

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE PROVINCIAL DIVISION)**

CASE NO: 14963/2007

In the matter between:

LEONARDO DORFLING

Applicant

and

THE INDEPENDENT DEMOCRATS

First Respondent

**MUNICIPAL MANAGER,
EDEN DISTRICT MUNICIPALITY**

Second Respondent

THE INDEPENDENT ELECTORAL COMMISSION

Third Respondent

LAETITIA HELOISE ARRIES

Fourth Respondent

JUDGEMENT DELIVERED ON 11 JUNE 2007

STEYN AJ

THE APPLICATION

1. This application for review relief was brought on an urgent basis in October 2007. On 25 October 2007 the matter was postponed to 7 April 2008 by agreement between Applicant and First Respondent. As far as it

may be necessary the relief requested by Applicant, for condonation of non-compliance with the Rules of Court regarding time periods, forms and service requirements, is granted.

2. The parties to the Application appear in the heading. Applicant requests that the costs of the Application be paid by the First Respondent, the Independent Democrats and any of the other Respondents who oppose the Application. The Application was opposed by the First Respondent. A notice was filed by Third Respondent abiding by the decision of this Court. There is no opposition to the Application from the Second and Fourth Respondents.

3. The application deals mainly with the aspect of whether the Applicant has a right to retain his seat as a councillor on the Council of the Eden District Municipality.

4. The review relief seeks to set aside decisions taken by the Second Respondent, the Municipal Manager of the Eden District Municipality ('the Municipality') on or about 17 September 2007, to report to the Third Respondent, the Independent Electoral Commission, ('the IEC') that Applicant had vacated his seat on the Council of the Municipality, and the decision of the IEC to declare the Applicant's floor-crossing notification

‘non compliant’, as well as the subsequent decisions to declare the Applicant’s seat to be vacant and to fill it with the Fourth Respondent.

5. Declaratory relief is sought confirming that Plaintiff’s floor-crossing notification was properly filed and that it had the effect in law that he retained his seat on the council as an Eden Forum (‘EF’) councillor.
6. It is furthermore requested that the Court should direct the IEC to process and give effect to Applicant’s floor-crossing notification.

BACKGROUND:

THE LAW

7. In June 2002 the South African Parliament passed four statutes aimed at allowing members of the national, provincial and local legislatures to change their party allegiances without losing their seats.
8. The contentious so-called floor-crossing statutes were challenged in the Courts. In a landmark ruling in October 2002, the Constitutional Court upheld the legislation passed by Parliament on floor-crossing. Thus the go-ahead was given to politicians to cross the floor and join another party without losing their seats.

9. The limited system of floor-crossing may only take place during a designated fifteen day period of time. In 2007 the floor-crossing window period for municipal councillors ran from 1 September to Saturday 15 September at midnight.

THE FACTS

10. The Applicant was formerly elected as one of two 'proportional representation' councillors, to represent the First Respondent, the Independent Democrats, ('the ID') in the Municipality Council.
11. Between 1 and 15 September 2007, the so-called window period, and in accordance with certain of the provisions of the Constitution of the Republic, referred to above, the Applicant was lawfully entitled to become a member of a different political party and to retain his seat as a councillor of the Municipality Council. In such a case his seat would thereafter be regarded as having been allocated to the new party which he elected to join.
12. Applicant alleges and it is common cause, that on 14 September 2007, during the so-called window period, he resolved to 'cross the floor' from the ID to a new and political party, the Eden Forum (the 'EF').

13. Accordingly, on the 14th September 2007 at 14h00 the Applicant and Ms Visagie-Janjijies, the leader of the EF, attended at one of the local offices of the IEC, situate in George.
14. The Applicant completed a pro-forma notice in order to cross the floor from the ID to the EF. He was assisted by a Ms Block, an official of the IEC.
15. According to the Applicant Ms Block 'accepted' the notice after completion thereof. Applicant assumed that Ms Block was authorised to receive floor-crossing forms on behalf of the IEC. Applicant alleges that Ms Block indicated to him that she would fax the original notice to the IEC's national offices situate in Pretoria.
16. At 17h05, later on the same day, Applicant faxed a copy of the floor-crossing notification to the IEC's national offices in Pretoria.
17. Applicant states in his Replying Affidavit that his decision to fax the notice to the IEC's national office later in the day, was an extra precautionary action. He was of the view that the floor-crossing procedure had been completed at the IEC's offices in George.

