REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

APPEAL NO. AR 392/2009

In the matter between:

ANC UMVOTI COUNCIL CAUCUS	**First Appellant**
PHILANI GODFREY MAVUNDLA	**Second Appellant**
ZWELINGANI TITUS NGUBANE	**Third Appellant**
JEFFREY NGOBESE	**Fourth Appellant**
SIBONGISENI A. NZAMA	**Fifth Appellant**
BHEKUMUZI O. VILAKAZI	**Sixth Appellant**
DINGAAN P. ZONDI	**Seventh Appellant**
PAMELA T. ZUMA	**Eighth Appellant**
AHMED SHAIKH	**Ninth Appellant**

and

UMVOTI MUNICIPALITY **Respondent**

JUDGMENT

GORVEN J

[1] The respondent launched an application seeking a rule *nisi* with interim relief on an urgent basis. It arose out of conduct which purported to be resolutions taken by the municipal council ("the council") of the respondent. The respondent contended that these resolutions were not taken by the council because, at the time they were taken, the council was not properly constituted.

[2] A rule *nisi* was issued in the following terms:

> A rule *nisi* do hereby issue calling upon the Respondents to show cause, if any, at 09h30 on the 7th day of May 2008 why an order should not be made in the following terms:
>
> (i) The gathering of councillors of the Applicant which continued to sit and purported to act as a municipal council after the Speaker had left the meeting of the council on 24 April 2008 and until his return to the council chamber was not the council of the said municipality and its resolutions have no force and effect.
>
> (ii) The purported removal by the said councillors of Alderman Ngubane as mayor and the appointment of T.Z. Ngubane in his stead is void and of no force and effect.
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> (iii) Alderman P.M. Ngubane is the mayor of the municipality.
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> (iv) The Applicant is ordered to pay the costs of this application, provided that, in the event of any person opposing the granting of this order, then an order will be made that such person or persons pay the costs occasioned by such opposition, jointly and severally, the one paying the other to be absolved.

[3] In addition to the first appellant all councillors other than the speaker ("the speaker"), who deposed to the founding affidavit, were cited as respondents. The second to ninth appellants are those councillors who opposed the application.

[4] The rule *nisi* was subsequently confirmed by Gyanda J. In addition to the confirmation of the rule, the second to ninth appellants were ordered to pay the costs of the application jointly and

severally, the one paying the others to be absolved.

[5] Leave was granted by the court *a quo* to appeal to this court in relation to the authority of the municipal manager to bring the application and in relation to the question of costs.

[6] The first aspect, therefore, is the finding that the respondent proved on the papers that the acting municipal manager ("the manager") had authority to bring the application on behalf of the respondent.

[7] The factual basis of this first aspect arose as follows:

a) The speaker averred in the founding affidavit that he was authorised by the municipal manager to depose to that affidavit on behalf of the respondent.

b) In the answering affidavit, the appellants made a number of averments. They averred that the speaker had no authority to bring the application proceedings on behalf of the respondent. They continued that the municipal manager was not authorised to delegate his powers to the speaker. This was followed by an averment that the power to institute legal proceedings in the name of the respondent rested with the council. They concluded by averring that although the speaker claimed to derive his authority from the manager, no confirmatory affidavit from the manager had been annexed and that the manager "is not authorised to delegate any of his powers to the Speaker … for purposes of instituting these proceedings. Any such delegation would necessarily have to be in writing. No such letter has been attached to the Applicant's founding affidavit." There was an assertion that the council was the only body which had the power to initiate litigation. The challenge was not formulated specifically as one

to the authority of the municipal manager but it seems to have been dealt with on this basis.

c) This attack prompted a reply. In it the speaker asserted that he had been verbally authorised by the then manager on 25 April 2008. The manager had been unable to depose to an affidavit since he had to go to Queenstown but had since deposed to an affidavit, which was annexed. In addition, the manager employed at the time of the replying affidavit put up an affidavit ratifying the speaker's actions prior to that date and authorising him to continue. An assertion was also made that the manager had had powers delegated to him by the council of the respondent which included the power to represent the respondent in court proceedings. In support of this delegation, an excerpt from the delegation of powers section of the Standard Operating Manual of the Department of Traditional and Local Government Affairs was put up. A further assertion was made that the respondent, as part of its obligations to develop a supply chain management policy and to delegate powers, had delegated to the manager *inter alia* the power to appoint lawyers.

