CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 43/02

THE AFRICAN NATIONAL CONGRESS	Applicant
versus	
THE UNITED DEMOCRATIC MOVEMENT	First Respondent
THE INKATHA FREEDOM PARTY	Second Respondent
THE DEMOCRATIC PARTY	Third Respondent
THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
THE MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	Sixth Respondent
THE AFRICAN CHRISTIAN DEMOCRATIC PARTY	Seventh Respondent
THE PAN AFRICANIST CONGRESS OF AZANIA	Eighth Respondent
THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL	Ninth Respondent
JOHANN KROG	First Intervenor
ALEX CHRISTIANS	Second Intervenor
ABBIE MCHUNU	Third Intervenor
SOOBRAMONEY VYTHILINGUM NAICKER	Fourth Intervenor

Heard on : 11 November 2002

Decided on : 19 November 2002

JUDGMENT

CHASKALSON CJ:

[1] In June 2002, Parliament passed four Acts aimed at allowing members of national, provincial and local legislatures to change their party allegiance without losing their seats. This legislation was subsequently challenged by the United Democratic Movement (UDM) in the Cape High Court. First a single judge and then a full bench of that Court dealt with the matter. The full bench suspended "the commencement and/or operation" of the four Acts pending the decision of this Court on the application by the UDM to have the Acts declared unconstitutional and invalid. On 3 and 4 July 2002, this Court convened to consider as a matter of urgency the UDM's application and an appeal by the government against the orders of the High Court. Having heard argument, the Court issued an interim order on 4 July 2002 to stabilise the situation pending a decision of this Court.[1]

[1] *United Democratic Movement v President of the Republic of South Africa and Others (1)* CCT 23/02 as yet unreported.

[2] A full hearing took place on 6, 7 and 8 August 2002. On 4 October 2002, this Court delivered three unanimous judgments concerning the case. The first, "the *UDM interim judgment*", gave reasons for the interim order of 4 July 2002.[2] The second, "the *UDM appeal judgment*", upheld an appeal against the order of the Cape High Court and set it aside.[3] The third, "the *UDM main judgment*", dealt with the merits of the constitutional challenge to the legislation.[4]

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2 Id.

3 *President of the Republic of South Africa and Others v United Democratic Movement* CCT 23/02 as yet unreported.

4 *United Democratic Movement v President of the Republic of South Africa and Others (2)* CCT 23/02 as yet unreported.

[3] As has already been mentioned, four pieces of legislation were challenged. The First Amendment Act[5] and the Local Government Amendment Act[6] both related to floor crossing in the local government sphere. The First Amendment Act provided for a fifteen-day period during the second and fourth years after a general election, as well as a once-off fifteen-day period immediately following the commencement of the legislation, during which party allegiances could be changed without the councillors concerned losing their seats. The Local Government Amendment Act complemented the First Amendment Act by removing references to the bar on floor crossing and by making provision for various aspects of local government to accommodate the new system of limited floor crossing. The Second Amendment Act[7] and the Membership Act[8] related to floor crossing in national and provincial legislatures. The Membership Act allowed for a limited system of floor crossing during a fifteen-day period during the second and fourth years after a general election as well as during a once-off fifteen-day period immediately following the commencement of the legislation. The Second Amendment Act complemented the Membership Act by allowing for the alteration of the composition of provincial delegations to the National Council of Provinces if the composition of a provincial legislature was changed due to floor crossing.

[4] In the *UDM main judgment*, this Court dismissed the constitutional challenge to the First Amendment Act, the Second Amendment Act and the Local Government Amendment Act. It

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5 Constitution of the Republic of South Africa Amendment Act 18 of 2002.

6 Local Government: Municipal Structures Amendment Act 20 of 2002.

7 Constitution of the Republic of South Africa Second Amendment Act 21 of 2002.

8 Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

did, however, uphold the challenge to the Membership Act on the ground that it impermissibly amended the Constitution by means of ordinary legislation rather than by a constitutional amendment. The practical effect of the judgment was that floor crossing could take place in the local government sphere, but not in the national or provincial government spheres.