18. Applicant again faxed the floor-crossing notification to the IEC's Pretoria office at 23h39 on the 14th September 2007 and again at 20h09 on the 15th September 2008.
19. It is common cause that the floor-crossing notification of Applicant was received at the IEC's national office in Pretoria at 17h05 on 14 September 2007. According to an e-mail notification from Mr. M Hendrickse, a Senior Manager of the IEC in Pretoria, addressed to the attorney representing the First Respondent in this matter, no notices from Applicant were received prior to that time. Mr. Hendrickse states furthermore that Ms Block denied that she had agreed to fax the Applicant's notice to the Chief Electoral Officer at the Pretoria office. According to her she had advised the Applicant to send the notification from his own office. This is, of course, hearsay evidence. The version of Applicant regarding 'acceptance' of his notification and the transmission thereof by Ms Block is disputed by the First Respondent.
20. It is common cause that on Sunday 16 September 2007 a facsimile, dated 14 September 2007, was transmitted to the Applicant by the same Mr. Hendrickse, acknowledging receipt by the IEC of his floor-crossing notification.

LOSS OF MEMBERSHIP

21. In terms of Schedule 6B to the Constitution of the Republic of South Africa, Act 108 of 1996, a councillor not representing a ward in a Municipal Council, ceases to be a member of that council if that councillor, other than in accordance with item 2, 3, or 7, ceases to be a member of the party which nominated that councillor as a candidate in the ward election.
(Item 1(2)(a))
22. Item 2 provides that, subject to item 4, a so-called 'list councillor' such as the Applicant, remains a councillor if he ceases, during the floor-crossing period, to be a member of the party that nominated him, subject to certain conditions.
23. Item 4 provides that during the floor-crossing period a councillor may only once change membership of a party, become a member of a party, or cease to be a member of a party 'by informing an officer designated by the Electoral Commission thereof in writing, and if that councillor has changed membership of a party or has become a member of a party, by submitting to that officer written confirmation from the party in question that he or she has been accepted as a member of that party'.

24. The floor-crossing provisions do not assist a list councillor who during the floor-crossing period resigns from the party that nominated him and thereafter tries to cross the floor in the manner described above. Such a councillor would lose his membership *ex lege* by virtue of item 1, which would then preclude him or her from making use of the provisions of items 2 and 4.
25. The Applicant states that he had a letter of resignation as a member of the ID prepared on 13 September 2007. On the 14th September 2007 this letter of resignation was printed and signed. The letter was addressed to 'DIE LEIER, INDEPENDENT DEMOCRATS, M28, Marks Building, Parliament, Plein Street, Cape Town, 8000 and was faxed to the Registered and National Office of the ID after 5pm on the 14th September 2007.
26. Applicant eventually conceded that his letter of resignation, which he alleges was sent as a courtesy gesture to the Leader of the ID, was actually transmitted a few minutes before his floor-crossing notification to the IEC.
27. It therefore has to be established whether the Applicant's resignation letter, addressed to the Leader of the ID, constituted his formal

resignation, which would have the effect of stripping him of his seat on the Municipality Council.

28. The Draft Constitution of the ID (the only Constitution of the ID, the 'ID Constitution') sets out the contractual relationship between its members, office bearers and public representatives. The ID Constitution provides in clause 15.1 that a member resigns when:

'15.1 He/She resigns in writing or verbally, addressed to the BEC or any structure of the Party.'

29. There is no indication or allegation that Applicant ever resigned verbally. Clause 23 of the ID Constitution provides that the Branch Executive Committee is referred to as the BEC. The letter was not addressed to the BEC.

30. The Structures of the party are referred to and defined in pars 20 to 70 of the ID Constitution. It is not indicated anywhere that the Leader of the Party is recognised as a structure of the Party.

31. *Infer alia* the National Executive Committee, (NEC), is a structure of the Party. The NEC consists of the Leader of the Party, the National Chairperson, The Secretary-General, etc.

