CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/02

UNITED DEMOCRATIC MOVEMENT	Applicant
versus	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE 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 : 6-8 August 2002

Decided on : 4 October 2002

JUDGMENT

THE COURT:

Background

1 In June 1999, the Democratic Party ("the DP"), the Federal Alliance ("the FA") and the New National Party ("the NNP") contested the national and provincial elections as separate parties. A month later, these parties formed a new party – the Democratic Alliance ("the DA"). Because members of Parliament and the provincial legislatures were unable to change parties without losing their seats,[1] DP, FA and NNP representatives continued to represent their original parties in Parliament and the provincial legislatures, though they operated in an alliance. In October 2000, municipal (local government) elections were held. The DP, FA and NNP did not participate in these elections – instead the DA contested the elections as a single party.

[1] In terms of item 23 of Schedule 2 of the interim Constitution as amended and kept in force by item 6(3) of Schedule 6 of the Constitution. These provisions are referred to in more detail below paras 41-42.

2 In November 2001, a political realignment took place and the NNP withdrew from the DA, leaving the control of the DA predominantly in the hands of the former DP. However, local government representatives who wanted to leave the DA as a result of this split were unable to do so without losing their seats.[2] This difficulty also affected other public representatives who wished to change parties as a result of the political realignment.

3 This situation led to Parliament passing four Acts in June 2002 that aimed to allow members of national, provincial and local government to change parties without losing their seats. The four Acts were:

- the Constitution of the Republic of South Africa Amendment Act 18 of 2002 ("the First Amendment Act");
- the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 ("the Second Amendment Act");
- the Local Government: Municipal Structures Amendment Act 20 of 2002 ("the Local Government Amendment Act"); and
- the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 ("the Membership Act").

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[2] In terms of sections 27(c) and (f) of the Local Government: Municipal Structures Act 117 of 1998. The provisions are referred to in more detail below para 43.

Overview of the impugned legislation

4 While the provisions of these Acts are discussed further on in this judgment, it will be convenient at this point to give an overview of the legislation. The First Amendment Act and the Local Government Amendment Act both relate to floor crossing in the local government sphere. The First Amendment Act establishes limited exceptions to the rule that a councillor that ceases to be a member of the party that nominated him or her, loses his or her seat. It provides for a fifteen-day period during the second and fourth year after an election, during which party allegiances may be changed without the councillors concerned losing their seats. This is subject to certain requirements being met, primarily that at least 10% of the representatives of a party must leave if this is to apply. It also puts in place a once-off fifteen-day period immediately following the commencement of the legislation during which party allegiances may be changed without the councillors concerned losing their seats – even if less than 10% of a party's representatives leave.

5 The Local Government Amendment Act complements 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. These include the composition of metropolitan sub-councils and executive committees, the registration of political parties and the role of the Electoral Commission.

6 The Second Amendment Act and the Membership Act relate to floor crossing in

national and provincial legislatures. The Membership Act removes the prohibition on floor crossing currently in place and provides for a limited system of floor crossing. Like the system in the local government sphere, this allows for a fifteen-day period during the second and fourth year after an election, during which party allegiances may be changed without the legislators concerned losing their seats, as well as a once-off fifteen-day period immediately following the commencement of the legislation. The requirement that at least 10% of a party must leave if this rule is to apply is again relevant only to the standard periods – not the once-off period.

7 The Second Amendment Act complements 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 is changed due to floor crossing, party splits or party mergers allowed by the Membership Act.

The court challenge

8 The legislation was challenged on an urgent basis by the United Democratic Movement ("the 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.

9 On 3 and 4 July 2002, this Court convened during recess to consider as a matter of urgency the UDM's application and an appeal against the orders of the Cape High Court. The Court on that occasion, though quorate, was differently constituted. Having heard argument from the UDM, the government and a number of other intervening parties, the Court issued an interim order on 4 July 2002 to stabilise the situation pending a full hearing in this case.[3] This hearing took place on 6, 7 and 8 August 2002 with argument being presented by the UDM, the government and a number of parties that were granted leave to intervene: the African Christian Democratic Party (ACDP), the African National Congress (ANC), the Inkatha Freedom Party (IFP), the Pan Africanist Congress of Azania (PAC) and the Premier of the Province of KwaZulu-Natal. Argument was also presented by the Institute for Democracy in South Africa and the Research Unit for Legal and Constitutional Interpretation, two non-governmental organisations with electoral expertise which had been admitted as amici curiae.[4]

10 This judgment deals only with the main application by the UDM concerning the constitutionality of the legislation. It does not deal with the reasons for that interim order, nor with the government's appeal against that interim order of the High Court.[5]

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3 Reasons for the interim order are delivered contemporaneously with this judgment in *United Democratic Movement v the President of the Republic of South Africa and Others (1)* CCT 23/02.

4 The first, third, fourth and fifth intervening parties and the two amici curiae all supported the relief sought by the applicant. For the sake of simplicity, these parties are collectively referred to as "the applicants" in this judgment. The three respondents and the second intervening party, which supported the relief they sought, are collectively referred to as "the respondents" in this judgment.

5 Judgment upholding the appeal is delivered contemporaneously with this judgment in *The President of the*

The issue before the Court

11 This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional. It ought not to have been necessary to say this for that is true of all cases that come before this Court. We do so only because of some of the submissions made to us in argument, and the tenor of the public debate concerning the case which has taken place both before and since the hearing of the matter.

Republic of South Africa and Others v United Democratic Movement CCT 23/02.

12 Amendments to the Constitution passed in accordance with the requirements of section 74 of the Constitution[6] become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.

13 It is not disputed that the First Amendment Act and the Second Amendment Act were passed in accordance with the special majority prescribed by section 74(3) of the Constitution and the special procedures for constitutional amendments prescribed by sections 74(4) to (9). The constitutionality of these two amendments therefore depends

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[6] Section 74 provides:

> "*Bills amending the Constitution*
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> (1) Section 1 and this subsection may be amended by a Bill passed by—
>
> (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
>
> (b) the National Council of Provinces, with a supporting vote of at least six provinces.
>
> (2) Chapter 2 may be amended by a Bill passed by—
>
> (a) the National Assembly, with a supporting vote of at least two thirds of its members; and
>
> (b) the National Council of Provinces, with a supporting vote of at least six provinces.
>
> (3) Any other provision of the Constitution may be amended by a Bill passed—
>
> (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and
>
> (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment—
>
> (i) relates to a matter that affects the Council;
>
> (ii) alters provincial boundaries, powers, functions or institutions; or
>
> (iii) amends a provision that deals specifically with a provincial matter."

Sections 74(4)-(9) set out the special procedures to be followed when amending the Constitution.

on whether or not they fall within the scope of section 74(3). It is only if they do not that a challenge to their constitutionality can succeed.

