mr Jerome Searll Swersky (Mr Swersky), a South African voter living in Perth, Australia. The first respondent is the Electoral Commission, the election management body in South Africa and the second respondent is the Chief Electoral Officer: Electoral Commission (collectively referred to as the Commission). The third respondent is the Minister of the Department of International Relations and Cooperation (the Department). The DA's argument is that the meaning of the word 'consulate' is not confined to consulates headed by career consular officers. It includes consulates headed by honorary consuls and, that being so, eligible voters can cast at such consulates. On the other hand, the Commission and the Department contend that the word 'consulate' does not include consulates headed by honorary consuls. They maintain that its meaning is confined to consulates headed by career consuls and, therefore, eligible voters cannot cast special votes at such consulates. The Department has since filed a notice to abide and is no longer participating in these proceedings.

[4] The dispute arises in the following context. Some registered voters who live in Perth, Australia enquired from the South African consulate in Perth whether they could cast their special votes there in the upcoming election on 29 May 2024. The consulate told them that they could not vote in Perth because 'according to an Act of Parliament of the Republic of South Africa, voting can only take place in South African Embassies, High Commissions and Consulates. Consulates only refer to those that are headed by the transferred staff from South Africans [sic] excluding Honorary consuls'. They need to cast their vote at the high commission in Canberra, Australia. Canberra is approximately 3 000km from Perth and is the only place in Australia at which a vote can be cast, according to the Commission's interpretation.

[5] As a result of a dispute between the parties regarding the meaning of the word 'consulate', the DA, on 15 February 2024, brought this application in which it sought an order, among others, in the following terms:

'2 It is declared that the Electoral Commission must allow the casting of special votes in terms of section 33 of the Electoral Act 73 of 1998 at any (all) South African embassy, high commission, or consulate abroad.

3 The Electoral Commission's decision not to allow the casting of special votes at any (all) South African embassy, high commission, or consulate is reviewed and set aside.

4 Alternatively, to paragraph 3, the Electoral Commission's failure to decide whether to allow the casting of special votes at any (all) South African embassy, high commission, or consulate is reviewed and set aside.

5 The Electoral Commission is directed to allow the casting of special votes in terms of section 33 of the Electoral Act 73 of 1998 at any (all) South African embassy, high commission, or consulate abroad.'

[6] The application for review is late. In terms of rule 6 of the Rules of this Court, it should have been brought within three days of the Commission's decision which is 9 February 2024. There is an application to condone the lateness. The application is not opposed. There is a satisfactory explanation for the delay; the period of delay is not excessive, and the Commission, the Department and the Court have not been materially prejudiced by the delay. The issues involved in this matter are of substantial importance to the parties and the public. Accordingly, it is in the public interests that condonation be granted.

[7] The DA brought the application in its own interests, in its members' interest and in the public interest. It also relies on the evidence of the second applicant, Mr Swersky. It alleges that in or about February 2024, several South African voters in Australia e-mailed the Commission and the Department, in which they explained that, when they attempted to register to vote on the Commission's online platform, they were unable to do so as the platform does not allow voters to register to vote at other South African consulate in Australia like in Perth. It allows the voters to vote only at the South African embassy in Canberra. The voters living in Perth explained that they cannot afford to travel to Canberra to vote as Canberra is some 3 000 kilometers from Perth.

[8] Mr Swersky alleges, in his supporting affidavit, that he emailed the South African consulate in Perth to enquire where he could cast his special vote in the upcoming general elections. He was told that he could not vote in Perth. Instead, he must cast his vote at the high commission in Canberra. He says due to various work and family caring commitments, it is unlikely that he will be able to travel to Canberra

from Perth to cast his vote at the high commissioner there. He states that over 35 000 people born in South Africa live in Perth. He maintains that the Commission's decision will mean that many of these voters would be unable to vote at all.

