

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

United Democratic Movement (the UDM) and others v President of the Republic of South Africa and others (government)(1)

United Democratic Movement and others v President of the Republic of South Africa and others (2)

President of the Republic of South Africa and others v United Democratic Movement and others

CCT 23/02

MEDIA SUMMARY

The following explanation is provided on 4 October 2002 to assist the media in reporting these cases and is not binding on the Constitutional Court or any member of the Court.

This morning the Constitutional Court handed down three related judgments dealing with floor crossing. The main judgment considers the constitutional validity of four Acts of Parliament passed in June this year providing for members of national, provincial and local government legislatures to retain their seats despite defecting from the parties under whose banner they were elected. The second judgment deals with an appeal by government against interim orders issued by the Cape High Court suspending the operation of this legislation; and the third gives reasons for an interim order made by the Constitutional Court when it convened on 3 and 4 July 2002 and heard argument on behalf of the UDM and government and also by a number of others with an interest in the matter who were allowed to intervene.

Two related sets of Acts are considered. The first, concerned with local government, consists of Act 18 of 2002 (“the First Amendment Act”), which amends the Constitution to permit limited floor crossing in municipal councils, and Act 20 of 2002 (“the Local Government Amendment Act”), which amends the Local Government: Municipal Structures Act correspondingly. The second set consists of Act 22 of 2002 (“the Membership Act”), which removes the existing prohibition on floor crossing in the National Assembly and the nine provincial legislatures, and Act 21 of 2002 (“the Second Amendment Act”), which further amends the Constitution to cater for corresponding changes to the composition of the National Council of Provinces.

The Court stressed that the merits or demerits of the disputed legislation are not in issue. That is a political question of no concern to the Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional. Also, amendments to the Constitution duly passed in accordance with the requirements of the Constitution become part of the Constitution. There is little scope for challenging amendments passed in accordance with these prescribed procedures and majorities.

The UDM and others contended that the right to vote and proportional representation are part of the basic structure of the Constitution and, as such, are not subject to amendment at all. But the electoral system adopted in our Constitution is one of many that are consistent with democracy, some containing anti-defection clauses, others not; some proportional, others not. Proportional representation and the anti-defection provisions which support it are not so fundamental to our

constitutional order as to preclude any amendment.

The UDM and others also contended that the disputed legislation is inconsistent with the founding values of the Constitution, in particular the value of multi-party democracy. The Court held that a prohibition on floor crossing, is not an essential component of multi-party democracy, nor of proportional representation. The Constitution does not demand an anti-defection provision. It provides for an anti-defection clause in the case of members of the National Assembly and provincial legislatures only – and then only for a limited transitional period – and specifically allows that it be amended during the transition by an Act of Parliament.

Limiting floor crossing to two window periods in the life of the legislature is directed to concerns relating to stability within legislatures and is a rational decision. A threshold of 10% of a party's representatives in a legislature for floor crossing is also rational, given that one of the main aims of the legislation is to accommodate mid-term shifts in political allegiances.

The general conclusion is therefore that floor-crossing legislation for national, provincial and local government is not as such inconsistent with the Constitution.

There is, however, a procedural objection which is fatal to the legislation pertaining to national and provincial legislatures. In adopting the Membership Act, Parliament chose to use the special transitional mechanism allowing for the introduction of floor crossing by ordinary legislation. This mechanism was, however, part of transitional provisions and was expressly to be exercisable “within a reasonable period after the new Constitution took effect” (on 4 February 1997). In the context of transitional provisions that apply only until the next elections in 2004, the period of more than five years that has elapsed since the Constitution came into force can hardly be said to be “a reasonable period”. This conclusion is reinforced by the circumstance that in June 1998 Parliament apparently accepted the advice of a special committee that floor crossing should remain barred and revived the issue only after the break-up of the Democratic Alliance and consequential political realignments during the last year. Therefore, although Parliament could have done away with the anti-defection provision entirely, the method it decided upon was no longer valid. The Membership Act is inconsistent with the Constitution and invalid.

In the result the challenge to the floor-crossing legislation is upheld insofar as it pertains to the national and provincial legislatures and dismissed in relation to local government. Accordingly, floor-crossing is not permitted in the national and provincial legislatures, but is permitted in relation to local government.

Because of the interim court orders, members of municipal councils were not able to cross the floor during the initial 15-day window period in June of this year. The will of Parliament has been blocked despite the fact that the law in question is constitutional. The Court decided it would be just and equitable to allow a 15-day window period to run from 8 October 2002 during which floor crossing may take place in the local government sphere.

The second judgment finds that the High Court orders suspending the operation of the legislation pending determination of its validity by the Constitutional Court were too wide and should not have been made. Assuming (but not deciding) that high courts have the power to do so, orders of this kind interfere with the legislative and executive functions of government and should be issued only in exceptional circumstances to prevent serious irreparable harm. No such case was made out here. Also, as appeared at the urgent hearing of the Constitutional Court, less invasive

relief would have preserved the interests of all concerned. Government's appeal is thus upheld. In the third judgment the Court sets out what happened when it convened urgently early in July. The proposed appeal by government raised the question as to when – if ever – a court is empowered to suspend the operation of an Act of Parliament. This bears on the separation of powers and is of particular constitutional significance and sensitivity. Leave to appeal was therefore granted but time had to be allowed for the parties to prepare full argument. Also, intervening parties had not filed affidavits and time had to be allowed for further interested parties to intervene. The judgment explains a series of orders the Court then made in consultation with the parties and interveners then represented, effectively freezing the situation until final judgment could be given on all the issues.