CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/02

UNITED DEMOCRATIC MOVEMENT	Applicant
versus	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	Third Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	First Intervening Party
AFRICAN NATIONAL CONGRESS	Second Intervening Party
INKATHA FREEDOM PARTY	Third Intervening Party
PAN AFRICANIST CONGRESS OF AZANIA	Fourth Intervening Party
PREMIER OF THE PROVINCE OF KWAZULU-NATAL	Fifth Intervening Party
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Sixth Intervening Party
INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA	First Amicus Curiae
RESEARCH UNIT FOR LEGAL AND CONSTITUTIONAL INTERPRETATION	Second Amicus Curiae

Heard on	:	3 and 4 July 2002
Order made on	:	4 July 2002
Reasons delivered on	:	4 October 2002

THE COURT

JUDGMENT

THE COURT:

[1] Until June this year, members of the National Assembly, provincial legislatures and municipal councils automatically lost their seats if they ceased to be members of the political parties which nominated them as members of the legislative body. The effect of this rule – referred to as the "anti-defection clause" – was that members of legislatures were not able to join other political parties, or "cross the floor" without losing their legislative seats. In June 2002, Parliament enacted four pieces of legislation,[1] including two constitutional amendments, which was aimed at relaxing the operation of this rule in all three spheres of government. The legislation was assented to by the President on 19 June 2002 and published in Government Gazettes dated 20 June 2002.

---

[1] Constitution of the Republic of South Africa Second Amendment Act 21 of 2002; Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002; Constitution of the Republic of South Africa Amendment Act 18 of 2002 and the Local Government: Municipal Structures Amendment Act 20 of 2002.

[2] On the evening of that day, the applicant launched proceedings for urgent relief in the Cape High Court to suspend the operation of the legislation pending a decision on the constitutionality of the legislation by a full bench of the Cape High Court. The respondents opposed the application, but an order was made by the Court in the terms sought by the applicant.[2] The High Court judge gave no reasons for the relief granted. The matter then came before the full bench of the High Court on 24 June 2002. The respondents opposed the grant of relief. The High Court made an order in the following terms:

> "1. The application for the amendment to the Notice of Motion is granted.
>
> 2. An order is made suspending the commencement and/or operation of the Constitution of the Republic of South Africa Amendment Act 2002; the Constitution of the Republic of South Africa Second Amendment Act 2002; the Local Government: Municipal Structures Amendment Act 2002; and the Loss or Retention of Membership of National and Provincial Legislatures Act 2002, pending the outcome of a Constitutional Court application which is to be instituted by the Applicant by not later than noon on 27 June 2002 in which the constitutionality of the aforesaid Acts is to be challenged.
>
> 3. No order as to costs."

Once again, no reasons were given for this order.

---

[2] The terms of the High Court order were as follows:

> "1. Pending a decision by a Full Court to be convened by the Judge President as a matter of urgency, the commencement of the Constitution of the RSA Amendment Act and the Second Amendment Act, the Local Government Municipal Structures Amendment Act 2002 and the Loss or Retention of Membership of National and Provincial Legislatures Act 2002 is suspended.
>
> 2. Costs to stand over."

[3] In accordance with the terms of this order, an application for direct access for an order declaring all four pieces of legislation to be unconstitutional was lodged in this Court on 27 June 2002. Directions were then given by the Chief Justice on 28 June setting the matter down for hearing on Wednesday 3 July 2002 and calling for argument on the following preliminary issues:

> "(i) Is it desirable that this Court, sitting as a court of first and final instance, should decide issues of such fundamental importance as those raised in this application, as a matter of urgency without a reasonable opportunity being given to all parties that might have an interest in the matter to prepare their arguments adequately and make considered submissions to the Court, and without the Court itself having a reasonable opportunity to give careful and adequate consideration to all the issues before deciding the matter?
>
> (ii) Can this Court make an order at this stage of the proceedings that will have the effect of stabilising the situation that exists and ensuring that no person or legislature is prejudiced by the uncertainty that exists, or by the orders made by the High Courts, pending the final determination of the issues that have been raised?"

The legal representatives of the parties were requested also to be prepared to address argument on any other issues pertaining to the merits of the dispute that may be called for by the Court.