[9] Against this background, the issue therefore is whether the word 'consulate' which appears in s 33 of the Act read with regulation 10(3) of the Election Regulations should be assigned a narrow meaning as contended by the Commission and the Department or a wide meaning as contended by the DA so as to include consulates headed by honorary consuls.

Constitutional and statutory provisions

[10] Political rights are a bulwark of the Constitution, playing a structural role in the Founding Provisions and being given content in the Bill of Rights.

[10.1] Section 1 of the Constitution establishes that:

'The Republic of South Africa is one, sovereign democratic state founded on the following values:

...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.'

[10.2] Section 3(2) provides:

'All citizens are-

- (a) equally entitled to the rights, privileges and benefits of citizenship; and
- (b) equally subject to the duties and responsibilities of citizenship.

[10.3] Section 19 of the Constitution gives particular content to the political rights of every South African citizen. In particular, s 19(2) and (3) provide as follows:

'...

(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—

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.'

The right to vote contemplated by s 19(3) is therefore a right for every citizen to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the requirements laid down by the Constitution. The details of the system are left to Parliament. The national legislation which prescribes the electoral system is the Electoral Act.

[11] The Electoral Act recognises that a registered voter may not be able, due to circumstances beyond their control, to cast their vote at their voting station on election day. It therefore allows a registered voter to apply for a special vote which allows them to cast their vote on a predetermined day before election day. This arrangement is dealt with in s 33 of the Electoral Act. Section 33(3) provides the following:

‘(3) In an election for the National Assembly, the Commission must allow a person, who will be outside the Republic on voting day, to cast a special vote if that person’s name appears on the segment of the voters’ roll for persons who are in the Republic, and if that person notifies the chief electoral officer, in the prescribed manner, by no later than the relevant date stated in the election timetable of his or her intention to vote outside the Republic and the location of the South African embassy, high commission or consulate where he or she will cast his or her vote: Provided that the Commission may make special arrangements for security services personnel serving in that capacity outside the Republic.’

[12] This provision must be read with regulation 10 of the Election Regulations which is headed **‘Notice of intention and application for a special vote outside the Republic on voting day’**. Regulation 10(3) states that a registered voter who will be outside the Republic on voting day ‘can apply for and cast a special vote at **any** South African embassy, high commission or consulate abroad.’ (Own emphasis.) It is important to note that the regulation uses the word ‘any’. The use of the word ‘any’ may imply that a broad and expansive meaning should be attributed to the meaning of the places where a registered voter can cast his or her special vote abroad. However, it must be noted that there is no mention of the word ‘any’ in s 33(3) of the Act. This means that the interpretation of s 33(3) should not be affected by the use of the word ‘any’ in regulation 10(3). The section must be interpreted before the regulation is looked at. In other words, the regulation cannot be used to cut down or enlarge the meaning of the section.

Contentions of the DA

[13] The DA seeks to review the Commission's decision on three bases. Their first argument is that 'consulate' means consulate, whether headed by a career or honorary consular officer. It therefore argues that the Commission's decision that eligible voters can only vote at certain consulates (not those headed by honorary consular officers) is unlawful. The DA accordingly seeks an order that the Commission be directed to ensure that eligible voters can cast special votes at any consulate, including those headed by honorary consular officers, at the upcoming general elections and all future general elections.

[14] The DA's second argument is the same as the first regarding the meaning of s 33(3) and regulation 10(3). Voters can cast special votes at all consulates, including those headed by honorary consular officers. The second argument differs on remedy. The DA seeks an order directing the Commission to take all reasonable steps to ensure that eligible voters can cast special votes at any consulate in the upcoming 2024 general elections. This argument recognizes that it may not be possible for the Commission to secure voting at all consulates before 17 May 2024, but, where the Commission can facilitate voting, it should. As for subsequent general elections, the Commission must ensure that voters can cast special votes at any consulate including those headed by honorary consular officers.

[15] The DA's third argument is an alternative interpretation of s 33(3) and regulation 10(3). It argues that 'any consulate' means those consulates where special voting would be reasonably practicable. Those include consulates with public offices, employing staff, that offer consular services, and can verify voters' identification. The Commission should be directed to facilitate voting at these consulates, both for this upcoming election and subsequent elections.

