THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 073/08
No precedential significance

In the matter between:

MATTHEW SHUNMUGAM	**FIRST APPELLANT**
GIJIMANI ALFRED MNCUBE	**SECOND APPELLANT**
CHUAN-YI LIU	**THIRD APPELLANT**
THENJIWE VERONICA BUTHELEZI	**FOURTH APPELLANT**
THEMBISILE MARY-MARGARET PHIRI	**FIFTH APPELLANT**
BHEKUMNDENI ALEC THUSI	**SIXTH APPELLANT**
INNOCENT MHLABUNZIMA MIYA	**SEVENTH APPELLANT**
THANDI ROSEMARY NDLOVU	**EIGHTH APPELLANT**
BHEKINKOSI DERRICK	**NINTH APPELLANT**
JOTHAM THEMBA SIMELANE	**TENTH APPELLANT**
TOBIAS SEZE GUMEDE	**ELEVENTH APPELLANT**
SENZO RICHARD SHWALA	**TWELFTH APPELLANT**
HANDSOME THOKOZANI	**THIRTEENTH APPELLANT**
THANDAZANI CYPRIAN NJOKO	**FOURTEENTH APPELLANT**
DUMISILE HELMAH XABA	**FIFTEENTH APPELLANT**
MBONGENI BHEKUMTHETHO MYENI	**SIXTEENTH APPELLANT**
DHAVANDRAN KRISHNASAMY PALAVAR	**SEVENTEENTH APPELLANT**
MBONGENI JEREMIAH SIBIYA	**EIGHTEENTH APPELLANT**
INKATHA FREEDOM PARTY	**NINETEENTH APPELLANT**

and

NATIONAL DEMOCRATIC CONVENTION	**RESPONDENT**

Neutral citation: *Shunmugam and Others v National Democratic Convention* (073/2008) [2008] ZASCA 165 (1 December 2008)

CORAM: HARMS ADP, STREICHER JA, COMBRINCK JA, LEACH AJA et MHLANTLA AJA

HEARD: 7 NOVEMBER 2008

DELIVERED: 1 DECEMBER 2008

Summary: Floor crossing under Schedule 6B of the Constitution – court having ordered that municipal councillors who had purportedly been expelled from their political party were to remain suspended during a floor crossing window pending a decision on whether their expulsions had been lawful – this order not depriving the councillors of their party membership or preventing them from crossing the floor – as their expulsions had been unlawful, councillors had been members of the party entitled to cross the floor.

ORDER

On appeal from: High Court, Natal (Rall AJ sitting as court of first instance).

(a) In case 6883/07, the appeal is dismissed.

(b) In case 7680/07, the appeal succeeds. The order of the court a quo is set aside and replaced by the following:

'(1) The application is dismissed with costs.

(2) The counter application is upheld with costs.'

(c) The respondent (NADECO) is to pay the appellants' costs of the appeal.

(d) The above orders as to costs shall include those of two counsel where so employed.

JUDGMENT

LEACH AJA (HARMS ADP, STREICHER JA, COMBRINK JA, et MHLANTLA AJA concurring):

[1] The political process commonly known as 'floor crossing', an expediency by which a sitting member of either the national assembly, a provincial legislature or a municipal council may change allegiance from one political party to another during a prescribed period without losing his or her

seat, is recognised in Schedules 6A and 6B of the Constitution. Floor crossing is a matter of some controversy and is about to be abolished. Nevertheless, in a window period covering the first fifteen days of September 2007, sitting members of municipal councils were entitled to cross the floor under the provisions of Schedule 6B.

[2] The respondent, the National Democratic Convention ('NADECO'), is a registered political party. The first to eighteenth appellants are former members of NADECO who had been municipal councillors before the floor crossing window in September 2007. Like most political parties, NADECO feared the possible defection of members when the floor crossing window opened. It also appears to have identified the first to eighteenth appellants as possible defectors and, seemingly as a pre-emptive step, expelled them from membership of the party during August 2007. As in terms of item 1 of Schedule 6B, loss of party membership leads to a councillor ceasing to be a member of a municipal council, their expulsions would have prevented them from crossing the floor.

[3] As will be more fully set out in due course, this led to litigation in the Pietermaritzburg High Court involving not only the first to eighteenth appellants but various municipal councils, NADECO and a number of other political parties, including the Inkatha Freedom Party ('the IFP'). Not all of those parties are before this court and not all of the present parties were parties to each application. In order to avoid confusion, I therefore intend to refer to the first to the eighteenth appellants as 'the appellants' and to the

respondent and the IFP (which is the nineteenth appellant) by their acronyms.