14 There were in substance three grounds on which it was contended that the amendments do not fall within the purview of section 74(3). The first contention was that the amendments undermine the basic structure of the Constitution and for that reason are not sanctioned by any of the provisions of section 74. The second was that the amendments are inconsistent with the founding values of the Constitution set out in section 1, which can only be amended in accordance with the provisions of section 74(1). The third was that the amendments are inconsistent with the voters' rights vested in citizens by section 19(3) of the Bill of Rights, which can only be amended in accordance with the provisions of section 74(2). These arguments, which are dealt with below, are also relevant to the constitutional challenges to the Local Government Amendment Act and the Membership Act.

The basic structure argument

15 The applicants contend that the right to vote and proportional representation are part of the basic structure of the South African Constitution, and as such, are not subject to amendment at all. In support of this contention they sought to rely on the judgment of this Court in *Premier of KwaZulu-Natal and Others v President of the Republic of South*

Africa and Others.[7] In that case Mahomed DP, in whose judgment all the members of the Court concurred, said:

> "There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."[8]

16 After referring to decisions of the Indian Supreme Court which had grappled with this difficulty, Mahomed DP continued as follows:

> "Even if there is this kind of implied limitation to what can properly be the subject-matter of an amendment to our Constitution, neither the impugned amendment to section 245 nor any of the other amendments to the Constitution placed in issue by the applicants in the present case can conceivably fall within this category of amendments so basic to the Constitution as effectively to abrogate or destroy it."[9]

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7 1996 (1) SA 769 (CC); 1995 (12) BCLR 1561 (CC).

8 Id at para 47.

9 Id at para 49.

17 Here too it is not necessary to address problems of amendments that would undermine democracy itself, and in effect abrogate or destroy the Constitution. 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. It cannot be said that proportional representation, and the anti-defection provisions which support it, are so fundamental to our constitutional order as to preclude any amendment of their provisions.

The founding values argument

18 The applicants also contended that the disputed legislation is inconsistent with the founding values of the Constitution. The founding values are set out in section 1 of the Constitution which provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

19 These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which

all law must comply in order to be valid. They are specially protected by section 74(1) of the Constitution which provides that section 1 may only be amended with the support of at least 75% of the members of the National Assembly, and six of the provinces in the National Council of Provinces.[10]

20 It is contended that the two constitutional amendments are inconsistent with the founding values and, as they were not passed in accordance with the provisions of section 74(1) of the Constitution, they are invalid. In particular, it is said that their provisions and those of the Membership Act and the Local Government Amendment Act (both of which were passed as ordinary Acts of Parliament) are inconsistent with a multi-party system of democratic government and the rule of law.

21 The argument as far as multi-party democracy is concerned, looks to the circumstances in which the Constitution was adopted; the decision then to base the first election on a list system of proportional representation in which floor crossing would not be permitted; the inequity of changing the system in mid-term; and the particular system of floor crossing for which provision is made in the Local Government Amendment Act, the Membership Act, and the two constitutional amendments.

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10 Section 74(1) of the Constitution, n 6 above.

22 The argument as far as the rule of law is concerned is that the legislation does not serve a legitimate government purpose. It is contended that the legislation is intended and has been designed to serve the purpose of the ruling party, rather than to introduce a fair electoral system; in the case of the Membership Act, the provisions are said also to be irrational and to a large extent to have no practical application. The two arguments, though directed to separate values identified in section 1 of the Constitution, overlap.

Multi-Party Democracy

23 The interim Constitution, which came into force on 27 April 1994, provided a transition from apartheid to democracy. It was replaced by the present Constitution adopted in 1996 by a democratically elected Constitutional Assembly. The relevant history of the two constitutions and the principles according to which the Constitution was drafted are referred to in detail in two judgments of this Court: the *First Certification Judgment*[11] and the *Second Certification Judgment*.[12] It is sufficient for the purposes of this judgment to mention only that the Constitution had to comply with the Constitutional Principles contained in Schedule 4 to the interim Constitution, and that this Court had to certify that this requirement had been satisfied.[13] This is relevant to some of the

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11 *Ex Parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

12 *Ex Parte Chairperson of the Constitutional Assembly, In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

13 Section 71 of the interim Constitution provided:

> "(1) A new constitutional text shall–
>
> (a) comply with the Constitutional Principles contained in Schedule 4; and

arguments that have to be addressed in this judgment.

24 The first question that has to be considered is the meaning of the phrase "a multi-party system of democratic government" in the context of section 1(d) of the Constitution. It clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete for office. But is that its only application?

(b) be passed by the Constitutional Assembly in accordance with this Chapter.

(2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection 1(a).

(3) A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

. . . ."

25 The phrase is not a term of art. We were referred to no authority on political science or on the South African Constitution that offers a meaning of these words. Nor can any assistance be gleaned from commentaries on the South African Constitution. Most authors seem to regard the meaning of the phrase to be self-evident and to require no explanation beyond the words themselves.[14]

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[14] Chaskalson et al *Constitutional Law of South Africa* (5th Revision Service, Juta, Johannesburg 1999) seem not to deal with the meaning of the term at all. Neither do Currie and De Waal *The New Constitutional and Administrative Law vol I* (Juta, Landsdowne 2001) despite their inclusion of a section on "Democracy" at 81-8. Devenish *A Commentary on the South African bill of rights* (Butterworths, Durban 1999) at 268 merely makes the point that multi-party democracy is guaranteed by section 19 and stresses that this does not confine activity to formal politics. Rautenbach and Malherbe *Constitutional Law* (revised 2nd ed, Butterworths, Durban 1997) at 109 point out that in "pursuance of the commitment to a multi-party system in section 1, political parties enjoy other forms of recognition in terms of the Constitution as well." A more detailed, but still very limited, discussion of the term is given by Malherbe "Die wysiging van die grondwet: die oorspoel-imperatief van artikel 1" 1999 (2) *Tydskrif vir Suid-Afrikaanse Reg* 191 at 203-4. He speaks of the need to facilitate and protect different parties with different perspectives and refers to the traumatic experiences of opposition parties in one-party states.

26 A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid. What has to be decided, therefore, is whether this is the effect of the disputed legislation.

27 The applicants contend that the proportional representation system is an integral part of the Constitution, that the purpose of the anti-defection provision is to protect this system and that any interference with these provisions is an interference with the multi-party system of democratic government contemplated by section 1(d) of the Constitution.

Proportional Representation

28 In support of this contention reliance was placed by the applicants on constitutional principle VIII which was one of the principles with which the Constitution had to comply. Constitutional principle VIII provides:

> "There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation."

29 Significantly, however, section 1(d) of the Constitution incorporates all the provisions of constitutional principle VIII, save for the last requirement that refers to

proportional representation. If it had been contemplated that proportional representation should be one of the founding values it is difficult to understand why those words were omitted from section 1(d). Textually, proportional representation is not included in the founding values. Nor, in our view, can it be implied as a requirement of multi-party democracy. There are many systems of multi-party democracy that do not have an electoral system based on proportional representation. The United States of America, India, and Canada are examples of constitutional states which fall into this category.

30 The applicants contend, however, that an anti-defection provision is an essential component of an electoral system based on proportional representation. This, so the contention goes, is necessary to ensure that the results of an election are not affected by the defection of persons who gained their seats in a legislature solely because of their position on the party list. It is the party, and not the members, which is entitled to the seats, and if a member is allowed to defect, that distorts the proportionality that the system was designed to achieve.