[5] The Court then considered the order to be made. When the Court dealt with the matter on an urgent basis on 4 July 2002, it issued an interim order to stabilise the situation until the main matter could be resolved. The relevant part of the order was paragraph 13 which provided:

> "Pending the determination of the constitutionality of the constitutional amendments and the legislation referred to in paragraph 3 [the four Acts already mentioned]:
>
> (a) anyone who was a member of the National Assembly, a provincial legislature, or a municipal council immediately prior to the order made by the Cape High Court on 20 June 2002 and who has since then or may hereafter cease to be a member of a party of which he or she was then a member shall not by reason of that fact cease to be a member of such assembly, legislature or municipal council, or be denied any rights and privileges attaching to such membership.
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> (b) anyone who, subsequent to the order made by the Cape High Court on 20 June 2002, has been removed from membership of the National Assembly, a provincial legislature, or a municipal council by reason directly or indirectly of anything done by such person to take advantage of the constitutional amendments and legislation referred to in paragraph 3, shall be restored to such membership with all rights and privileges attaching thereto, and any person who has replaced such person as a member of the national assembly, provincial legislature, or municipal council shall cease to be a member of such body.
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> (c) no resolution shall be taken in the National Assembly, a provincial legislature or a municipal council that will have the effect of shifting the control of the

executive authority of such bodies from the political party or parties exercising such control as at the 20th June 2002, to any other party or parties.

(d) no member of a political party shall from now onwards attempt to rely on the provisions of the floor-crossing legislation to become a member of another political party."

[6] This order was still in force when the Court gave its judgments on 4 October 2002. By then, the fifteen-day period prescribed by the First Amendment Act for floor crossing in the local government sphere had elapsed without councillors having been able to cross the floor. To address this problem, the Court's order provided that the window period referred to in the Local Government Amendment Act, which had in effect been suspended by the interim orders, should commence on 8 October 2002. The Court also ordered[9] that paragraphs 13(a), (b) and (c) of the interim order would be kept in force until the expiry of the fifteen-day window period. This was to

"ensure that no prejudice is suffered as a result of the orders that have been made by the High Court and this Court before an adequate opportunity has been allowed for the consideration of the terms of this judgment . . .".[10]

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9 *UDM main judgment* above n 4 at para 4 of the order.

10 Id at para 118.

[7] On 11 October 2002, the Minister for Justice and Constitutional Development (the Minister) published the Constitution of the Republic of South Africa Fourth Amendment Bill, 2002 in the Government Gazette for comment. The Bill aims to amend the Constitution to allow members of the National Assembly and provincial legislatures to retain their seats despite having changed party allegiance. It allows floor crossing only during a fifteen-day period during the second and fourth year after an election as well as during a once-off fifteen-day period immediately following the commencement of the legislation. Section 7(3) of the Bill provides:

> "Any person who, during the period from 22 October 2002 until the date of the commencement of this Schedule, has been removed from membership of a legislature by reason directly or indirectly of anything done by such person in anticipation of the enactment of provisions substantially similar in content to this Schedule, shall be restored to such membership with all rights and privileges attaching thereto, and any person who has replaced such person as a member of the legislature shall cease to be a member of such legislature."

[8] This case relates largely to the position of five individuals who were members of the KwaZulu-Natal Provincial Legislature. These five individuals changed their party allegiance on 21 June 2002 - that is after the initial floor-crossing legislation had been passed. They allege that they did so in ignorance of the fact that a judge in the Cape High Court had suspended the commencement of the legislation. They retained their membership of the provincial legislature initially due to orders of the Natal High Court and then due to the interim order of this Court. On 20 October 2002, the African National Congress (ANC) approached the Natal High Court for an order concerning the status of these five individuals. Pending the finalisation of an application to be brought to this Court, the ANC asked for an order interdicting the Speaker of the Legislature from swearing in new members to replace the five individuals and interdicting the five

individuals from participating in debates or sitting and voting in the Provincial Legislature. Combrinck J dismissed the ANC's application on 22 October 2002. On 23 October 2002, the Speaker of the Legislature swore in four new members of the Legislature with one seat remaining vacant.