[4] On 1 July 2002, the respondents lodged a counter-application seeking leave to appeal against the interim orders made on 20 June and 24 June contending, amongst other things, that the High Court lacked jurisdiction to make the orders it had made. At the commencement of the hearing on 3 July, the African Christian Democratic Party, the African National Congress, the

Inkatha Freedom Party, the Pan Africanist Congress of Azania, the Premier of the province of KwaZulu-Natal and the South African Local Government Association all sought and were granted leave to intervene as parties in the proceedings. The Institute for Democracy in South Africa and the Research Unit for Constitutional and Legal Interpretation, a non-governmental organisation with constitutional law expertise, sought and were granted leave to be admitted as amici curiae.

[5] It became clear at the hearing that the complex and important issues raised in the case were not capable of final resolution on an urgent basis. In the circumstances, the Court decided that it would be in the interests of justice for the status quo to be maintained pending the determination of the constitutional challenge. Accordingly, the Court, having consulted the parties, made an order in the following terms:

> "1. The application by the respondents for condonation of the failure to apply for a certificate in terms of rule 18 is granted.
> 2. The respondents are given leave to appeal against the orders made by the High Court on 20 June 2002 and 24 June 2002.
> 3. The hearing of the appeal and of the application made by the applicant for an order declaring the Constitution of the Republic of South Africa Amendment Act 2002, the Constitution of the Republic of South Africa Second Amendment Act 2002, the Local Government Municipal Structures Amendment Act 2002 and the Loss or Retention of Membership of National and Provincial Legislatures Act 2002 (the floor-crossing legislation) to be unconstitutional is postponed to 6 August 2002. The appeal record must be lodged by not later than 11 July 2002. The hearing will commence on 6 August 2002 and if necessary will continue on 7 and 8 August 2002.
> 4. The applicant and intervening parties challenging the constitutionality of the constitutional amendments and the legislation referred to in paragraph 3 are

given leave to supplement their affidavits by not later than 16 July 2002. Those who have not yet lodged affidavits and wish to do so must lodge their affidavits by 16 July 2002.

5. The respondents and the intervening party opposing the relief sought by the applicant are given leave to lodge or supplement their affidavits by not later than 19 July 2002.

6. The applicant and the intervening parties referred to in paragraph 4 are given leave to reply to any new matter contained in the affidavits referred to in paragraph 5 by not later than 23 July 2002.

7. The applicant and the intervening parties referred to in paragraph 4 must lodge their written argument by not later than 26 July 2002.

8. The respondents and the party referred to in paragraph 5 and all amici curiae must lodge their written argument by not later than 30 July 2002.

9. If the South African Local Government Association wishes to participate in the hearing of this matter it must lodge its written argument by not later than 2 August 2002.

10. The written arguments of the amici curiae must comply strictly with the requirements of rule 9. On receipt of the written argument a decision will be made as to whether or not the amici will be given leave to address oral argument to the Court at the hearing of the matter.

11. Any other person seeking to intervene in the proceedings must lodge an application to do so by not later than 16 July 2002. Such application must contain all the evidence on which such person will rely if admitted as an intervening party.

12. Any other person seeking to be admitted as an amicus curiae must lodge an application in terms of rule 9 to do so by not later than 16 July 2002.

13. Pending the determination of the constitutionality of the constitutional amendments and the legislation referred to in paragraph 3:

    (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.

(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.

(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.

14. The costs of the hearing on 3 and 4 July 2002 are reserved for determination at the hearing of the application and the appeal."

[6] At the same time, the Court indicated that it would provide its reasons at the time judgment was given in the main application for this order. Those reasons are provided now.

[7] The Constitution establishes that the criterion for determining when a Court should entertain an appeal is "when it is in the interests of justice and with leave of the Constitutional Court".[3] It is clear that the respondents' appeal against the orders made by the Cape High Court raises a constitutional issue of substance – when, if ever, a High Court may make an order

[3] Section 167(6) of the Constitution.

suspending the coming into operation of a constitutional amendment or an Act of Parliament. The question raised is a particularly sensitive one in the light of the doctrine of the separation of powers. The legislative authority of the national sphere of government is vested in Parliament in terms of section 43 of the Constitution but the suspension of the coming into operation of a piece of legislation has the effect of defeating the will of the elected legislature and hampering its ability to exercise the legislative authority conferred upon it by the Constitution. The question raised by the respondents in their application for leave to appeal was therefore an important one of particular constitutional significance. In the circumstances, it was clear that it was in the interests of justice for the Court to grant leave to appeal to the respondents, which it did.