32. Clause 71.1 of the ID Constitution sets out the roles and functions of the Leader of the Party. I have not found any indication in the ID Constitution that the Leader of the Party has any role or function with regard to the resignation of members. In terms of the provisions of Clause 16 of the Constitution, the Leader of the Party or the Provincial Executive Committee (PEC), who is defined as a structure of the Party, may at any time suspend the membership of any person who is charged with having transgressed the provisions of clause 15 or is in breach of any rule in the Code of Conduct of the party.
33. The resignation letter was therefore not formally or legally effective when the Applicant submitted his floor-crossing form to the IEC. Hence the resignation letter forwarded to the ID's Leader, did not strip the Applicant of his seat as provided for in Item 1 of Schedule 6B to the Constitution.
34. It is common cause that the IEC received the floor-crossing notification just after 17h00 on 14 September 2007. Floor-crossing occurs when the notification is handed to the IEC (Item 4(2) of Schedule 6B to the Constitution).
35. Applicant accordingly crossed the floor before he formally, effectively or legally terminated his membership of the ID in terms of the provisions of the ID Constitution. There is no indication or allegation that any letter of

resignation of the Applicant was ever addressed or received by the BEC or a structure of the party, as required by the ID Constitution.

REVIEW RELIEF DISCRETIONARY

36. It is trite law that review relief is discretionary. It was submitted on behalf of First Respondent that the Court should refuse the relief claimed by Applicant based on an exercise of this residual discretionary power, in view of certain circumstances. The Courts will generally not lightly deprive an Applicant of relief. In this particular case I am not convinced that the objections and inconveniences raised by the ID to the granting of an order are justified or that the Court should exercise a discretion **not** favoring the Applicant.

37. *Inter alia*, the Court is not convinced that the retrospective reinstatement of the Applicant to the position on the Municipality from which he has been removed will be impractical or lead to a threat to the Municipality. There are precedents where the Courts have reinstated politicians into positions from which they were improperly removed. I can find no compelling reason or principle preventing the Court from granting Applicant the relief he seeks in respect of his reinstatement.

38. In view of the concerns raised that the relief sought by Applicant may have deleterious consequences for the Municipality, the Applicant has indicated that he only seeks to be reinstated with prospective effect. He accepts that he only has a claim to his seat on the Municipality from the date on which this Court grants him relief. This tailored relief is justified in terms of section 172(1) of the Constitution of the Republic of South Africa, in which the Court is specifically empowered to grant an order limiting the retrospective effect of the declaration of invalidity.
39. The Court does not accept, as submitted by the First Respondent, that section 93 B of the Structures Act has the effect of ousting this Court's power to grant the Applicant the relief he requests. A Court should be slow to find that its power to declare an action unlawful has been ousted. Section 93 B deals with the prescribed time periods for publication of the results of floor-crossing on Municipal Councils. I agree with Mr. Borgström's contention that the prescribed time period of seven days, within which the floor-crossing results must be published, was inserted to ensure that the IEC acted swiftly and to give parties a remedy if the IEC failed to act with due haste. It cannot be intended to oust this Court's jurisdiction after the seven days have elapsed.

DELAY TO LAUNCH

40. The ID argues that the Applicant should be unsuited due to his failure to launch an application for a period of a month after the date on which he became aware of the decisions now under review. It is suggested that this is an unreasonable delay in terms of section 7(1) of PAJA.

41. I am not impressed by this argument. It is clear from the voluminous documentation filed in this matter that there were efforts made to settle the matter. Not to do so would have been irresponsible. Applicant states that when court proceedings finally appeared unavoidable, he had a commitment to visit his ailing brother in the UK. I am satisfied that Applicant proceeded with the Application without undue delay.

APPLICANT'S MOTIVATIONS

42. First Respondent also argued that the IEC'S decision, which is under review, is justifiable and should be upheld on the basis that Applicant's motive for crossing was suspect and tainted by greed. These allegations have not been proved and I find that the Applicant's motives are largely irrelevant. The IEC's decision was based on the incorrect view that Applicant was no longer a councillor, as he had resigned prior to crossing the floor. In any event I am not aware of any power of the IEC to refuse to

process a floor-crossing notification based on an assessment of impure motives. The IEC has no discretion or residual power to refuse in this regard.

JURISDICTION

43. It was argued on behalf of the First Respondent that this Court does not have the necessary jurisdiction to hear the matter, as the decisions taken by the IEC were taken in Pretoria and that the proceedings should have been launched there.

44. Section 19(1) (a) of the Supreme Court Act sets out the persons over whom and matters in relation to which provincial and local divisions have jurisdiction. It provides that a provincial or local division shall have jurisdiction over all persons residing in or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance.

45. In terms of the provisions of Section 19(1) (b) of the Supreme Court Act, the provincial or local division shall also have jurisdiction over any person residing outside its area of jurisdiction, who is joined as a party to any cause in relation to which such provincial or local division has jurisdiction.