[8] It is clear that, where authority is challenged in the answering affidavit, it is permissible to make out a case in reply[1]. It is further clear that, even if the authority was not in place when the litigation commenced, actions taken can be ratified subsequently. This was fully dealt with in *Smith v KwaNonqubela Town Council**[2]*** where the following was stated:

> It was further argued that, after an objection has been taken to the authority of a person to act on behalf of another, reliance may not be placed upon a ratification that did not exist when the objection was taken. …Lest there be any future doubt about the matter, this judgment holds that the point is bad ….

[9] This does not, of course, resolve the matter. It only goes so far as to show that, if the manager

had the relevant power, he had ratified the actions of the speaker in writing by virtue of the supporting affidavits annexed to the replying affidavit. Mr Gajoo SC who, together with Mr Kuboni, appeared for the appellants, submitted in closely reasoned heads of argument that the speaker failed to prove on the papers that the manager was duly authorised by the respondent to launch the application on its behalf.

[10] Mr Gajoo analysed the relevant legislation and submitted that no legislation directly authorised the speaker or the manager of a municipality to act as agent of a municipality in launching an application in court. I agree with this analysis. He submitted that, since s151 (2) of the Constitution of the Republic of South Africa, 1996, vests the executive and legislative authority of a municipality in its Municipal Council, it was necessary for the council to have delegated the power to institute legal proceedings. Such a delegation must be in writing. Absent any such delegation, a council resolution was required to empower an official to institute court proceedings on its behalf. These submissions are sound. Mr Seggie made the broad submission that a conspectus of the relevant legislation such as s82 of the Local Government: Municipal Structures Act, No. 117 of 1998, s55 of the Local Government: Municipal Systems Act, No. 32 of 2000 and ss 60, 61 and 62 of the Local Government: Municipal Finance Management Act, No 56 of 2003 shows that the legislature has given municipal managers extensive powers. This may be so, but his submission does not go so far as to contend that these powers include the power to litigate on behalf of the municipalities by which they are employed. Neither can I find any such power in the legislation referred to. In addition, the extract from the Standard Operating Manual relied upon by Mr Seggie does not in terms imbue them with such power. All it does is to repeat powers already conferred on managers by virtue of s55 of the Local Government: Municipal Systems Act, No 32 of 2000.

[11] Mr Gajoo submitted further that, when the applicant in application proceedings is an artificial

person, some evidence should be placed before the court to show that the applicant had duly resolved to institute the proceedings. In this he relied on the dictum of Watermeyer J to the effect that "the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient".[3] He developed his argument by submitting that the respondent is a body corporate with perpetual succession and is capable of suing and being sued[4]. "The council therefore by a statute is made the agent of the body corporate but the council itself is not a body corporate; it consists of a number of members whose acts are determined by the majority and when they act collectively by resolution properly taken then they act as agents for the body corporate, the municipality".[5] This means that an employee such as the manager is not, without more, entitled to act as the agent of a municipality. He sought to rely on *Gcali's* case where the court held that a Town Clerk under a previous legislative dispensation was not an agent of the municipality and did not have power to litigate for and on behalf of a municipality. In that case, however, a different legislative framework governed the relationship between the Town Clerk and the municipality. No general principle can therefore be gleaned from it without reference to the ruling legislative framework governing it at the time. In addition, in *Gcali's* case, the applicant sued in his own name *nomine officio* claiming to represent the municipality. It was held that he had no *locus standi* to do so. In the present matter the municipality was cited as the applicant rather than the speaker or the manager.

[12] Mr Seggie did not press the submissions on authority contained in his heads of argument at the hearing. He contented himself in submitting, albeit faintly, that in situations such as those which confronted the manager in this matter, the manager must be accorded some basis for approaching the court on behalf of the municipality. He could give no reason for advancing such a submission nor could he cite any authority in support of it. I have been unable to find any such authority.