31 There is a tension between the expectation of voters and the conduct of members elected to represent them. Once elected, members of the legislature are free to take decisions, and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign.

32 It is often said that the freedom of elected representatives to take decisions

contrary to the will of the party to which they belong is an essential element of democracy. Indeed, such an argument was addressed to this Court at the time of the certification proceedings where objection was taken to the transitional anti-defection provision included in Schedule 6 to the Constitution. It was contended that submitting legislators to the authority of their parties was inimical to

> "accountable, responsive, open, representative and democratic government; that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti-defection clause militates against the principles of 'representative government', 'appropriate checks and balances to ensure accountability, responsiveness and openness' and 'democratic representation'."[15]

33 This Court rejected that submission holding:

> "Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.

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15 *First Certification Judgment* above n 11 at para 182.

> . . . . An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate. This objection cannot be sustained."[16]

34 It does not follow from this, however, that a proportional representation system without an anti-defection clause is inconsistent with democracy. It may be that there is a closer link between voter and party in proportional representation electoral systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency-based elections, there is a close link between party membership and election to a legislature and a member who defects to another party during the life of a legislature is equally open to the accusation that he or she has betrayed the voters.

35 We were referred in argument to a number of democratic countries with proportional representation systems in which defection is not allowed. No case was cited to us, however, in which a court in any country has ever held that, absent a constitutional

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16 Id at paras 186-7.

or legislative requirement to that effect, a member of a legislature is obliged to resign if he or she changes party allegiance during the life of a legislature. In our view such a requirement, though possibly desirable, is not an essential component of multi-party democracy, and cannot be implied as a necessary adjunct to a proportional representation system. Where the law prohibits defection, that is a lawful prohibition, which must be enforced by the courts. But where it does not do so, courts cannot prohibit such conduct where the legislature has chosen not to do so.

The anti-defection provision in the context of conditions in South Africa

36 The interim Constitution made provision for a system of proportional representation for elections to both the National Assembly and provincial legislatures. In the case of local government, it required the electoral system to include both proportional and ward representation. The details were to be determined by legislation.[17] A transitional provision of the interim Constitution[18] provided that the first elections would be on the basis of 60% ward representation and 40% proportional representation. The electoral system for the proportional representation component of councils was to be

> "according to the system of proportional representation applicable to an election of the

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17 Sections 179(1) and (2) of the interim Constitution.

18 Section 245(3) of the interim Constitution.

> National Assembly and regulated specifically by or under the [Local Government Transition Act 1993]".[19]

37 Details of the electoral system for the National Assembly and provincial legislatures were set out in Schedule 2 to the interim Constitution, to which reference will be made later. The election was contested by political parties who prepared lists of candidates. Although voters might have been influenced by the names of candidates, and possibly their place on the list, they voted for parties and not for particular candidates. Seats were allocated to the various parties proportional to the votes cast. Those seats were filled by representatives on the party lists, seats being allocated in accordance with the order in which the party's candidates were named on the list.

38 Schedule 2 to the interim Constitution did not deal with the circumstances in which a member of the National Assembly was required to vacate his or her seat. This was dealt with in sections 43 and 133 of that Constitution. Of relevance to this case is section 43(b) which provided:

> "A member of the National Assembly shall vacate his or her seat if he or she–
>
> . . .
>
> (b) ceases to be a member of the party which nominated him or her as a member of the National Assembly".

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19 Section 245(3)(b) of the interim Constitution.

A similar provision concerning loss of membership of a provincial legislature was to be found in section 133(1)(b).

39 The Constitution, as the interim Constitution did, deals separately with the electoral system and the loss of membership of a legislature. Section 46(1) which deals with the election of the National Assembly provides:

> "The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that–
> (a) is prescribed by national legislation;
> (b) is based on the national common voters roll;
> (c) provides for a minimum voting age of 18 years; and
> (d) results, in general, in proportional representation."

Section 47 deals with membership. Qualifications for membership are prescribed in section 47(1). Loss of membership is dealt with in section 47(3) which provides:

> "A person loses membership of the National Assembly if that person–
> (a) ceases to be eligible; or
> (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership."

40 Whilst section 46(1)(d) requires the electoral system to result "in general" in proportional representation, the details of that system are not prescribed and section 46(1)(a) leaves these to be determined by national legislation. The loss of membership provision, unlike section 43(b) of the interim Constitution, does not prescribe that

membership will be lost if a member ceases to belong to the party on whose list he or she gained membership of the Assembly.

41 The anti-defection provision relied upon by the applicants in respect of members of the National Assembly and provincial legislatures finds its place in the Constitution as a transitional provision. Schedule 6 to the Constitution, which deals with transitional arrangements, provides in item 6(3) that,

> "Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies–
>
> (a) to the first election of the National Assembly under the new Constitution;
>
> (b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution; and
>
> (c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution."[20]

42 The relevant amendment dealing with loss of membership is inserted by item 13 of Annexure A to Schedule 6. The insertion is as follows:

> "*Additional ground for loss of membership of legislatures*

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[20] See also item 11(1) of Schedule 6 which makes it clear that Annexure A also applies to the elections of provincial legislatures:

> "Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—
>
> (a) to the first election of a provincial legislature under the new Constitution;
>
> (b) to the loss of membership of a legislature in circumstances other than those provided for in section 106_(3) of the new Constitution; and
>
> (c) to the filling of vacancies in a legislature, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the legislature under the new Constitution."

23A. (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for–

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party."

43 In the case of local government, sections 157(2) and (3) of the Constitution provided:

"*Composition and election Municipal Councils*

(1) . . . .

(2) The election of members to a Municipal Council . . . must be in accordance with national legislation, which must prescribe a system–

(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or

(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties."

No reference is made in the Constitution to the circumstances in which councillors will lose their membership. This was dealt with in section 27 of the Local Government: Municipal Structures Act.[21]

44 What emerges from these provisions is that the Constitution does not demand an

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[21] Above n 2. The section reads as follows:

"*Vacation of office*

A councillor vacates office during a term of office if that councillor–

(a) resigns in writing;

(b) is no longer qualified to be a councillor;

(c) was elected from a party list referred to in Schedule 1 or 2 and ceases to be a member of the relevant party;

(d) contravenes a provision of the Code of Conduct for Councillors set out in Schedule 1 of the Local Government: Municipal Systems Act, 2000, and is removed from office in terms of the Code;

(e) is a representative of a local council in a district council and ceases to be a member of the local council which appointed that councillor to the district council or is replaced by the local council as its representative in the district council; or

(f) was elected to represent a ward and who–

(i) was nominated by a party as a candidate in the ward election and ceases to be a member of that party; or

(ii) was not nominated by a party as a candidate in the ward election and becomes a member of a party."