[16] The DA submits that the Commission's decision to limit voters only to consulates headed by what the Commission calls 'career consuls' is unlawful as it contravenes s 33 of the Electoral Act read with regulation 10(3). It argues that, based on their plain text, context and purpose, s 33, read with regulation 10(3), includes consulates headed by honorary consular officers. As regards the plain text of these provisions, the DA's argument is that s 33 of the Electoral Act obliges the Commission

to allow a voter to cast a special vote if he or she is outside South Africa and has given notice of 'the location of the South African embassy, high commission or consulate where he or she will cast his or her vote'; 'present himself or herself to vote at the South African embassy, high commission or consulate on whose segment of the voters' roll his or her name appears'; or has given notice that he or she 'intends to vote at a South African embassy, high commission or consulate other than one on whose segment of voters' roll his or her name appears'.

[17] On its plain and natural meaning, proceeds the argument, the Electoral Act provides eligible voters with the right to vote at the consulate he or she chooses; to vote at the consulate on whose segment of the voters roll his or her name appears; where he or she present himself or herself or to vote at a consulate other than the one whose segment of the voters roll his or her name appears if he or she gives notice of his or her intention to do so. The Electoral Act, so it is argued, does not expressly limit the kind of consulate at which an eligible voter may cast a special vote. To substantiate its argument, the DA relies on the Vienna Convention on Consular Relations, 1963 (the Convention) which was ratified and domesticated as Schedule 2 to the Diplomatic Immunities and Privileges Act 37 of 2001. The Convention governs the position of consulates and provides for the establishment of consular posts. The procedure for the appointment of consulates is neatly summarized by Davis J in *Sayed v Editor, Cape Times*.¹

[18] In terms of Articles 3 and 4, consular posts exercise consular functions, like protecting the interests of nationals abroad and issuing passports. Consular post means 'any consulate-general, consulate, vice-consulate or consular agency'. Consular posts comprise of, among others, consular officers. In terms of Article 1 (1)(d) of the Convention a consular officer is any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions.

[19] There are two categories of consular officers, namely career consular officers, who are employed to perform consular functions, full-time, by the sending state, and honorary consular officers, who are persons resident in or national of the receiving

¹ *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C) at 64D.

state who perform consular functions on part-time basis. Relying on the provisions of the Convention, the DA argues that the word 'consulate' as used in s 33, denotes a place or post – not a person. The implication, continues the argument, is that the plain meaning of 'consulate' is a consular post as envisaged in the Convention. Therefore, proceeds the DA, whether that consulate is headed by a career or honorary consular officer is irrelevant – what matters is that there is a consulate where the registered voters can cast their special vote.

[20] As regards the contextual setting of s 33 and regulation 10(3), the DA submits that there is nothing in the context suggesting that 'consulate' excludes consular posts headed by honorary consular officers. In substantiation of its submission the DA states that s 33 is the only provision in the Electoral Act regulating overseas special votes in elections for the National Assembly. Voters in elections for provincial legislatures cannot vote from abroad.

[21] With regard to the purpose of s 33, it is submitted by the DA that its purpose is closely tied to the rights in s 19(2) and (3) of the Constitution. The DA argues that every citizen has the right to free, fair and regular elections. Every adult citizen has the right to vote in elections for any legislative body. It argues that s 33 and regulation 10(3) seek to give effect to these rights for all eligible voters who happen to be or live outside South Africa during an election. With reference to *Chisuse v Director-General, Department of Home Affairs (Chisuse)*,² the DA submits that s 33 and regulation 10(3) must be interpreted in a manner that promotes the rights in s 19(2) and (3) of the Constitution and that, if there is one interpretation that advances the rights more than another interpretation, the former must be preferred.