[8] On 3 and 4 July the parties had not had an opportunity fully to prepare argument or indeed to exchange affidavits. Many of the intervening parties had not had an opportunity to file affidavits at all. It was the Court's view that it would have been undesirable for it to seek to reach a decision on the important matters raised in the appeal and in the applicant's application for direct access on the record as it stood on 4 July and without giving all the litigants and others with an interest in the matter a reasonable time to prepare argument. In the circumstances, the Court considered it was not in the interests of justice to proceed with the matter on 4 July. The order made on that day therefore postponed the matter till 6 August 2002, giving an opportunity to other interested parties to lodge applications to intervene and to the parties to file further affidavits and further argument.

[9] The Court was concerned however that there should be stability and clarity as to the situation in the period pending the final determination of the matter. By 3 July, it appeared from

the affidavits filed before this Court by litigants other than the applicant that several members of legislatures had sought to rely on the provisions of the new legislation to change their political allegiance. In the ordinary course, the new law would have applied pending the determination of its constitutionality. Given the orders granted by the Cape High Court, however, great uncertainty existed as to the position of such members. This uncertainty was exacerbated by the fact that such changes in political allegiance had been responded to, in some cases, by the expulsion of such members from their original political parties which meant that in terms of the law that obtained prior to 20 June 2002, they would have lost their membership of the relevant legislative bodies.

[10] Moreover, in this Court, the South African Local Government Association sought leave to intervene simply to argue that it would be appropriate and in the interests of all its members that there should be certainty as to the legal situation pending a determination of the constitutional challenge and, in particular, that there should be the least possible disruption of the functioning of municipal councils. The Association is a statutory body representing all nine provincial local government associations, which in turn represent the majority of municipalities in each province, regardless of political affiliation.[4] The Association pointed out that in the wake of the orders made by the Cape High Court, other litigation had commenced relating to the threatened expulsion of members of municipal councils who had indicated their intention to cross the floor in terms of the new legislation. The Association also stated that it was aware of threatened expulsions across the country which might result in political uncertainty and a flurry of litigation.

---

[4] See Government Notice R175, Regulation Gazette No. 6087, 30 January 1998, published in Government Gazette No. 18645, read with section 2(1)(b) of the Organised Local Government Act 52 of 1997, and with section 163 of the Constitution.

[11] It also became clear from affidavits placed before this Court, particularly by the third and fifth intervening parties, that in some municipal councils and possibly even in some provincial legislatures, political control of the council or legislature might have been affected by the defection of members within the legislative body. This possibility was giving rise to political instability, particularly in the province of KwaZulu-Natal. It was the Court's view that it would be undesirable for the political control of a legislature to be changed as a result of reliance on the new package of legislation before the Court had had an opportunity to decide on its constitutionality.

[12] The purpose of paragraph 13 of the order made on 4 July 2002 was therefore to ensure that the situation as it obtained on 20 June 2002, prior to the enactment of the package of legislation under challenge, be maintained until the Court could have an opportunity to hear the matter and make a final order. In so doing, the Court sought to avoid unnecessary disorder in the political system and unnecessary litigation throughout the country on the question of expulsions and floor-crossing. These risks had been elaborated upon in affidavits filed by litigants other than the applicant, whose affidavits in the Cape High Court contained only a bald allegation as to political disruption. It is important to make clear, however, that determining whether it is in the interests of justice that a status quo order be granted, will depend on the facts of each case and, in particular, on the question of whether the Court is persuaded that there is a need to prevent what might otherwise be substantial prejudice. In this case, the evidence presented to this Court as described in this judgment warranted the grant of interim relief to preserve the status quo, in the light of the uncertainty occasioned by the Cape High Court order, until this Court could make a

final decision.

By the Court: Chaskalson CJ, Langa DCJ, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Yacoob J.

For the Applicant and the First and Fourth Intervening Parties:

J.C. Heunis SC and M. Osborne instructed by De Klerk and Van Gend Incorporated, Cape Town.

For the Respondents:

W. Trengove SC, V. Maleka SC, K.D. Moroka and A. Schippers instructed by the State Attorney, Cape Town.

For the Second Intervening Party:

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

For the Third and Fifth Intervening Parties:

M. Pillemer SC and A. Annandale instructed by Larson Bruorton & Falconer, Durban.

For the Sixth Intervening Party:

P. Kennedy SC and A. Dodson instructed by Cheadle, Thompson and Haysom, Johannesburg

For the First Amicus Curiae:

A.M. Breitenbach and D. Borgstrom instructed by Owen Incorporated, Cape Town.

For the Second Amicus Curiae:

A. Katz instructed by Kruger, Slabber, Esterhuyse, Cape Town.