[13] I have grave reservations whether the court *a quo* was correct in its conclusion that a case was made out on the papers that the manager had authority to institute the proceedings. This despite the fact that certain averments in the replying affidavit relating to authority went unanswered. In such a situation the appellants could have sought leave to deliver an additional affidavit dealing with the new matter raised but did not do so[6]. In the view I take of the matter, however, it is not necessary to decide this point.

[14] The question is, rather, whether an applicant is obliged to prove, on the papers, that authority has been given to initiate litigation where the applicant is an artificial person. As mentioned above, this was held to be the position in the *Merino Ko-Operasie Beperk* case[7] and this approach has been followed over the years[8].

[15] In *Ganes & Another v Telecom Namibia Limited**[9]*** the Supreme Court of Appeal dealt with similar issues as the present ones arising from the papers in that matter. Streicher JA held:

> There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf

> of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C - J.)

[16] Rule 7(1) provides as follows:

> Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

[17] The dictum in *Ganes's* case held that the use of this rule provides the remedy to be employed by a respondent to challenge whether the initiation of litigation on the part of an artificial person has been authorised. Flemming DJP reasoned as follows in the *Eskom* case referred to:

> The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney…
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> The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.
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> As to when and how the attorney's authority should be proved, the Rule-maker made a policy

decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.[10]

[18] This underlying rationale was endorsed and expanded on by Brand JA when he dealt with a ground of appeal relating to lack of authorisation in *Unlawful Occupiers, School Site v City of Johannesburg*[11] to the following effect:

> [14] At the hearing of the appeal, counsel for the appellants conceded that she could not support this ground of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this Court in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624I - 625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court…
>
> [15] These remarks by Flemming DJP must be understood against the background that Rule 7(1) in its present form was introduced by way of an amendment only in 1987. Prior to the amendment an attorney was obliged to file a power of attorney whenever a summons was issued in an action, but not in motion proceedings. The underlying reason for the distinction, so it was said, was that in motion proceedings there is always an affidavit signed by the applicant personally or by someone whose authority appears from the papers (see eg *Ex parte De Villiers* 1973 (2) SA 396 (NC)). On the basis of this reasoning it is readily understandable why, before 1987, the challenge to authority could be directed only at the adequacy of the averments in the applicant's papers and pre-1987 decisions regarding proof of authority should be read in that light.
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> [16] However, as Flemming DJP has said, now that the new Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a

> deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised… In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides.

[19] The court *a quo* cited extracts from these judgments but did deal with the procedure to be adopted in challenging whether an application had been authorised. Mr Gajoo sought to distinguish the present matter from the above cases by relying on the observations of van Zyl J in *Cekeshe & Others v Premier, Eastern Cape & Others**[12]** where he said:

> In *South African Allied Workers' Union v De Klerk NO (supra)* it was held that the type of authority contemplated by Rule 7 is the special type of power which is given by a client to his attorney to authorise him to institute or defend legal proceedings on the client's behalf. The authority of a litigant's attorney to represent him is not a fact which needs to be challenged in pleadings or established at a trial. Rule 7 dispenses with proof thereof except only if the other party challenges the authority. On the other hand, the authority of one litigant to launch proceedings on behalf of another needs to be alleged in the pleadings.

Both *De Klerk's* and *Cekeshe's* cases involved multiple applicants whom one of the applicants claimed to represent. Those cases required confirmatory affidavits by those applicants to associate themselves with the evidence of the deponent to the founding affidavit. They are, accordingly, distinguishable on the facts from the present matter.

[20] Prior to the amendment, Rule 7(1) read as follows:

> Before summons is issued in any action at the instance of the plaintiff's attorney, the attorney shall file with the registrar a power of attorney to sue. Such power of attorney shall state generally the nature of the particular action authorized to be instituted, the nature of the relief to be claimed therein

and the names of the party to be sued.