Contentions of the respondents

[22] The Commission contends that the meaning of 'consulate' does not include a consulate headed by an honorary consul because such consul does not have the capacity to properly facilitate and supervise voting. For this contention, the Commission relies on the evidence of Ms De Jong, the Director: Diplomatic Immunities

² *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) (*Chisuse*) para 46.

and Privileges, in the State Protocol and Consular Services branch of the Department. She stated that none of South Africa's honorary consuls have ever had the power and permission to conduct, oversee the casting of special votes in an election, as, the immunities and privileges conferred on diplomats, as well as the chanceries and official residences, do not extend to honorary consuls and their private offices and their immunities are limited in terms of the Convention. The Commission alleges that the facility in Perth is limited. It is run on a part-time basis by a private businessman. It argues that such facility does not constitute a 'consulate'.

[23] Counsel for the Commission emphasized that it was important to have regard to the following observations in interpreting the relevant provisions of the Electoral Act and Election Regulations. First, neither the Electoral Act nor the Election Regulations define the term 'consulate' and that regard must be had to the context and purpose of the provision. Second, the self-evident purpose of specifying limited places at which a vote may be cast outside South Africa is to ensure that the right to vote can be exercised through a mechanism which is administratively effective and secure, and in which the integrity of the process is assured. He submitted that that purpose would not be achieved by conferring the right to vote at honorary consulates. Third, Parliament cannot be understood to have placed a duty on the Commission to conduct elections in foreign countries through private offices that do not themselves have the capacity properly to facilitate and supervise and control such an exercise, and that are not under the supervision and control of either the Commission or the Government.

[24] Fourth, as appears from its long title, the Electoral Act is intended to regulate elections of the national assembly, the provincial legislatures, and municipal councils. He argued that s 2 of the Electoral Act enjoins 'Every person interpreting or applying [the] Act to - (a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution; and (b) take into account any appropriate Code'. One of the constitutional guarantees at issue in this matter, proceeded the argument, is the right of every citizen in s 19(2) to free, fair and regular elections for any legislative body established in terms of the Constitution. Fifth, s 33(3) of the Electoral Act says the Commission 'must' allow a person who is outside the country, to cast a special vote. This, it was argued on behalf of the Commission, places

a duty on the Commission to permit that such special votes be cast at an embassy, high commission, or consulate.

[25] Sixth, s 33(3) of the Electoral Act refers to a person giving notice of 'the location of the South African embassy, high commission or consulate where he or she will cast his vote'. This, so it was argued, means that the person will advise where they propose to cast their vote, from amongst a range of the available options. The section does not confer upon a would-be voter the right to decide what should constitute a 'consulate', nor does the section give a would-be voter an unqualified right to vote at their desired location, irrespective of whether the place falls within s 33(3).

[26] Seventh, there are fundamental differences between the nature and functions of consuls and honorary consuls. Those differences make it inconceivable that the legislation could intend that honorary consulates are to carry out electoral functions. This submission relies on the evidence of Ms De Jong regarding the nature of the functions these two officers are authorized to perform, the manner of their appointment and their support staff compliment. Counsel for the Commission emphasized that a consul is a diplomat who is a full-time public servant in the Department, subject to the discipline of the Constitution and the public service administration and paid a salary by the South African government. A consul is issued with a South African diplomatic passport.

[27] An honorary consul is not a diplomat. He or she is a private person, who is not employed by the South African government; is not subject to the duties imposed by the Constitution and the public service administration; is not paid a salary, although an honorarium may be paid, and expenses may be reimbursed; and ordinarily has other primary business interests and acts as honorary consul on a part-time basis. An honorary consul is usually someone resident in the host country who has commercial ties to South Africa. A consul is a citizen of South Africa, subject to the Constitution and the relevant laws of South Africa. An honorary consul is most frequently a citizen of the host State, and subject to its Constitution and laws.