The two sections that prohibit floor crossing are therefore sections 27(c) and (f) of the Act. Both are deleted by section 2 of the Local Government Amendment Act which is challenged in these proceedings.

anti-defection provision. It makes provision for an anti-defection provision only in the case of members of the National Assembly and provincial legislatures and then only for a limited transitional period, and sanctions that provision being amended during the transition by an Act of Parliament.

45 The applicants contend that in the conditions prevailing in South Africa an anti-defection provision is essential to promote multi-party democracy. This so they contend is because we are a new and fragile democracy in which the governing party, the ANC, holds almost two-thirds of the seats in the National Assembly. The applicants say this means that the ANC has the ability to attract members from other parties by offering them inducements to cross the floor. They contend that if defections are permitted this is likely to weaken the position of smaller parties and thus to weaken multi-party democracy.

46 It is correct that the threshold of 10% makes it easier to defect from smaller parties than from larger parties. Presently there are eight political parties with three or fewer representatives in the National Assembly. A single member may defect from any of these parties if the threshold is 10%. But in the case of the ANC which has 252 seats, the threshold would be 26. On the other hand, the higher the percentage, the more difficult it becomes to defect from larger parties. If the threshold were to be raised to 30% one member could still defect from the eight parties referred to but 78 members would be the ANC threshold. It is of course possible to provide for no threshold, or a threshold

expressed in a percentage of total seats linked with a minimum number. But if the number were set above four that would mean that there could be no defections at all from the eight small parties.

47 The fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional. For instance, the introduction of a constituency-based system of elections may operate to the prejudice of smaller parties, yet it could hardly be suggested that such a system is inconsistent with democracy. If defection is permissible, the details of the legislation must be left to Parliament, subject always to the provisions not being inconsistent with the Constitution. The mere fact that Parliament decides that a threshold of 10% is necessary for defections from a party, is not in our view inconsistent with the Constitution.

48 Objection was also taken to the introduction of the system during the term of the legislatures. It was contended that the anti-defection provision might have affected the way voters cast their votes and that its repeal would thus infringe their rights under section 19 of the Constitution. The section provides:

> "(1) Every citizen is free to make political choices, which includes the right–
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (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."

49 None of the rights specified in section 19, seen on its own or collectively with others, is infringed by a repeal or amendment of the anti-defection provisions. The rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.

50 The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems. At the time of the last election the ANC had the support of the majority of the voters on the national voters' roll. According to the evidence a number of parties campaigned on the basis that they would oppose the ANC in the National Assembly. That, however, could not preclude a party from changing its mind after the elections and forming an alliance with the ANC. Persons who voted for that party may feel betrayed by such a decision, but they cannot contend that the change infringed their rights under section 19. Their remedy comes at the time of the next election when they decide how to cast their votes.

51 Counsel for the applicants contended that voters can be assumed to have been aware of the anti-defection provisions of item 23A of Annexure A to Schedule 6 and that this would have influenced the way that they cast their votes. If so, it must also be assumed that voters knew that the Constitution makes provision for Parliament to amend the Constitution. Apart from the fact that the express provisions of item 23A contemplated the possibility of such an amendment by an Act of Parliament, Parliament is entitled to repeal or amend any provision of the Constitution, including Schedule 6 and Annexure A. Voting on the assumption that this will not happen is a political decision. And if it does happen, and defections take place, that is the result of an incorrect political judgment, and the conduct of the particular persons who were elected to represent their interests, and not an infringement of section 19 of the Constitution.

52 It was contended, however, that the impact of floor crossing on smaller parties goes beyond the temporary loss of membership and affects the funding to which they are entitled under the Constitution. Section 236 of the Constitution provides:

> "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."

If the present legislation dealing with the funding of political parties does not adequately meet these requirements in the event that floor crossing becomes permissible, that legislation may have to be amended. It is not necessary to decide whether the current Act meets the constitutional requirements once floor crossing is permitted and we expressly

refrain from expressing a view on this issue. That, however, is no reason for holding that floor crossing is inconsistent with section 236 of the Constitution. An equitable and proportional basis for funding political parties is possible in circumstances where floor crossing is permissible. For instance in Germany where floor crossing is allowed, funding of political parties is provided on the basis of the proportion of votes gained at the last general election.[22]

53 The contention that an anti-defection provision is an essential adjunct to the proportional representation system contemplated by the Constitution, and that the repeal of the provision to permit defection without loss of membership of a legislature is inconsistent with the multi-party system of democratic government contemplated by section 1(d), must therefore be rejected.

54 In support of the challenge based on section 1(d) of the Constitution it is contended that the legislation is designed to and in fact serves the interests of the ANC, which is the governing party in the National Assembly. In particular, it is contended that exclusion of the 10% threshold from the initial period, is designed to enable the NNP and the ANC to

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22 Parteiengesetz 18 cited in Steytler "Parliamentary democracy – the anti-defection clause" November 1997 *Law, Democracy and Development* 221 at 230.

take advantage of the breakup of the alliance which previously existed between the NNP and the DP. Objection is also taken to the fact that a defecting member comes under the party discipline of the party which he or she joins, and if he or she should cease to be a member of the legislature, the seat is regarded as having been allocated to the party to which that member defected. Finally, it is contended that limiting defections to two "window periods" of 15 days each during the life of the legislature is likely to encourage opportunistic defections, rather than defections resulting from issues of principle. Similar issues are raised in relation to the argument that the disputed legislation is inconsistent with the rule of law, and it will be convenient to deal with them together.

Rule of law

55 Our Constitution requires legislation to be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.[23]

56 The appellants contend that the purpose of the disputed legislation is to enable the ANC and the NNP to take advantage of the breaking up of the DA. This argument equates purpose with motive. Courts are not, however, concerned with the motives of the members of the legislature who vote in favour of particular legislation, nor with the consequences of legislation unless it infringes rights protected by the Constitution, or is

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23 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 84-5; *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 24; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

otherwise inconsistent with the Constitution. Here, the legislation was supported by 280 of the 324 members who voted – an 86% majority. Those voting in favour included not only members of the ANC and the NNP, but also members of the DP.

57 The purpose of the disputed legislation was to make provision for members of legislatures to change their party allegiances without losing their seats in the legislature. The enactment of such legislation is specifically contemplated by item 23A introduced by Annexure A of Schedule 6 to the Constitution, but in any event, it is within the power of Parliament to deal with matters related to elections and the membership of the various legislatures.

58 This power must be exercised subject to the provisions of the Constitution itself. We deal later with whether the legislation was enacted in accordance with the requirements of the Constitution. It is, however, beyond doubt that the subject matter – i.e. the retention and loss of membership – is a legitimate purpose in respect of which Parliament has the power to legislate and pass constitutional amendments.

59 It was also contended that it is not rational to confine changes of membership to two window periods of 15 days each, nor to distinguish between the first period during which the 10% threshold does not apply, and all subsequent periods, during which there is such a restriction.