[9] On 22 October 2002, the ANC applied for direct access to this Court as a matter of urgency. It asked for an order:

> "That the provisions of paragraph 4 of the Order in the judgment handed down by the Constitutional Court on 4 October 2002 . . . shall be extended so as to expire on the rejection by Parliament or promulgation of the Constitution of the Republic of South Africa Amendment Bill."

[10] The Minister, who was cited as the fourth respondent by the ANC, applied to intervene in the matter and asked for an order as follows:

> "4 Declaring that the order made in UDM v President of the Republic of South Africa (1) limited the retrospective effect of the declaration of invalidity of the Loss or Retention of Membership Act, 22 of 2002 ("the Membership Act") to 22 October 2002;
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> 5 Alternatively, and in the event that this was not the intention of this Court, declaring that the order of invalidity of the Membership Act operates prospectively from 22 October 2002 and that all acts performed or decisions taken in terms of the Membership Act shall not be rendered invalid by reason of the declaration of invalidity;
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> 6 Extending the limitation of the retrospective effect of the declaration of invalidity of the Membership Act to 31 March 2003;

> 7 Keeping in force paragraphs 4(a), (b) and (c) of the order made on 4 October 2002, insofar as they relate to the National Assembly and provincial legislatures, pending the finalization of the application for variation of the order made on 4 October 2002; . . .".

[11] The relief sought in the two applications was opposed by the second respondent (the Inkatha Freedom Party), the third respondent (the Democratic Party), the eighth respondent (the Pan Africanist Congress of Azania) and the ninth respondent (the Premier of the Province of KwaZulu-Natal). It was also opposed by four individuals who sought leave to intervene in the proceedings. These were the four individuals who had been sworn in as new members of the Legislature on 23 October 2002. I will refer to those who oppose the ANC's application and the Minister's application as "the respondents".

The application by the Minister to intervene as an applicant

[12] The Minister is a party to the proceedings. There is accordingly no need for him to intervene. He seeks an order different to that claimed by the ANC. That he is entitled to do. His application is in effect a counter-application. Rule 6(7)(a) of the Uniform Rules adopted by Rule 28 of the Rules of this Court permits such applications.[11]

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[11] Rule 6(7)(a) of the Uniform Rules states:

> "Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action."

Direct Access and Urgency

[13] The relief sought by the ANC and the Minister concerns the variation of an order made by this Court in a matter involving an amendment to the Constitution. This is the only Court with jurisdiction to deal with such a matter, and it was therefore competent for the ANC and the Minister to approach this Court directly for the relief they sought. The matter is one of importance and there has been full argument on the merits. It is in the interests of justice that the dispute be resolved by this Court expeditiously.

The Relief Claimed by the ANC

[14] This Court has previously drawn attention to the limited power that a court has to vary its orders after they have been made. In *Minister of Justice v Ntuli*[12] it was held:

> "The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if Courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid."

[15] The common law principles are referred to in paragraphs 22 and 23 of the judgment in *Ntuli* where it was said:

> "The general principles of the common law applicable to the variation of orders of Court were summarised by Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG* as

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12 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 29. See also *Ex Parte Women's Legal Centre: in*

follows:

> 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.' (Citation omitted.)

Certain exceptions to this general principle have been recognised and are referred to in the *Firestone* judgment. They are variations in a judgment or order which are necessary to explain ambiguities, to correct errors of expression, to deal with accessory or consequential matters which were 'overlooked or inadvertently omitted', and to correct orders for costs made without having heard argument thereon.

Trollip JA was prepared to assume in the *Firestone* case that the list of exceptions might not be exhaustive and that a Court might have a discretionary power to vary its orders in other appropriate cases. He stressed, however, that the

> '. . . assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded . . .'" (Citation omitted.)

[16] It was assumed in *Ntuli's* case that

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re Moise v Greater Germiston Transitional Local Council 2001 (4) SA 1288 (CC) at para 4.