[21] In *De Klerk's* case[13], Jansen J said the following:

> It is true that reference to an attorney was omitted from the amended subrule (1), but if regard is had to Rule 7 in its entirety, it is clear to me that, in spite of the omission of a reference to an attorney in subrule (1), the type of authority contemplated by Rule 7 means the special type of power which is given by a client to his attorney to authorise him to institute or defend legal proceedings on the client's behalf.
>
> The power of attorney contemplated by Rule 7(1) is a power to take certain formal procedural steps, namely to issue process and to sign Court documentation such as a summons or notice of motion on behalf of a litigant. It does not contemplate a general authority by one person to another to represent him in legal proceedings. There is a clear distinction to be drawn between an attorney being mandated in the form required by Rule 7 to issue formal Court process, and the general authority of one litigant to act in all respects on behalf of others.

[22] In the light of the dictum of Flemming DJP that,

> If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised,

I have doubts as to the accuracy of the distinction drawn by the learned judge in *De Klerk's* case. In addition to no longer requiring a power of attorney absent a challenge, the rule maker made at least two significant changes to the rule. Whereas before the need to provide a power of attorney was limited to actions, the amended rule applies to an "action or application". In addition, it is the authority of "anyone acting on behalf of a party" not just an attorney which, absent a challenge, is presumed to be valid. The rules relating to interpretation of statutes provide that, "[*p*]*rima facie* the deliberate change of expression must be taken to import a change of intention".[14] Rules 7(2), (3) and (4) refer

specifically to attorneys filing powers of attorney. It seems to me, therefore, that the legislature intended the authority of "anyone" who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under Rule 7(1) and not by way of the application papers. However, since this appeal deals with the authority to represent an artificial person, I refrain from further comment on the situation applying where one litigant purports to represent another in applications.

[23] In each of the *Eskom, Ganes* and *Unlawful Occupiers* cases, the courts mentioned the averments made on the papers which dealt with issues of authority. The question therefore arises whether the *dicta* from these cases referred to above are *obiter*. Mr Gajoo submitted that a respondent has an election as to whether to challenge authority to initiate proceedings on the papers or by way of Rule 7(1). If the *dicta* were *obiter* and the courts in those cases made findings on the papers, there may be some force in his submission. I will deal with each in turn and explain why I am of the opinion that the *dicta* in question are not *obiter*.

[24] In the *Eskom* case, whilst the deponent made the averment that he was authorised to make the affidavit, Flemming DJP held that, because the application was delivered under the name and signature of an attorney, there was no need to rely on proof that someone other than the attorney was also authorised. He went on to hold that authority had to be challenged on the level of whether that attorney in fact held empowerment. He made no findings concerning the averments in the affidavits relating to authority. His dealings with the manner in which to challenge authority were therefore not *obiter*.

[25] In *Ganes's* case an attorney had put up an affidavit together with the notice of motion confirming his authority to represent the respondent. The court accepted that the proceedings had been authorised. Since the appellants did not avail themselves of the procedure provided in Rule 7, no

challenge to the authority of the attorney had been made even though a challenge was made to the authority of the deponent to the founding affidavit who was not the attorney. This case therefore also held that it is the authority of an attorney which must be challenged and that this must be done in terms of Rule 7(1).

[26] In the *Unlawful Occupiers* case Brand JA, after stating that the procedure of dealing with authority on the affidavits should not be adopted, said:

> All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, be answered only in the negative.

In the context of the judgment, Brand JA, in making these comments, was demonstrating, as one of the reasons for his earlier support of the procedure of using Rule 7(1), the futility of wasting time and costs in the application when the Rule 7(1) procedure had been available. In other words, this is not a finding on the papers which renders the *dictum obiter*, it is a further example of why he supports the approach of Flemming DJP endorsed earlier. Brand JA could not have put it more plainly than to say that "a party who wishes to raise the issue of authority should *not* adopt the procedure followed by the appellants in this matter"[15]. He clearly endorsed as correct the statement by Flemming DJP that the rule-maker had made a policy decision that Rule 7(1) must be used to challenge authority. This is therefore also binding authority for the procedure. I therefore consider that this court is bound by these judgments.