60 Floor crossing has been the subject of debate within South Africa since the time of the negotiations prior to the adoption of the interim Constitution. Those opposed to floor crossing often cite the Indian experience. Counsel for the applicants referred us to a paper prepared by the Centre for Policy Research in New Delhi,[24] where it was said that between 1967 and 1972

> "from among the 4000 odd members of the Lok Sabha and the Legislative Assemblies in the States and the Union Territories, there were nearly 2000 cases of defection and counter-defection. By the end of March, 1971 approximately 50% of the legislators had changed their party affiliations and several of them did it more than once – some of them as many as five times. One MLA was found to have defected five times to be a minister for only five days. Defections were always rewarded thereby establishing the fact that these 'floor crossings' were engineered and bought."

This identifies two of the main objections to floor crossing – lack of stability within legislatures and the possibility of corruption.

61 Although the South African Constitution prohibited floor crossing during the transitional period, it also made provision for the ban on floor crossing to be lifted by an amendment to item 23A. The Constitution came into force on 7 February 1997. Within a

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24 *Review of Election Law, Processes and Reform Options* Consultation Paper prepared for the National Commission to Review the Workings of the Constitution, Centre for Policy Research, New Delhi, January 2001 at para 19.

week Parliament had appointed a committee

> "to consider the drafting of legislation which gives effect to Item 23A.(3) of the amended Schedule 2 to the Constitution, 1993, as provided for in Item 13 of Annexure A of Schedule 6 to the Constitution, 1996".

62 The committee deliberated for over a year during which it received evidence from Professor Steytler of the University of the Western Cape and Professor Schrire of the University of Cape Town. The committee reported on 5 June 1998. The recommendation of the majority was that "at this stage of our transitional democracy, it would be neither fair nor democratic for the ban to be lifted." The committee accordingly resolved by a majority "that Item 23A should be retained as it is." The committee went on to recommend

> "3. . . . that the ban on defections should be reviewed in the process of devising the new electoral system after the 1999 general elections. The majority in the Committee felt that the case for reviewing the ban will be strengthened if the new electoral system includes constituency elections.
>
> 4. The issue of 'loss of membership' through expulsion from a political party should also be addressed, together with the review of the ban on defections.
>
> 5. In any future review of the ban on 'crossing the floor' and 'loss of membership' through expulsion from a political party, this Report and the deliberations of this Committee should be given appropriate attention."

63 It appears from the report that the committee considered that there were three basic approaches to crossing the floor. First, absolute freedom to cross the floor; second an

absolute prohibition on floor crossing; and thirdly qualified freedom to cross the floor.[25] As far as qualified freedom was concerned, the committee drew attention to systems in which groups of members, and not individual members, may cross the floor. Limits are imposed in respect of the minimum number of members who can form a group entitled to cross the floor and form a new party or join an existing one. Attention was also drawn to the fact that

> "[i]n some systems, a qualified freedom to 'cross the floor' is not allowed immediately after a general election but only after the first year or so of the term of the legislature."

64 The committee stated that:

> "The basic argument for this approach is that during the term of the legislature there can be significant shifts in public opinion which do not warrant fresh elections, but which have to be represented in the legislature. By allowing groups of MPs to 'cross the floor' these shifts of opinion may be reflected in the legislature. Also, genuine differences of interpretation on what mandate the electorate gave a party, and how to implement it, can lead to splits in the party, and this should be allowed expression by way of 'crossing the floor'. The ability to cross the floor also curtails the power of the 'party bosses' and makes for a more vibrant political atmosphere. In short, greater democracy and representivity is made possible through a qualified freedom to 'cross the floor'."

65 In dealing with the approach to be adopted in South Africa, reference was made in

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25 This approach is also taken by Professor Steytler above n 22 at 222-4.

the committee's report to the opinions of Professor Steytler and Professor Schrire, both of whom felt that a qualified freedom to cross the floor should be allowed in South Africa. It was reported that

> "Prof Steytler was of the opinion that if 20% to 25% of the members of a party wanted to leave that party, they should be allowed to do so, provided that they constitute a minimum number of members in the case of small parties. Prof Schrire felt that 5% to 10% of a party would be acceptable."

66 It also appears from the report that a number of representatives of the political parties, including the DP, the NNP, the PAC and the ACDP, argued for an absolute freedom to cross the floor. The ANC and the IFP seem to have been the only parties in favour of the restrictions on defections imposed by item 23A.

67 What is apparent from this is that there were conflicting views within Parliament as to whether or not floor crossing was appropriate for South Africa. The differing views were each supported as being consistent with democracy and ultimately a political decision was taken not to amend item 23A.

68 In the *Pharmaceuticals Manufacturers* case[26] it was pointed out that rationality as a minimum requirement for the exercise of public power,

> "does not mean that the courts can or should substitute their opinions as to what is

[26] Above n 23 at para 90 (foonote omitted).

> appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

This applies also and possibly with greater force to the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution.

69 The limitation of floor crossing to two window periods in the life of the legislature is clearly directed to concerns relating to stability within the legislatures that had been identified in the debates that had taken place concerning floor crossing. Viewed objectively in the light of the debates and the expert opinions that had been obtained, a decision to limit floor crossing to two window periods is in our view a rational decision.

70 The distinction between the first period and all subsequent periods is also rational. The DA had broken up. The legislation was clearly a reaction to that event. Parliament was able to assess the extent of the break up itself, and there was no need for an artificial threshold to be set to determine whether or not significant changes in the political climate had taken place that warranted the sanctioning of changes of membership. The DP and NNP, the two parties most affected by the change, both voted in favour of the amendments. Whilst other parties would not necessarily have been affected by this event, it cannot be said to be irrational to pass a law of general application to deal with a concrete situation, rather than a law which would apply only to members of the DA, the

DP and the NNP. Indeed, to have made provision only for members of those parties might itself have given rise to constitutional objection.[27]

71 The final issue with regard to the founding values and rule of law relates to the filling of vacant seats. Members elected on party lists are subject to party discipline and are liable to be expelled from their party for breaches of discipline. If that happens they cease to be members of the legislature.

72 Defecting members who form or join another party become subject to that party's discipline and are equally liable to expulsion for breaches of discipline. Thus, if a defecting member is subsequently expelled from his or her new party, or if a member dies, provision has to be made for how the vacant seats are to be filled.

73 The legislation makes provision for seats of defecting members to be regarded as having been allocated to the party that the defecting members join or form. It is contended that this is not rationally related to the governmental purpose of permitting defections, and that it is inconsistent with multi-party democracy, for it allows a member

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[27] It is not necessary to consider whether or not legislation in such terms would have been consistent with the Constitution.

not only to defect, but to cede to party B a seat won at the election by party A.

74 The legislation accommodates mid-term shifts in political allegiances. Hence the 10% threshold. Bearing in mind that the purpose of the legislation is to accommodate mid-term shifts in political allegiances and the limited term for which a defecting member will remain a member of the legislature it seems to us to be neither irrational nor inconsistent with multi-party democracy to provide that the seat should be regarded as the seat of the new party for the remainder of that member's term.