[28] It was further submitted, on behalf of the Commission, that the staff of a consulate and an honorary consulate are fundamentally different: The staff of a

consulate are employed and paid by the South African government. They are subject to the Constitution and other relevant laws of South Africa and are accountable to the government for the performance of their functions. An honorary consulate may have no staff at all. If it does have staff, they are employed and paid by the honorary consul. They are usually part of the business office of the honorary consul. They are not subject to the Constitution of South Africa and other relevant South African laws. They are not accountable to the government of the Republic of South Africa: they are accountable to the honorary consul.

[29] Eighth, there are fundamental and material differences between the offices of a consulate and an honorary consulate: a consulate is a South African government office situated in a foreign country. Its security and other arrangements are made by the consul and the staff of the consulate in line with determinations made by the Department. The consul has top security clearance and is vetted in accordance with South African national security protocols.

[30] An honorary consulate is a private office, usually the business premises of the honorary consulate. Its security and other arrangements are made by the honorary consul. If votes are to be cast at an honorary consulate, this will ordinarily take place in private business premises over which neither the South African government, nor the Commission has any control. The staff of the honorary consulate (if honorary consul has any) may not have the capacity to verify voters' identification.

[31] The staff are not subject to the control and discipline of the government or Commission. The security systems will not be under the government or the Commission. The same applies to the administrative systems which are followed by the honorary consulate, and the steps (if any) which are taken to ensure the security and privacy of voting, and to ensure the safe transmission of ballot papers to the Commission. All of this will lie in private hands, beyond the control of the government or the Commission.

Analysis

[32] The word 'consulate' is not defined in the Electoral Act. As previously indicated, the question is whether it includes a consulate headed by an honorary consul. This word must be interpreted in terms of the principles applicable to statutory interpretation. In this regard, the logical and helpful point of departure is the decision of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*.³

[33] *Endumeni* tells us that the prevailing state of the law on the subject is as follows: 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'⁴

[34] Accordingly, the inevitable point of departure is the language used in the provision under consideration in the light of the overarching scheme of the legislation

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

⁴ *Ibid* para 18.

and, in particular, the context.⁵ *Endumeni* has been consistently referred to with approval in several judgments of the Constitutional Court.⁶

[35] In *Chisuse*,⁷ the Constitutional Court reiterated that the process of interpretation is a unitary exercise, not a mechanical consideration of the text, context and purpose of the instrument under consideration. This means that statutory provisions should always be interpreted purposively, properly contextualised and construed consistently with the Constitution (*Cool Ideas 1186CC v Hubbard*).⁸ In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*,⁹ the Constitutional Court explained that context is not limited to reading a provision together with other provision in the statute. It includes the social and historical background of the legislation. Most recently, the essence of what the interpretative exercise entails was neatly captured by Unterhalter AJA, in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,¹⁰ in the following terms:

‘It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.’

⁵ See, in this regard, the separate concurring judgment of Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G-663A whose approach was endorsed by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) paras 77 and 89-91.

⁶ See, for example, *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*); *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29; *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) (*Road Traffic Management*) paras 29-30.

⁷ *Chisuse* para 52. See also, *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) (*Goedgelegen Tropical Fruits*) in which the Constitutional Court stressed that statutory provisions must always be interpreted purposively.

⁸ *Cool Ideas* para 28.

⁹ *Goedgelegen Tropical Fruits* para 53.

¹⁰ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) 2022 (1) SA 100 (SCA) para 25.

[36] The Constitutional Court held, in *Road Traffic Management Corporation v Waymark (Pty) Limited*,¹¹ that:

‘ . . . courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights. [However,] courts should not unduly strain the reasonable meaning of words when doing so. This obligation entails understanding statutes to “lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa”.’