[4] There are in fact two appeals before this court arising from separate applications brought in the high court under case numbers 6883/07 and 7680/07. Although not formally consolidated, the two applications became intimately intertwined, were eventually heard together and were decided in a single judgment. By that stage, case 6883/07 had for all practical purposes become moot and the relief sought in that matter was refused. Despite case 6883/07 being of academic interest only, leave to appeal was granted in both cases. Mr Gauntlett SC, who appeared for the appellants in this court, however referred to case 6883/07 only as background or where its papers had been incorporated by reference into those of case 7680/7. Although it was the decision in the latter case which essentially formed the subject of the appeal, it is useful to describe the somewhat convoluted proceedings which took place in the high court.

[5] The appellants decided to appeal against their expulsions under the party's constitution. However, in the light of the imminent opening of the floor crossing window, they also launched an urgent application (case 6883/07) in which they sought an order that, pending the outcome of their internal appeals, their expulsions be declared unlawful and their positions as councillors of the various municipalities be declared of full force and effect. They cited as respondents the various municipalities in which they had been serving as councillors as well as the Electoral Commission and NADECO.

[6] Inadequate notice of this application was given to the various respondents and it was heard *ex parte* by Madondo J on 24 August 2007. Nevertheless a rule *nisi* returnable on 27 September 2007 was issued calling upon those cited as respondents to show cause why a declaratory order in the form sought should not be issued. In addition, the court directed the rule to operate as an interim order pending the finalisation of the application. As the return day was after the close of the floor crossing window, this order amounted to final relief *ex parte* declaring the appellants to have been unlawfully expelled which, in turn, would have allowed them to cross the floor. It is not surprising that as soon as NADECO became aware of the order, it applied for it to be reconsidered under rule 6(12)(c).

[7] The application for reconsideration of the order of 24 August 2007 was heard by Msimang J on 31 August 2007. It is clear from the record that the learned judge was acutely aware of the ramifications of the floor crossing period which was about to open, and the resultant necessity to deal fairly and speedily with the dispute but to preserve the parties' rights until the lawfulness or otherwise of the expulsions had been determined. He urged the parties to reach agreement on an order which would achieve that end. This led to the appellants and NADECO (the latter being the only respondent in the proceedings who was represented at the time) agreeing to the matter being postponed to 12 September 2007 - so that it could be heard before the end of the floor crossing period – and the following order which they had drawn up being issued by consent:

'1. The rule *nisi* granted on 24 August 2007 be and is hereby discharged.

2. That pending the final determination of this application:

(a) the (appellants) remain suspended as members of (Nadeco)

(b) that (Nadeco) undertakes not to replace the (appellants) as councillors of the (municipal councils).'

[8] The appellants purported to cross the floor before the hearing on 12 September 2007 and, when the matter was called that day, leading counsel then appearing for them informed the court that his clients had resigned from NADECO and had joined other political parties. Although NADECO immediately attempted to persuade the court to dismiss the application, the court declined to do so as there had been 'no official pronouncement on this issue at this stage'. The matter was then postponed *sine die* although, somewhat strangely in the light of their counsel's statement that the appellants had resigned from NADECO, a further interim order was issued in the same terms as paragraph 2 of the order of 31 August 2007.

[9] Subsequently, on 19 September 2007, NADECO learnt that the Electoral Commission had recognised the appellants' move to other political parties, with the eleventh, fifteenth and sixteenth appellants having joined the IFP. In the light of the Electoral Commission's recognition of these defections, NADECO launched another urgent application (case 7680/07) on 20 September 2007. Citing various respondents, including the appellants and the municipalities in which they were sitting, the Electoral Commission and the IFP, it sought an order (i) declaring that the appellants had ceased to be members of their respective municipal councils before midnight on 31 August

2007 and were accordingly not members of any municipal council, and (ii) setting aside the decision of the Electoral Commission to recognise the appellants as members of the various municipal councils.

[10] This application was set down as a matter of urgency on 21 September 2007 but was postponed to 27 September 2007. On that date it was again postponed to 22 October 2007, with the court further ordering that the application in case 6883/07 also be set down for hearing that day.

[11] The eleventh, fifteenth and sixteenth appellants, who had crossed the floor to join the IFP, thereafter lodged a counter application in case 7680/07 seeking an order declaring (i) that their expulsions were unlawful, and (ii) that they had been members of NADECO as at 31 August 2007. An order in those terms would effectively have declared them to have been councillors when the floor crossing window opened and therefore entitled to move to other parties.