[27] Even if these *dicta* are *obiter* they have strong persuasive force, given that they emanate from or are endorsed by the Supreme Court of Appeal as well as their clear and unequivocal nature. With respect, the reasoning in these cases also appears to me to accord with sound legal principle. The deponent to an affidavit is merely a witness, as was pointed out by Streicher JA in *Ganes's* case. It is

the attorney of a litigant who, by signing a notice of motion and issuing application papers, signifies that that attorney has been authorised to initiate the application on behalf of the named litigant. Whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of Rule 7 (1) since this is a procedure which safeguards the interests of both parties. It frees the applicant from having to produce proof of what may not be in issue, thus saving an inordinate waste of time and expense in "the many resolutions, delegations and substitutions still attached to applications"[16]. It protects a respondent in that, once the challenge is made in terms of Rule 7(1), no further steps may be taken by the applicant unless the attorney satisfies the court that he or she is so authorised. Of course if the challenge is to the authority of the respondent's attorney in an application, these comments apply equally but for the opposite reasons.

[28] I am therefore of the view that the position has changed since Watermeyer J set out the approach in the *Merino Ko-Operasie Beperk* case. The position now is that, absent a specific challenge by way of Rule 7(1), "the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant"[17] is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo's submission that Rule 7(1) provides only one possible procedure and that, if a respondent elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.

[29] There was no challenge in terms of Rule 7 (1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not

necessary for the applicant to prove the authority to initiate the application nor appropriate to attempt to do so on the papers. It was also not necessary for the court *a quo* to make a finding relating to authority on the affidavits delivered in the matter. Since there was no challenge in the required manner to the authority of the respondent's attorney who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority. I am therefore of the view that the appeal on this issue must fail.

[30] As regards the costs order, the primary submission by Mr Gajoo was that the relevant appellants were indemnified against such order in the light of the provisions of s28(1)(b)(i) of the Local Government: Municipal Structures Act, No. 117 of 1998 ("the Structures Act"). The submission was that the appellants concerned were protected by the provisions of this section because the resolutions which were set aside fell squarely within the ambit of this section.

[31] Subsections 28(1)(b)(i) and 28(2) read as follows:

> (1) Provincial legislation in terms of section 161 of the Constitution must provide at least-
>
> (b) that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-
>
> (i) anything that they have said in, produced before or submitted to the council or any of its committees…
>
> (2) Until provincial legislation contemplated in subsection (1) has been enacted the privileges referred to in paragraphs (a) and (b) of subsection (1) will apply to all municipal councils in the province concerned.

[32] It is not disputed that provincial legislation has not been enacted and that, in the light of s28(2), the provisions of s28(1)(b)(i) apply to the council of the respondent.

[33] The appellants relied on the case of *Swartbooi & Others v Brink & Others**[18]**. The appellants in that matter had been councillors of the third respondent municipality and had taken part in deliberations concerning, and voted in favour of, two decisions taken by the council that affected the rights of the first and second respondents who were also councillors. The High Court reviewed and set aside the resolutions and awarded costs *de bonis propriis* against the appellants. The first decision set aside was that the respondents in question should recuse themselves from council meetings pending an investigation into their conduct which had been called into question in a report tabled at the council meeting. The second was a resolution suspending the first respondent without pay for one year.

[34] The Constitutional Court held that the order requiring the appellants to pay the costs of the application amounted to liability to civil proceedings within the meaning of s28(1)(b). In that case the individual councillors were not original parties to the application which was brought against the council. In addition, it was held that the conduct which led the High Court to make the costs order against the appellants included the production of a report by the speaker, the statements made by various members in support of the resolution and their votes in favour of them. The Constitutional Court found that that conduct fell within the ambit of s28(1)(b) since these were integral to deliberations at a full council meeting and to the legitimate business of that meeting.