> "in an appropriate case an order for the suspension of the invalidity of the provisions of a statute may subsequently be varied by a Court for good cause. But if this is so, such a power, like the discretionary powers assumed in the *Firestone* case, would be one that 'should be very sparingly exercised'."[13]

[17] The ANC does not contend that the order is obscure, ambiguous or otherwise uncertain. Nor does it contend that the order fails to make provision for the relief that it now claims due to oversight or inadvertent omission. It accepts that the order has retrospective effect and that once the limited protection given to sitting members by paragraph 4 of the order expired, members who had ceased to be members of the parties by which they were nominated, ceased to be members of the KZN legislature.

[18] The relief that it claims is that these persons be reinstated as members of the KZN legislature because of the notice given by the Minister of the Bill to amend the Constitution to make provision for floor crossing in the National Assembly and provincial legislatures. This, it contends, constitutes changed circumstances which allow for the variation of the order made.

[19] Sections 74(5), (6) and (7) of the Constitution deal with the procedure to be followed when a Bill amending the Constitution is to be introduced into the National Assembly. The relevant provisions are as follows:

> "(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must–

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13 Id at para 30.

a) publish in the national *Government Gazette*, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;
b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and
c) submit, in accordance with the rules and orders of National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures–
(a) to the Speaker for tabling in the National Assembly; and
(b) in respect of amendments referred to in subsection (1), (2) or (3)(b) to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of–
(a) its introduction, if the Assembly is sitting when Bill is introduced; or
(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced."

[20] As required by section 74(5), the Minister caused the Bill amending the Constitution to be published in Government Gazette 29341 of 11 October 2002. It is not necessary to refer in any detail to the provisions of the Bill. They are dealt with briefly in the memorandum accompanying the Bill, which is also published in that Government Gazette. After referring to the decision of this Court in the *UDM* matter, the memorandum continues in paragraph 2 as follows:

"2.1 The objects of the Bill are to amend the Constitution in order to enable a member of the National Assembly or a provincial legislature to become a member of another party whilst retaining membership of that legislature; to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one subdivision to merge with another party.

2.2 The provisions of the Bill are modelled largely on the amendments effected to the Constitution by the Constitution of the Republic of South Africa Amendment Act, 2002, that inserted the provisions related to the "crossing of the floor" in the local government sphere in the Constitution. By adhering to the principles embodied in those provisions, the Bill will give effect to the Legislature's clearly stated objective, as stated in the Preambles to the Acts in question, of ensuring that uniformity exists within the three spheres of government regarding loss or retention of membership of the National Assembly, any provincial legislature or any municipal council in the event of a change of party membership, or mergers or subdivisions or subdivision and merger of parties.

2.3 The provisions of the Bill are applicable to members of, and parties represented in, the National Assembly and provincial legislatures. The mechanism contained in the Bill provides that a member of a legislature will be allowed to change party membership, and allows a party to merge or to subdivide, or to subdivide and merge, only during the first 15 days following the commencement of the legislation, and thereafter –

- Only during a period of 15 days from the first to the fifteenth day of September in the second year following the date of an election of the legislature; and
- During a period of 15 days from the first to the fifteenth day of September in the fourth year following the date of an election to the legislature."

[21] In his affidavit the Minister says that the Bill will operate retrospectively to June 2002. In the High Court proceedings, however, Combrinck J expressed the opinion that the Bill does not envisage that the constitutional amendment will have retrospective effect. It is neither necessary nor desirable to consider that question in this judgment, nor whether it would be competent by means of a constitutional amendment to remove sitting members of the provincial legislature and replace them with members who lost their positions as a result of their having ceased to be members of the parties which nominated them.

[22] The relief sought by the ANC does not arise out of any ambiguity or omission in the order made by this Court. Though couched as an application for variation of this Court's order, it is in effect a substantive application for mandatory relief by the ANC to protect its new members who lost their seats in the KZN legislature because of the action taken by them in the mistaken belief that the Membership Act was valid.