75 In the result the objection to the four Acts on the grounds that they are inconsistent with the founding values and the Bill of Rights must fail. That makes it unnecessary to consider whether such provisions can be amended by inference, or whether it is necessary if that be the purpose of an amendment, to draw attention to this in the section 74(5) notices, and to state specifically that the provisions of section 74(1) or 74(2), as the case may be, are applicable to such amendments.

76 It is now necessary to consider the challenges directed specifically to change of membership in the local government sphere, and to change of membership in the National Assembly and provincial legislatures. We deal first with local government. This involves the First Amendment Act and the Local Government Amendment Act.

The Constitutionality of the First Amendment Act and the Local Government Amendment

Act

77 Prior to these amendments the Constitution provided that the local government electoral system must ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for that party.[28] The terms of the First Amendment Act are set out below. The words in square brackets indicate deletions and the underlined portions indicate additions. The amendments to section 157 of the Constitution were as follows:

> "(1) **Subject to Schedule 6A,** a Municipal Council consists of–
>
> (a) members elected in accordance with subsections **[**(2), (3), (4) and (5)**]** **(2) and (3)**; or
>
> (b) if provided for by national legislation–
>
> (i) members appointed by other Municipal Councils to represent those other Councils; or
>
> (ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.
>
> (2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system–
>
> (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
>
> (b) of proportional representation as described in paragraph (a) combined

[28] Section 157(3) of the Constitution.

with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection 2 must **[**ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties**]** **result, in general, in proportional representation**."

78 Schedule 6A details the circumstances in which the loss of membership of the party to which a councillor belongs will result in the loss of membership of the council, and circumstances in which a change of allegiance will not have such a result. The broad principles have already been referred to[29] and it is not necessary to set out the full terms of the Schedule. Item 9 of the Schedule provides that

"[t]his Schedule may be amended by an Act of Parliament passed in accordance with section 76(1)."

29 Above para 4.

79 In the *First Certification Judgment* this Court held that the Constitution could not immunise statutes from constitutional review.[30] In the *Second Certification Judgment*, however, it accepted that transitional provisions subject to amendment by an Act of Parliament could be recorded in a schedule to the Constitution, holding that in such circumstances the transitional provisions constituted ordinary legislation.[31] A material consideration in reaching this conclusion was that the Constitutional Principles prescribed that a special majority would be necessary for amendments to the Constitution.

80 Item 9 of the Schedule therefore gives rise to some uncertainty. Is it valid? If so, what impact does it have on the status of the Schedule? Does the Schedule have constitutional status or the status of ordinary legislation or possibly a special status of provisions which, if not amended, are protected against constitutional review?

81 There was no challenge to the validity of item 9 and, as such, it is not necessary to deal with these issues here. In our view, however, it is not appropriate to deal in a schedule to the Constitution with detailed legislative provisions of a permanent nature,

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30 Above n 11 at paras 149-50.

31 Above n 12 at paras 91-5.

which are subject to amendment by an Act of Parliament. It may even be impermissible to do so where such provisions are not closely related to constitutional structures. Here, however, the Constitution regulates elections, and the circumstances in which an elected member of a legislature will lose his or her membership. There is accordingly sufficient proximity between the subject matter of Schedule 6A and the provisions of the Constitution to make it unnecessary to consider this question. That, however, does not dispose of the difficulty as to the status of the Schedule.

82 The validity of the Schedule was challenged on the grounds that it permits floor crossing and thus fails to meet the prescribed constitutional standard that the electoral system must result *in general* in proportional representation. In support of this contention it was submitted that although Schedule 6A was introduced into the Constitution by way of a constitutional amendment, because it is subject to amendment by an Act of Parliament, its status is that of ordinary legislation. It is not necessary for the purposes of this judgment to decide whether this is correct. We will assume in favour of the applicants that it is.

83 The First Amendment Act amends sections 157(1) and (3) of the Constitution. It was contended that there is an irreconcilable tension between subsection (1), which refers to Schedule 6A, and subsection (3) which states the requirement that the electoral system must result in general in proportional representation. A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that

a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them. Sections 157(1) and (3) must thus be read together in the context of the Constitution and the section as a whole.

84 The Constitution as amended contemplates that floor crossing will be permissible in the local government sphere. Section 157(1) provides that council members must be elected in accordance with subsections (2) and (3), but subject to Schedule 6A. This does not subordinate the Constitution to the Schedule. It simply requires section 157(3) to be read consistently with section 157(1) and the Schedule. If this is done, then in the light of the reference to Schedule 6A, the reference in subsection (3) to the need for the electoral system to result in general in proportional representation must be construed as a reference to the voting system and not to the conduct of elected members after the election. This is consistent with other provisions of the Constitution which deal separately with the electoral system and loss of membership. In our view, even if Schedule 6A has the status of ordinary legislation, it is not inconsistent with the Constitution as amended by the First Amendment Act.

Constitutionality of the Second Amendment Act and the Membership Act

85 Membership of the National Assembly and provincial legislatures is dealt with in the Second Amendment Act and the Membership Act. The Membership Act makes provision for the circumstances in which a member of the National Assembly or a

provincial legislature can change party allegiance without losing membership of the Assembly or the provincial legislature.

86 Items 6 and 10 of Schedule 6 to the Constitution, read with Schedule 2 to the interim Constitution and Annexure A to Schedule 6 of the Constitution establish a transitional electoral and membership regime applicable to the first election of members of the National Assembly and provincial legislatures.[32] This regime is to remain in place until the second election which is to be regulated by the legislation envisaged in sections 46(1)(a) and 105(1)(a) of the Constitution.

87 Item 23A of Annexure A, which contains the anti-defection provision, in effect makes provision for an additional ground for loss of membership of the legislature during the transitional period. In terms of item 23A(3), however, Parliament had the authority to pass legislation to make it "possible for a member of the legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature."[33] Such legislation had to be passed "within a reasonable period after the new

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32 See above n 20.

33 The terms of item 23A are set out above para 42.

Constitution took effect".[34]

88 Annexure A is a transitional provision which has no life beyond the transitional period that it regulates. It follows, that the anti-defection provision of item 23A and the power to amend that provision within a reasonable period, also have no life beyond the transitional period.

89 Counsel for the respondents correctly accepted that this was so and that the transitional period will come to an end at the latest in September 2004 which is the latest time by which the second election must be held. They contended, however, that this means that item 23A can be amended at any time during the transitional period. In effect this treats the qualification that the amendment must be made within a reasonable period as having no meaning. We deal later with this and with a further submission that the qualification that the amendment be passed within a reasonable period after the new Constitution came into force is unenforceable. But first we must deal with another argument addressed to the rationality of the provisions.

90 According to the new item 23A introduced by the Membership Act, the window periods apply for a period of 15 days from the first to the fifteenth day of September in

34 Id.

the second and fourth years following the date of the election. A year is defined as a period of 365 days – not a calendar year. The elections were held in June 1999. The first window period in September of the second year following the election, would have been in September 2000. The fourth year following the election would be September 2002, but in terms of subparagraph (5)(a) of the new item 23A, window periods do not apply during the year ended 31 December 2002. It was contemplated that the window period for 2002 would commence immediately after the coming into force of the Membership Act, and that the 10% threshold would not apply then.

