

# Crossing the floor

## The judgment

**O**n 4 October the Constitutional Court ended a period of political instability that started just less than a year ago with the break up of the Democratic Alliance (DA). The eagerly awaited judgment of the Court declared as constitutional the Acts that relate to crossing the floor at local government level, namely the Local Government: Municipal Structures Amendment Act 20 of 2002 and the Constitution of the Republic of South Africa Amendment Act 18 of 2002. The content of these Acts was discussed in *LGL Bulletin* 2002 (2) 1-3.

However, the Court declared invalid the Acts that relate to national and provincial legislatures, namely Constitution of the Republic of South Africa Amendment Act 21 of 2002 and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

This article discusses *United Democratic Movement v The President of the Republic of South Africa and others* Case CCT 23/02, insofar as it deals with local government. It also outlines the Court's reasons for striking down the legislation with regard to provincial and national legislatures.

## **The argument around the majority**

All amendments to the Constitution must be passed in accordance with section 74 of the Constitution. The constitutional amendments dealing with the crossing of the floor legislation were passed in terms of section 74(3) of the Constitution, which requires a two-third majority (66%) in the National Assembly and the support of at least six provinces in the NCOP. An argument was put before the Court that the amendments should have been passed in terms of section 74(1), which requires a 75% majority in the National Assembly and the support of at least six provinces in the NCOP. It was argued the amendment affected the basic values of the Constitution as contained in section 1. The Court did not find that the amendments are so fundamental to the Constitution that they undermine its basic structure and paid more attention to the arguments around proportionality.

## **Proportional representation**

The UDM argued that proportional representation (a 'party list system') is protected by the anti-defection clause and that this is a fundamental element of South Africa's multi-party democracy. The party – and not the member – is entitled to the seat. If a member is allowed to defect, the proportionality is distorted.

The Court said that, internationally, there are many systems of multi-party democracy that do not have a system of proportional representation (e.g. the United States, India and Canada). Multi-party democracy is not the same as proportional representation. Nowhere does the Constitution say that it requires an anti-defection provision. There are countries with proportional representation systems that prohibit defection. However, this does not mean that the Court should go against the will of Parliament and also prohibit defection.

The situation in South Africa makes anti-defection essential, the UDM argued. The African National Congress (ANC) can easily attract members from other parties by making them offers. The 10% threshold also favours bigger parties because it makes it more difficult for their members to defect. Smaller parties, and therefore multi-party democracy, will be the victims, the UDM told the Court.

The Court said that the fact that an electoral system works in favour of particular parties does not make it unconstitutional. If a constituency-based system were to be introduced, it could very well wipe out the smallest parties and still be constitutional.

### Voters' rights

According to the Court, voters' rights are not infringed. Persons who voted for a party may feel betrayed by a defection to another party but they can cast their own verdict in the next election. If a voter assumes that people cannot cross the floor, he or she is also falsely assuming that the Constitution cannot be changed.

### Political expediency?

The lifting of the 10% threshold in the first year was a political strategy to serve the interests of the ANC, the UDM argued. The Acts were not enacted with a legitimate government purpose, but simply so the ANC could take advantage of the break up of the DA. The Court said that the *motive* of the legislation should not be confused with its *purpose*. Courts are not interested in the motive of legislation or in its (political) consequences, unless constitutional rights are infringed. The purpose of the Acts is to allow crossing the floor, which is a legitimate purpose to legislate on. Any ulterior political motives are not for the Court to review.

The Court also discussed the workings of the committee that started investigating the possibility of lifting the anti-defection clause in 1997

- The legislation on crossing the floor is constitutional for local government.
- The changes do not affect the founding values of the Constitution: multi-party democracy is not the same as proportional representation.
- The fact that an electoral system works in favour of particular parties does not make it unconstitutional.
- The purpose of the Acts is to allow crossing the floor, which is a legitimate purpose. Ulterior political motives are not for the Court to review.
- Parliament waited too long to make the changes at provincial and national level. It exceeded the 'reasonable time period' within which it could be done by ordinary statute: it should have been done by constitutional amendment.

and resolved a year later to advise Parliament to leave the clause in the Constitution. The committee saw three approaches to crossing the floor: absolute freedom (no requirements), absolute prohibition and qualified freedom (crossing only according to requirements). The opinions within and between the political parties varied but, the Court stressed, all the opinions were accepted as being consistent with democracy.