46. Jurisdiction in cases involving review relief is specifically dealt with in section 6 of the Promotion of Administrative Justice Act, Act 3 of 2000. ('PAJA'), read together with the definition of a 'court' in section 1, in terms of which any High Court can hear an application for the review of administrative action as long as the party affected is domiciled in the area of the Court or the adverse effect will be experienced in the area of the Court.

47. The person affected by the decisions, the Applicant resides in the area of jurisdiction of this Court and the effects of the decisions under review are experienced in the area of jurisdiction of this Court.

REVIEW RELIEF AGAINST THE MUNICIPAL MANAGER AND THE IEC

48. The First Respondent furthermore argues that the Municipal Manager and the IEC made no 'decisions' which can be subject to review. The suggestion is that the Municipal Manager acted as a conduit of information and did not determine rights. As regards the IEC, the suggestion seems to be that the Applicant lost his seat as a matter of law and was replaced by Fourth Respondent based on information supplied, acting without discretion.

49. On behalf of Applicant it has been argued that if these propositions are not incorrect it would mean that Applicant was removed and replaced without any decision being taken and he would be left without remedy.
50. I agree with Mr. Borgström's argument on behalf of Applicant that the decisions and actions taken by the Municipal Manager and the IEC were based on erroneous assumptions of fact and law, namely that Applicant had resigned before crossing the floor. The resignation, flawed as it was, is a fact which should have been ignored by the IEC. In the circumstances the actions of the Municipal Manager and the IEC fall to be set aside in terms of the provisions of section 6(2) of PAJA.

RELIEF AGAINST THE IEC

51. The Applicant requests this Court to direct the IEC to process and give effect to his floor-crossing application. The Court is empowered to grant the relief in terms of the provisions of PAJA, which authorises this court to direct the IEC to act in a manner the court requires.(Section 8(1)(a)).
52. In terms of section 8(1)(c)(ii)(aa) of PAJA the court is authorised to 'substitute or vary' the IEC's decisions or to correct a defect resulting from such a decision.

53. This Court is in as good a position as the IEC to determine the proper processing of Applicant's floor-crossing application and to determine that he remained a councillor at the time when his floor-crossing notification was submitted.

10% REQUIREMENT

54. In terms of item 2(1) of schedule 6B to the Constitution of the Republic, a councillor may only cross the floor if he, together with one or more other councillors who, during the floor-crossing period ceased to be members of the original party, represent not less than 10% of the total number of seats held by the original party in that Council.

55. The Applicant was one of two councillors representing the ID in the Council. He constituted 50% of the ID's representation by himself. He accordingly does not fall foul of the 10% requirement.

THE REGISTRATION OF THE EF

56. It has been established that the Eden Forum, the party to which Applicant crossed, was properly constituted and registered by the IEC.

ORDER

57. I accordingly find that Applicant is entitled to the relief he seeks and an order is granted as follows:

1. The decision of and action taken by Second Respondent, (the Municipal Manager) on or about 17 September 2007, to report to Third Respondent, (the IEC) that the Applicant had vacated his seat on the Council of the Eden District Municipality (the Municipality) is corrected and set aside;
2. The decision of and action taken by Third Respondent (the IEC), taken on or about 20 September 2007, to declare as 'non-compliant' a floor-crossing notification which the Applicant had transmitted to it on 14 September 2007, in terms of which he gave notice that he had changed membership from the First Respondent (the ID) and joined the Eden Forum (the EF) is corrected and set aside and it is found that the notification was duly and properly filed in accordance with all the requirements of item 4(2) read with item 2 of schedule 6B to the Constitution of the Republic of South Africa, 1996;

3. The decision of the IEC taken on or about 21 September 2007 to declare the seat held by the Applicant on the Municipality's Council to be vacant, is set aside;
4. The decision of the IEC taken on or about 21 September 2007 to fill the seat held by the Applicant on the Municipality's Council, with Fourth Respondent is set aside;
5. It is ordered that Applicant validly became a member of the EF on 14 September 2007 and holds his seat on the Municipality Council on behalf of the EF;
6. The IEC is requested and directed to process and give effect to the Applicant's floor-crossing notification, referred to in par 2 above and to take all steps necessary, including publication in a Government Gazette, to recognise the Applicant as a councillor on the Municipality's Council of the Eden District Municipality, holding a seat on behalf of the EF;
7. Applicant shall be entitled to be reinstated in his seat on the Municipality Council from the date of this Court's order. Applicant's reinstatement will not affect the validity of past decisions of the Council;

8. The costs of the Application shall be paid by First Respondent.



Elize Steyn AJ