91 What seems to have been overlooked in the drafting of the new item 23A is that the Schedule of which it is part has only a limited life and will expire at the time of the second election. Item 23A will therefore expire before any of the September window periods for which it makes provision. It was contended that in the circumstances, and viewed objectively, the provisions are irrational and serve no legitimate purpose.

92 There is much to be said for this proposition. It is, however, not necessary to decide whether this is so, and if it is, whether subitem (4) which deals with the initial period can be severed from subitems (2) and (3). The challenge to the validity of the Membership Act goes beyond the argument directed to rationality.

93 We have already drawn attention to the fact that prior to the passing of the Membership Act, item 23A made provision for the Schedule to be amended by an Act of

Parliament passed in accordance with Section 76(1) of the new Constitution "within a reasonable period after the new Constitution took effect". This is the only item in Schedule 2 read with Annexure A that was declared to be subject to amendment by an Act of Parliament. There is nothing to suggest that it was contemplated that the other items in the Annexure and Schedule could be amended in this way. It is not necessary, however, to deal with this issue.

94 It is not clear why the temporal limitation was inserted into item 23A, nor what the full implications are of this having been done. The applicants contend that this was done to ensure that any change would be known before the first election, so that voters would know at the time of the election that there existed a possibility that members of the party for whom they voted, might subsequently defect to join another party. If this had been so, however, one would have expected the item to say in specific terms that an amendment must be passed prior to a specified date or within a reasonable period prior to the first election.[35]

95 It may be that the anti-defection issue was one which the Constitutional Assembly could not resolve and decided to deal with on the basis of a transitional provision, leaving

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[35] For instance, at the time of the certification proceedings, item 26 of Schedule 6 provided that
> "the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993) . . . remain in force until 30 April 1999 or until repealed, whichever is sooner . . ."

the principal issue to be determined at a later date.

96 Item 23A was included in the first draft adopted by the Constitutional Assembly. In the first certification proceedings no objection was taken to certain other transitional provisions that were subsequently challenged during the second certification proceedings. There were two such challenges: one to the continuation of the Local Government Transition Act[36] and the other to the continuation of transitional provisions of the interim Constitution dealing with public administration and security services.[37]

97 In the *Second Certification Judgment* this Court dismissed these objections, holding that the continuation of the Local Government Transition Act as an interim measure was permissible. The Act remained ordinary legislation and was not immunised by the Constitution from constitutional review. It was thus not inconsistent with the constitutional principle that required the Constitution to be the supreme law.[38]

98 The continuation of transitional provisions of the interim Constitution dealing with public administration and security services was of a different character. In terms of item 24 of Schedule 6, they were continued "subject to":

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36 Item 26 of Schedule 6 to the Constitution.

37 Item 24 of Schedule 6 to the Constitution.

38 Above n 12 at paras 83-7.

"(a) . . .

(b) any . . . amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and

(c) consistency with the new Constitution."

The Court held that on a proper construction of the Constitution the relevant provisions of the interim Constitution were continued as ordinary legislation which was expressly made subordinate to the Constitution. They fell to be dealt with in the same way as any other legislation continued by the Constitution and were therefore not inconsistent with the Constitutional Principles.[39]

99 No objection was taken at any stage of the confirmation proceedings to the continuation of Schedule 2 to the interim Constitution read with Annexure A to Schedule 6. The implications of item 23A were accordingly not considered in the certification judgments. Item 23A(3) is different to the transitional provisions that were dealt with in the second confirmation proceedings and held to be consistent with the Constitution. It applies only to an amendment to item 23A(1) and not to the other provisions of the Annexures. Presumably it was contemplated that the other provisions would be subject to amendment only in terms of the Constitution. We deal later with the implications of this as far as the status of item 23A is concerned.

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39 Id at para 88-95.

100 If item 23A is seen in this light and not in hindsight, there may have been good reason for requiring that the special exception to the ordinary amendment procedure be exercised expeditiously. If this was not done, the special exemption would fall away and section 23A could then be amended only in the same way as the other provisions of Schedule 2 to the interim Constitution read with Annexure A to Schedule 6 – i.e. by a constitutional amendment. Consistently with this need for expedition the National Assembly which formed part of the Constitutional Assembly that drafted the Constitution appointed a committee to enquire into this issue within a week of the Constitution having come into force. Approximately a year later the committee recommended against an amendment.

101 But whatever the reason might have been, the stipulation that the amendment be passed "within a reasonable period after the new Constitution took effect" placed a constraint upon the power of Parliament to act in terms of that provision.

102 The Constitution took effect on 4 February 1997. As we have mentioned previously, the evidence shows that Parliament immediately appointed a committee to consider whether or not to make provision for floor crossing. This committee reported to Parliament in June 1998 recommending that the provision be not amended. The matter only returned to the Parliamentary agenda during 2002 after the break-up of the DA occurred. The amendments were passed in June 2002. That was approximately five years

after the new Constitution took effect and approximately two years before the expiry of the transitional period.

103 It seems clear to us that if Parliament had wished to modify the anti-defection provisions it could reasonably have done so at the time the ad-hoc committee reported and recommended against any change. Allowing for the time required for drafting of legislation and for public debate, the legislation could reasonably have been passed during 1999. The fact that it was only passed some three years later was due to the change in the political climate, rather than to constraints of time.

104 Item 23A vested a special power in Parliament to amend the transitional provisions of the Constitution by an Act of Parliament, rather than by a constitutional amendment. That power was subject to a limitation that it be exercised within a reasonable period after the Constitution came into force. We are unable to accept the contention advanced on behalf of the respondents that this permitted the making of an amendment at any time during the transitional period. That would render the qualification meaningless.

105 In determining what is a reasonable period within which such legislation could be passed, it is necessary to have regard to all relevant facts and circumstances. The relevant considerations depend in the first instance upon the nature of the task that has to be performed, and in the second instance upon the object for which the time is given. Here the task to be performed was the passing of legislation to modify transitional provisions

that had a limited life. Although regard must be had to the difficulties confronting a young Parliament faced with the need to transform many of the laws of the country and bring them into line with the political changes which have taken place since 1994, there is nothing to suggest that this was the reason for the delay in amending Item 23A. Having regard to all the circumstances, we are unable to conclude that an amendment passed more than five years after the Constitution came into force, to change a provision which had only another two years to run, was passed within a reasonable period.

106 We have considered whether the Second Amendment Act has a bearing on what is a reasonable period. This amendment makes provision for the possibility that changes may be made to the appointment of delegates to the National Council of Provinces, if there are changes to party membership of provincial legislatures. There can be no doubt that the amendment was passed in order to make provision for the consequences of the Membership Act which Parliament assumed to be valid. If, however, the Membership Act was not passed within a reasonable period after the Constitution came into force, and was accordingly not valid, the constitutional amendment can have no bearing upon its validity. The purpose of the amendment was not to validate the Act of Parliament and the amendment did not purport to do so. It assumed that the Act had been validly passed, and on that assumption made provision for consequences of changes of membership which might take place.