[23] Counsel for the ANC stressed that the five persons who had crossed the floor on 21 June 2002 had done so in good faith in the belief that they were protected by the Membership Act and that they should not be prejudiced for having done so. The claim is not based on any right that these members have. It is based on the assumption that the Constitution will be amended at some time in the future to restore these members to the provincial legislature, and that this Court would have given the protection claimed to the members if it had been advised of the Minister's intention to seek an amendment to the Constitution at the time it made its order. There is no basis for such an assumption.

[24] At best for the ANC, a Bill proposing an amendment to the Constitution has been introduced into Parliament which, if passed, might have such consequences. Even if it is assumed that this will be the case, it does not constitute grounds on which the order of this Court can be varied. There are no legal grounds on which the relief claimed can be granted or could reasonably have been granted at the time this Court made its order. To do so would be to give effect to the Membership Act that was declared invalid in the *UDM main judgment*. It may be unfortunate that the five persons concerned have been prejudiced by relying on the Membership Act. But once they had chosen to leave the parties by which they were nominated, this is what the Constitution demands.

[25] Counsel for the ANC also asked us to have regard to the fact that if this application fails the Executive Council of the KZN legislature may be reconstituted. If the composition of the Executive Council is changed that will be the result of a political decision. The taking of such decisions is regulated by the Constitution and there is no basis for this Court to prevent such decisions being taken simply because the Constitution may be amended.

The relief claimed by the Minister

[26] In the affidavit lodged by him in support of the counter-application, the Minister contends that the order made on 4 October 2002 suspended the consequences of the declaration of invalidity until 22 October 2002. Thus members of legislatures who crossed the floor in June in the belief that the Membership Act was valid did so lawfully and were protected by that Act until 22 October 2002. They would, however, lose their seats on that date when the declaration of invalidity took effect with retrospective effect. The Minister suggests that this interpretation of

the order differs from that asserted by the ANC in its founding affidavit. Because of this difference he submits that the order needs to be clarified.

[27] The ANC's contention has already been referred to. It is that the effect of the order was to deprive the members of the KZN provincial legislature who had crossed the floor of the protection they would have had if the Membership Act had been valid. They were, however, given limited protection by paragraph 4 of the order against loss of their membership of the legislature until 22 October 2002. This is much the same as the submissions made by the respondents. I refer more fully to these submissions later in this judgment.[14]

[28] The difference between the Minister's interpretation of the order and that of the other parties seems to be of little if any practical significance. Counsel who appeared for the Minister at the hearing of the application did not suggest that the members who changed party allegiances in June would be entitled to remain as members of the KZN legislature after 22 October 2002. He accepted, correctly in my view, that they ceased to be members on the expiry of the interim protection afforded to them by paragraph 4 of the order. In any event, even if there are material differences, the mere fact that the Minister's understanding of the order differs from that of the other parties would not in itself be sufficient reason to require this Court to clarify its order.

[29] In the written argument lodged on behalf of the Minister, a somewhat different approach is adopted to that taken in his affidavit. It is acknowledged that a literal reading of the order of

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[14] Below para 30.

invalidity suggests that with effect from 23 October 2002 it will operate retrospectively to 20 June 2002. It is submitted, however, that it is not clear that this is what the Court intended and that it is desirable in the circumstances for the Court to clarify its order.

[30] In support of this argument it is contended that no apparent purpose is served by declaring the Membership Act invalid with retrospective effect, and at the same time extending the protection of the interim order to members of the National Assembly and provincial legislatures until 23 October 2002. In their written argument counsel for the respondents submit, correctly in my view, that

> "[i]n practical terms, all that paragraph 4 did was to grant to those persons who had changed political alliance and left their original parties after 20 June 2002 as well as to the political parties affected thereby, an opportunity to consider the judgment and rearrange their affairs having regard to the fact that their membership of the respective Legislatures could end nineteen days later if they were then no longer members of the party that had nominated them."