[12] In this way, the applications in cases 6883/07 and 7680/07 together with the counter application in the latter case came before Rall AJ on 22 October 2007. Judgment was delivered on 4 December 2007. The application in case 6883/07 was dismissed with costs. In case 7680/07, the court held that the appellants had ceased to be members of their respective municipal councils before the floor crossing window had commenced and, accordingly, granted NADECO the relief it sought and dismissed the counter application of the eleventh, fifteenth and sixteenth appellants. With leave of the learned acting

judge, the appellants and the IFP now appeal to this court against those orders.

[13] As already mentioned, due to the appellants having joined other political parties the proceedings in case 6883/07 could be of no more than academic interest, and they wisely did not seek to argue the appeal in regard to that case and conceded that it should be dismissed. The argument on appeal was therefore directed at the decision in case 7680/07, the outcome of which turns on whether the appellants had lawfully crossed the floor between the court appearances of 31 August and 12 September 2007.

[14] In the court a quo, NADECO had contended that the appellants had been lawfully expelled and could accordingly not cross the floor when the window opened as they had ceased to be councillors. However, on appeal, counsel for NADECO conceded that for present purposes it could be accepted that the individual appellants had not been lawfully expelled. Notwithstanding this admission, he relied on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) to found an argument that, although invalid, the decision to expel the appellants was not devoid of consequences but remained effective until set aside – so that the appellants had to be regarded as not having been members of NADECO on 1 September 2007 and had therefore not been entitled to cross the floor.

[15] In *Oudekraal*, and subsequently in *Seale v Van Rooyen NO and Others;*

Provincial Government, North West Province v Van Rooyen NO and Others 2008 (4) SA 43 (SCA), the court was called on to decide what effect an invalid administrative act had upon a further administrative act which was dependent on the initial act. It was held that where a person, the so-called 'second actor', unaware of the invalidity of the initial act, assumed it to be valid when taking the further act, and where the factual existence rather than the substantive validity of the initial act was a precondition for the validity of the subsequent act, the latter act could be regarded as valid until the initial act was set aside.

[16] The present case involves a direct attack upon the legality of the decision to expel the appellants and does not concern the validity of an act taken on the strength of that decision. The appellant's membership of NADECO at the crucial time depended on the substantive validity of their expulsions. The appellants were required to vacate their seats as councillors if lawfully expelled. They declined to do so as they felt their expulsions had been unlawful. NADECO then sought declaratory relief against them, contending the expulsions had been lawful. The appellants resisted that application by challenging the validity of the administrative act expelling them. The court was then called on to decide the validity of the action expelling the appellants. Having regard to NADECO's concession that their expulsions were indeed unlawful, and the principle of legality which is fundamental to our legal order, there can be no question that the appellants were members of NADECO and councillors who were entitled to cross the floor when the floor crossing window opened.

[17] For these reasons NADECO's reliance on the decision in *Oudekraal* is misplaced and the matter is not to be decided on the basis that the expulsions, even if invalid, resulted in the appellants losing their party membership.

[18] NADECO in the alternative contended that the order of 31 August 2007 had in any event prevented the appellants from crossing the floor while it was in place. A decision on this issue turns largely upon the interpretation of the provision in the order that, pending the final determination of the application, the appellants were to 'remain suspended as members' of NADECO.

[19] Despite having been drafted by the legal representatives of the parties, this provision was absurd as it had not been suggested by either side that the appellants had been suspended from membership of the party and the dispute had at all times been whether they were still members of the party or whether they had been expelled.

[20] Counsel for NADECO argued that the order had to be read in its context and the circumstances which prevailed when it was made. In the light of the imminent opening of the floor crossing window and the postponement of the case to a date within that window for resolution of the dispute about the lawfulness of the expulsions, he submitted that by necessary implication the order was intended to mean that the appellants were prohibited from crossing the floor until the application had been determined by the court on 12

September 2007.

[21] The issue whether the court has the power to order a councillor not to cross the floor, even should he or she agree not to do so, was mentioned, albeit briefly, by counsel for the appellant. Although a matter of interest and one which may be the subject of substantial constitutional debate, it is unnecessary to reach any decision on the issue for purposes of this judgment. The answer to NADECO's argument is that if the parties had intended their draft order to prohibit the appellants from crossing the floor, they could simply have expressly provided for that to be the case. Not only did they not do so but, for the reasons that follow, the order cannot be construed to have that effect by necessary inference.