107 What are the consequences of the failure to pass item 23A within a reasonable

period? In his affidavit opposing the application the Minister contends that if item 23A does not have constitutional status it is ordinary legislation and can thus be amended as ordinary legislation. Although the Constitution requires ordinary legislation of this character to be amended in accordance with the provisions of section 75 of the Constitution, it was contended in argument that this did not invalidate the amendment, for resort to what was claimed to be the more rigorous procedure of section 76 was permissible. On the other hand, the applicants contended that the manner and form provisions of the Constitution are mandatory, and if item 23A has the status of ordinary legislation, the wrong procedure was followed, and the amendment was accordingly invalid.

108 We have come to the conclusion that the amendment to item 23A passed in terms of section 76 of the Constitution is invalid because it was not passed within a reasonable period. We prefer, however, to base our decision to that effect on grounds different from that contended for by the applicants.

109 We have already drawn attention to the fact that item 23A is different to the transitional provisions that were considered during the second certification proceedings. In the case of such provisions the purpose of the Constitution was clear. The provisions were to remain in force throughout the transition subject to amendment by an Act of Parliament. As such, they had the status of ordinary legislation and to treat them as such was consistent with the Constitutional Principles. In the case of item 23A, however, the

purpose was different. Item 23A was to remain in place during the transition unless amended by an Act of Parliament within a reasonable period.

110 We do not have to consider the precise status of item 23A. It is a provision of a schedule which forms part of the Constitution which can only be amended in accordance with the provisions of the Constitution. The special exemption in respect of an amendment of item 23A during the limited transitional period may have given that item a special status. This does not mean, however, that the manner and form provisions according to which the special exemption could be exercised were invalid. They were part of the Constitution and had to be complied with. Thus, however one describes item 23A, once the prescribed time expired, the "special exemption" ceased to be applicable. That means that the only way in which the item can now be amended is by a constitutional amendment.

111 To hold otherwise, and to conclude that the failure to comply with the special exemption contained in item 23A results in Parliament being able to amend the item at any time, would be inconsistent with the language of item 23A and its purpose.

112 Item 23A was part of the Constitution. Whether the special exemption permitting an amendment of a transitional provision for a limited period by an Act of Parliament was consistent with the Constitutional Principles need not now be considered. The reasonable period has expired, and the precise status of item 23A during the period when it could be

amended by an Act of Parliament, is no longer relevant. The Constitution was certified and we must interpret its provisions in a way that gives effect as far as possible to the purpose of Schedule 6.

113 We are concerned here with the interpretation of a provision of the Constitution. In doing so we should avoid legal formalism[40] and strive to give effect to its purpose. Any construction other than the one we have adopted would defeat the very purpose of the provision, and must therefore be avoided. We hold, therefore, that the section 76 procedure was an option only during the "reasonable period" contemplated by item 23A, and that having expired, the amendment of the Constitution in a manner not contemplated or sanctioned by the Constitution itself, was invalid.

114 In the result, we have come to the conclusion that the objection to the validity of the Membership Act must be upheld, and that the other objections must be dismissed. Although counsel for some of the parties referred to the four pieces of legislation as a "package", it was correctly not contended that a finding of unconstitutionality with regard to one of the Acts would render the other Acts unconstitutional as well. It is therefore only the Membership Act that must be declared unconstitutional.

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40 *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 27 citing *Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 (PC) and stressing that in South Africa and in other jurisdictions:

> ". . . national constitutions, and Bills of Rights in particular, are interpreted purposively to avoid the 'austerity of tabulated legalism'."

The appropriate order

115 It is necessary now to consider what an appropriate order will be in the circumstances of this case. Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

What is just and equitable depends on the circumstances of each case. In *Fose v Minister of Safety and Security*[41] this Court held that it may be necessary for courts to fashion orders to ensure that effect is given to constitutional rights. One of the considerations that must be kept in mind by a court in making orders in constitutional matters,

> "is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy . . . in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend ultimately on the correct

41 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19.

> construction to be placed on the Constitution as applied to the legislation and facts involved in each case."[42]

116 Both of these cases were concerned with orders that would be appropriate to ensure that constitutional rights are enforced. But similar considerations apply in the present case where it is necessary to consider what is a just and equitable order in a case where constitutional challenges have failed. This is necessary because the interim orders made intruded into the field reserved by the Constitution for the legislature. As a result, local government councillors were not able to take advantage of an amendment to the Constitution and legislation we have held to be valid. The first window period contemplated by item 7 of Schedule 6A of the Constitution has in the meantime expired. Unless this Court makes an order that addresses this, the effect of the Court proceedings will have been to frustrate the will of Parliament and to render nugatory the provisions of item 7 of Schedule 6A.

117 We consider it necessary in the circumstances to fashion an order to deal with this situation. This can best be done by providing that the window period in item 7 of Schedule 6A, which has in effect been suspended by the interim orders, should commence

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42 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 66.

to run on 8 October 2002. This will allow a sufficient period for those interested to study the judgment and consider their positions accordingly. The fifteen-day window period will then come into force and municipal council members wishing to cross the floor will be able to do so.

118 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. They provide:

> "(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 [floor-crossing legislation] 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."

Costs

119 The first, third, fourth and fifth intervening parties who have identified themselves with the applicant's claim during the proceedings before this Court, were not parties to the dispute at the time of the proceedings in the High Court. They were admitted as parties at the time of the first hearing before this Court. They opposed the application for leave to appeal against the interim orders, and resisted the appeal. The second intervening party, which identified itself with the respondents' contentions, also joined the proceedings at the time of the first hearing before this Court. The respondents have been successful in their appeal against the orders made by the High Court and the full bench and in the first hearing before this Court. That involves the two hearings in the High Court and the hearing in this Court on 3 and 4 July 2002. The respondents have also succeeded in resisting the constitutional challenge to the two constitutional amendments and to the Local Government Amendment Act. Although the applicant and the intervening parties supporting it have failed in many of the arguments advanced in support of the challenge to the four Acts, they have been successful in their challenge to the Membership Act and thus have effectively blocked floor-crossing in the national and provincial spheres of government.

120 It is not practical to attempt to disaggregate the costs incurred by the different parties in regard to these various issues. If regard is had to all aspects of the dispute

between the parties and to their relative success and failure in relation to the issues raised, it seems to us that it would be equitable in the circumstances to require each party to pay its own costs.

Order made

121 We make the following order:

1. The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002, is declared to be inconsistent with the Constitution and invalid.

2. Save as aforesaid, the application is dismissed.

3. The period of 15 days referred to in item 7 of Schedule 6A to the Constitution shall be deemed to be a period of 15 days commencing on 8 October 2002.

4. The following provisions of the order of this Court made on 4 July 2002 shall remain in force until the expiry of the fifteen-day window period referred to in paragraph 3 of this order:

"(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 [floor-crossing legislation] 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."

5. Each party is to pay its own costs.

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

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For the Respondents:

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For the Second Intervening Party:

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For the Third and Fifth Intervening Parties:

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For the First Amicus Curiae:

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