**The purpose of the Acts is to allow crossing of the floor, which is a legitimate purpose on which to legislate. Any ulterior political motives are not for the Court to review.**

### No threshold in 2002

The lifting of the 10% requirement for crossings in 2002 was certainly politically motivated and therefore irrational, the UDM argued. The threshold was built into the system to allow for crossing the floor in the event of 'significant shifts of opinion', while guarding against individual crossings as a result of political corruption. The Court said that lifting these requirements for the first year is

not irrational. Parliament already knew that a significant shift of opinion had occurred within the DA. It did not need to set an artificial threshold to determine this. A law to deal with a specific situation is not necessarily irrational. A law

that would only apply to a particular political party could be irrational, but this law applies to all parties and is supported by more than one party.

## **Crossing/defections inconsistent with proportionality required by section 157(3)?**

The new part (Schedule 6A) in the Constitution, which deals with crossing/defections, can be amended by ordinary legislation. This prompted the Court to look at the status of this part of the Constitution: does it have constitutional status or the status of ordinary legislation? The Court did not really have to answer the question but assumed that it is ordinary legislation. It was argued that it is inconsistent with the new section 157(3), which requires, in general, proportional representation.

The fact that there is tension, the Court said, is not good enough reason to hold that the amendments are unconstitutional. Courts must try to read various parts of the Constitution in harmony. This also applies to ordinary legislation and the Constitution. In other words, regardless of the status of crossing/defection (Schedule 6A), it should be read together with section 157(3). It is not the role of the Court to sit on each and every inconsistency, but rather to harmonise the Constitution as one document.

In sum, the Court found that the legislation on crossing the floor at local government level is valid.

## **Anti-defection for provincial and national legislature remains**

Parliament chose to use the special transitional mechanism in the Constitution for the adoption of the Membership Act. This mechanism allowed for the introduction of crossing the floor by ordinary legislation. However, the above mechanism was part of a transitional provision, which had to be used within a reasonable time after the new Constitution took effect. The court said that a period of more than five years has lapsed after

the Constitution took effect and this is not a reasonable time.

Changes in the political climate, rather than time constraints, brought crossing the floor to the fore. The Court concluded that Parliament had waited too long and exceeded the 'reasonable time period'. This means that defections at national and provincial level can only be allowed by an amendment to the Constitution. As the above amendment was done in terms of ordinary legislation, it was thus invalid.

**Defections at national and provincial level can only be allowed by an amendment to the Constitution.**

## **The order: Protection against legal uncertainty**

The Court took into consideration that local government councillors could not take advantage of an amendment to the Constitution that it held to be valid. In the meantime, the first window period had expired. Unless the Court made an order proclaiming a new window period, the effect of the Court proceedings would have been to frustrate the will of Parliament and to render the provisions useless. That is why the Court proclaimed a new 15-day window period (starting on 8 October 2002) and left the following parts of the High Court order intact until the end of that period:

- Anyone who was a councillor, MP or MPL immediately before the order made by the Cape High Court on 20 June 2002 and who had since then lost party membership should not for that reason lose membership of the council or legislature. Nor could they be denied any rights and privileges that such membership entails.
- Anyone who, after the above order made by the Cape High Court, had been removed from membership of the National Assembly, a provincial legislature, or a municipal council for something done to take advantage of the floor-crossing legislation should be restored to such membership with all rights and privileges.
- No resolution should be taken in the National Assembly, a provincial legislature or a municipi-

pal council to shift control of the executive authority of such bodies.

## Assessment

From the point of view of separation of powers between Parliament and the courts, this judgment sends out a clear signal. The Court did not wish to be entertained by political arguments for or against crossing the floor. Those political arguments should find a hearing in Parliament,

not in the courtroom, the Court said. In saying that it can concern itself with the *purpose* of legislation but not with the *motive*, the Court showed remarkable restraint. It clearly outlined the outer boundaries against which it could exercise its limited review of constitutional amendments.

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