[22] In considering whether the order can impliedly bear the meaning NADECO seeks to attribute to it, it is indeed useful to place the order in its context as counsel for NADECO asked us to do. In order to prevent the appellants from crossing the floor, NADECO was seeking a court order recognising that it had lawfully expelled them. On the other hand, the appellants contended that they had not been lawfully expelled, that they were still members of NADECO and that they were entitled to exercise their constitutional right to cross the floor during the prescribed period if they so wished. The lawfulness of the appellants' expulsions was crucial to this dispute, and the determination of that issue was to be postponed for adjudication before the end of the floor crossing window. In formulating the order, the parties had in mind an arrangement which would preserve, not

prejudice, their respective rights; in particular the right of the appellants to switch their political allegiance without losing their seats should they not have been lawfully expelled. The order was not intended to cause the appellants to surrender this right, as was correctly conceded on appeal by NADECO.

[23] Bearing that in mind, it is important to have regard to schedule 6B of the Constitution. As already mentioned, item 1 of the schedule provides for a councillor to cease to be a member of a municipal council if he or she ceases to be a member of a political party. Item 4(2)(a) provides that during a floor crossing period a councillor may only once (i) change membership of a political party, (ii) become a member of a party, or (iii) cease to be a member of a party. On the other hand, item 4(2)(c) prohibits a party from suspending or terminating the party membership of a councillor during a floor crossing period or from performing any act during such period which may cause a councillor to be disqualified from holding office in a council.

[24] In the light of these provisions, the appellants had to be members of NADECO when the floor crossing window opened in order for them to cross the floor during the prescribed period. If they had been expelled, they could not do so. But, on the other hand, if they had not been expelled and were still members of the party, NADECO could not prevent them changing their allegiances to another party.

[25] NADECO's counsel conceded, correctly, that neither the court nor the parties ever had the power, or had intended, to deprive the appellants of their

rights under schedule 6B. As they would have been deprived of those rights if they were not NADECO members at the commencement of the floor crossing window, whatever the order of 31 August 2007 was intended to mean (and while it may possibly have been intended to mean that the appellants should not attend council meetings or something of that nature) it could never have been intended to deprive the appellants of their party membership or prohibit them from crossing the floor.

[26] This conclusion renders it unnecessary to attempt to decide precisely what the parties or the court had in mind when formulating the order of 31 August 2007. Either the order is meaningless or it did not deprive the appellants of their right to cross the floor if their expulsions were unlawful. In either event, in the light of NADECO's acceptance that the appellants had been unlawfully expelled, they remained members of the party when the floor crossing window opened and were therefore entitled to cross the floor to other parties when they did.

[27] Consequently, the order of the court a quo in case 7680/07 cannot stand and must be set aside. In regard to the counter application, the appellants to whom it relates enjoy status and privileges as councillors and the right to participate in the political processes of the municipal councils in which they have been seated since September 2007, all of which was disputed by NADECO. An order in the counter application re-asserts these rights and privileges as well as the fact that those appellants were unlawfully expelled by NADECO. In these circumstances, the declaratory relief sought in the counter

application is not solely academic and should be issued.

[28] In regard to costs, the application in case 6883/07 was probably ill conceived and should have been abandoned once the appellants crossed the floor. It should also not to have been appealed against. However, as the appellants did not argue the appeal and the papers in that case were both necessary as background and were incorporated by reference into the papers in case 7680/07, it is unnecessary to make a costs order in the appeal in case 6883/07. In regard to case 7680/07, the costs should follow the event. I am also satisfied, and both sides were agreed, that the order for costs should include those of two counsel where so employed.

[29] The following order is made:

(a) In case 6883/07, the appeal is dismissed.

(b) In case 7680/07, the appeal succeeds. The order of the court a quo is set aside and replaced by the following:

'(i) The application is dismissed with costs.

(ii) The counter application is upheld with costs.'

(c) The respondent (NADECO) is to pay the appellants' costs of the appeal.

(d) The above orders as to costs shall include those of two counsel where so employed.

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L E LEACH
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellants:	JJ Gauntlett SC A M Annandale Instructed by Thorpe & Hands; Durban (On behalf of First – Sixth Appellants) Symington & De Kok; Bloemfontein Larson Falconer Incorporated; Durban (On behalf of Seventh – Nineteenth Appellants) Symington & De Kok; Bloemfontein
For Respondent:	AM Stewart SC M Du Plessis Instructed by John Wills Attorney; Pietermaritzburg Naudes Incorporated; Bloemfontein