This is made clear in paragraph 118 of the *UDM* judgment to which I have already referred.[15] The breathing space ensured that precipitate action would not be taken and allowed both the political parties and the affected members time to reconsider their positions in the light of the judgment and if so advised to enter into negotiations concerning their future relationships. There is no ambiguity in the order that calls for an

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15 Cited above at para 6 of this judgment:

> "To ensure that no prejudice is suffered as a result of the orders that have been made by the High Court and this Court before an adequate opportunity has been allowed for the consideration of the terms of this judgment, paragraphs 13(a), (b) and (c) of the interim order of this Court will be kept in force until the expiry of the fifteen-day window period."

explanation or that justifies a request to this Court to correct or supplement its judgment, nor is there any reason why the order should not be given its literal meaning.

[31] It was also submitted on behalf of the Minister that there is nothing in the judgment to suggest that this Court considered the effect of a retrospective order on the rights and privileges of those persons who would cease to be members of the KZN legislature, or on the validity of decisions taken by the KZN legislature whilst those members were protected by the interim order.

[32] The affected members have not approached this Court for relief in this regard, nor has any decision that might have been taken by the KZN legislature during the relevant period been challenged. This Court is not obliged to deal with such matters as abstract questions at the instance of the Minister. He has not drawn attention to any decision of the KZN legislature during the relevant period that might affect him, or to any matter concerning the rights and privileges of members of the KZN legislature in which he might have an interest. Indeed, there is nothing to show that any material decisions were taken by the KZN legislature during this period. Any dispute in relation to such matters can be dealt with if and when it arises. It is not appropriate for this Court to supplement its judgment of 4 October 2002 to deal specifically with these matters.

[33] I am not persuaded, therefore, that there is any need for the judgment to be clarified.

The Minister's alternative contentions

[34] In the alternative, the Minister sought an order

> "Extending the limitation of the retrospective effect of the declaration of invalidity of the Membership Act to 31 March 2003; . . .".

He contends that if a constitutional amendment is passed with retrospective effect, there will be uncertainty as to the validity of decisions taken by the KZN Legislature in the interim. There will also be uncertainty as to the rights and privileges of the members who lose their seats as a result of the constitutional amendment, and the rights and privileges of those persons who replace them "with retrospective effect".

[35] In effect, the Minister seeks an order which, pending the outcome of the constitutional amendment, reinstates those persons who lost their membership of the legislature and removes those members who have taken their places in accordance with the provisions of the Constitution. There are two obstacles to the granting of such relief. First, the period fixed for the operation of paragraph 4 of the order has expired. Even if it is permissible to extend the order after its expiry date – a proposition doubted but left open in *Ntuli's* case[16] – it would have to be exercised "very sparingly". No circumstances exist in the present case that would justify the making of so drastic an order if there is indeed the power to do so. Secondly, the cause of the concerns expressed by the Minister is the proposal to amend the Constitution with retrospective effect, and not the order made by this Court. There are no grounds on which this Court can or should amend its order to facilitate the passing of such an amendment, or to avoid any adverse consequences that would result from a proposed retrospective amendment. These are matters for

Parliament.

[36] In the result the Minister's claim must also be dismissed.

Costs

[37] The respondents are entitled to their costs. The application dealt with an important issue. The applicant was represented by two counsel and in my view it was not inappropriate for the respondents to be represented in the proceedings by two counsel. Counsel for the respondents asked for the order to be made jointly and severally against the ANC and the Minister and this will be done.

[38] The following order is made:

1. The application by the African National Congress is dismissed.

2. The application by the Minister for Justice and Constitutional Development is dismissed.

3. The costs of these proceedings are to be paid by the African National Congress and the Minister for Justice and Constitutional Development jointly and severally and are to include the costs of two counsel.

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[16] Above n 12 at paras 30 and 38.

Langa DCJ, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Chaskalson CJ.

For the Applicant:

K. Swain SC and R.J. Seggie instructed by Von Klemperers, Pietermaritzburg.

For the Second, Third and Ninth Respondents and First to Fourth Intervenors:

M. Pillemer SC and A.A. Gabriel instructed by Larson Bruorton and Falconer Inc, Durban.

For the Fourth Respondent:

D.O. Potgieter SC instructed by the State Attorney, Johannesburg**.**