Plain meaning

[37] Considering the textual ordinary grammatical meaning of a provision is to give that provision a plain, natural and literal interpretation.¹² It is correct that the Electoral Act and Election Regulations refer to ‘consulate’ and not to an honorary consulate. The Electoral Act and Election Regulations also do not exclude an honorary consulate from what may be meant by a consulate. When considering “plain meaning”, a technical meaning that is not obvious to those who do not have specialist knowledge should be avoided when, as in this case it leads to the exclusion of the eligible voters who live or happen to be in a country which does not have a South African embassy, high commission or consulate. On this interpretation, these voters are deprived of the benefit derived from the special dispensation afforded by s 33 and there is no indication that the legislature either expressly or by necessary implication intended to exclude them. This interpretation undermines the context and purpose of s 33(3).

Context

[38] In *Afriforum v University of the Free State*,¹³ the Constitutional Court held as follows:

‘Some of those key interpretive aides that have by now become trite are the textual or ordinary grammatical meaning, context, purpose and consistency with the Constitution. Context comes into operation where the ordinary grammatical meaning is not particularly helpful or conclusive. And contextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration

¹¹ *Road Traffic Management* para 32.

¹² *Rand Rietfontain Estates Ltd v Cohn* 1937 AD 317 at 321.

¹³ *Afriforum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) para 43.

be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located. The meanings and themes emerging from that reflection would then reveal the overall thrust that cannot justifiably be veered away from.'

While I agree with the Commission that the meaning of 'consulate' must be considered in its context, by having regard to the accompanying words 'embassy and high commission', I however, disagree with the proposition that the consulate headed by an honorary consul was intended to be excluded on the basis that it is not a diplomatic mission and does not have full foreign immunities, privileges, powers and functions which apply to a diplomatic mission. In terms of Article 59 of the Convention, honorary consular officers and consular posts headed by such officers, like other consular officers, are entitled to certain privileges and immunities.

Purpose

[39] The purpose of s 33(3) is to broaden the rights under s 19(2) of the Constitution: a right to free, fair and regular elections for any legislative body established in terms of the Constitution. Section 33 broadens the opportunity to vote, by creating opportunities to do so outside South Africa. Considering the importance of political rights in the Constitution, and in our history, these rights must be protected and an interpretation which results in their promotion and greater accessibility must be preferred.¹⁴ The interpretation contended for by the DA is a plausible one because by extending the ambit of the definition of 'consulate' it enables the eligible voters who happen to be outside the Republic on voting day to exercise their s 19(2) right. If voters cannot cast special votes in places such as Perth which do not have an embassy or high commission, then there is a strong chance that thousands of South Africans will not be able to vote.

[40] The fact that the consulates headed by honorary consuls are by their nature fundamentally different institutions, and serve different purposes, does not provide a sufficient basis for denying the eligible voters their rights to vote in the National Assembly elections. A special voting officer may be employed to facilitate voting at a

¹⁴ This approach is consistent with that postulated by the Constitutional Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others : In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at [21]

consulate headed by an honorary consul and the Department, in conjunction with the receiving state, will have to create a conducive environment for the Commission to manage and conduct elections at consulates headed by honorary consuls.

[41] The Commission and the Department may not decide which certain consulates may facilitate voting and which ones may not. Their decision cannot influence the interpretation of s 33 and regulation 10(3). I agree with the DA's submission that the fact that the Commission and the Department have decided not to empower honorary consular officials to facilitate special votes at their consul posts cannot change the meaning of the Act and Regulation (*Kubyana v Standard Bank of South Africa Ltd*).¹⁵

[42] In conclusion, I therefore hold that based on the context and purpose of s 33(3) of the Act the word 'consulate' appearing in that section includes a consulate headed by an honorary consul and that eligible voters can cast their special votes at such consulate. In the light of the conclusion I have reached on the interpretation of 'consulate,' it is not necessary to consider the DA's alternative argument.

Costs

[43] The award of costs is a matter which is within the discretion of the court. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious. I can think of no reason why the general rule should be departed from. Each party should therefore bear its own costs.

[44] These are reasons for the order we made.

D H ZONDI
CHAIRPERSON OF THE ELECTORAL COURT

¹⁵ *Kubyana v Standard Bank of South Africa Ltd* 2014(3) SA 56 (CC) at para 78.

Appearances

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