[35] It was submitted by the respondents in that case that the section must be interpreted to protect only conduct integral to the legislative functioning of the council as distinct from administrative or executive decision making. This submission was rejected by the Constitutional Court in the following terms:

> For the purpose of this case it is therefore sufficient to say that s 28 protection covers the conduct of members of a municipal council that constitutes participation in deliberations of the full council (as distinct from a meeting of any of its committees) in the course of the legitimate business of that council.[19]

[36] In the present matter, all of the councillors other than the speaker who deposed to the founding affidavit on behalf of the respondent, were joined in the application as respondents. This was proper since all had an interest in the outcome of the application. They were therefore liable to civil proceedings within the meaning of those words in s28 in the light of the reasoning in the *Swaartbooi* case.

[37] The question which arises in this matter, therefore, is whether the second to ninth appellants were participating in deliberations of the full council in the course of the legitimate business of that council. If so, based on the reasoning in *Swartbooi's* case, the appeal against the costs order must succeed since they would be protected by the provisions of s28(1)(b)(i). If not, the question is whether, under the common law as submitted by Mr Gajoo in the alternative, the costs aspect of the appeal should succeed. If this is also decided against the appellants, the appellants can only succeed if there are grounds to interfere on appeal with the exercise of the discretion of the court *a quo* in making the costs order. I shall deal with s28(1)(b)(i) first.

[38] Section 28(1)(b)(i) is clearly aimed at promoting free and untrammelled speech within a specific context, viz. the legitimate business of municipal councils. It is designed to enhance the proper ventilation of council business for the common good. In such a context, councillors must not fear repercussions if they should say something which might otherwise prove actionable. It extends the limited privilege of immunity afforded to parliamentarians in debate within the National Assembly to councillors within municipal councils. It was necessary that s161 of the Constitution of the Republic of

South Africa, 1996, made such provision. Prior to the new dispensation ushered in by the Constitution, municipal councils were not organs of State but operated under delegated power. They were subject to judicial scrutiny to a far greater extent than was the National Parliament. Under the present dispensation, municipal councils have original legislative powers and "[t]he deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions"[20]. In the same way that the legislative business of municipal councils is now subject to judicial scrutiny on a similar basis to that of the Provincial and National assemblies, so must there be extended protection for the councillors taking part in the work of councils. This appears to have been the underlying purpose of enacting s 28(1)(b)(i). But, also for this reason, the protection is confined to the "legitimate business of that council" whether the nature of the business is part of the legislative, executive or administrative functioning of the municipal council concerned. There is no protection in a context outside of legitimate business of the council.

[39] The resolutions which were taken in the present matter fall within the competence of a properly constituted municipal council. Can it therefore be said that the resolutions in question were part of the legitimate business of the council of the respondent? It was held by the court *a quo* in paragraph (i) of the confirmed rule *nisi* that the gathering at which the resolutions in question were adopted was not the council since it was not properly constituted at the time. This aspect of the judgment of the court *a quo* is not subject to appeal and the appellants are therefore bound by it, as is this court. This means that the appellants cannot claim to have been involved in deliberations of the council at the time since the actions complained of were not part of the business of the council of the respondent. This, of course, clearly distinguishes the present matter from that dealt with in the *Swaartbooi* case where the resolutions were taken at a properly constituted council meeting. In the present matter, the resolutions were not part of the legitimate business of the council of the respondent. Therefore, the protection

afforded to councillors by s28(1)(b)(i) does not apply to the second to ninth appellants.

[40] The question then arises whether, under the common law, the costs order should be overruled. There is a long line of cases which deal with the principles involved. These were articulated by Lord de Villiers CJ as early as 1911 in the following words:

> I am satisfied, however, that in a case like the present where the tribunal from which the appeal comes has acted in a judicial or quasi-judicial capacity, and no question is raised as to the good faith of such tribunal, or as to the legality or regularity of its proceedings, it should not, in case of an appeal to a Superior Court, be subjected to the payment of the costs of such appeal.[21]

The jurisdictional fact required to trigger this common law principle is that the person or body claiming immunity must have acted in an official capacity at the time the actions complained of were taken. Once again, in the present matter, the relevant respondents did not act, in the gathering in question, in an official capacity. Neither were the proceedings regular or legal. That much has already been dealt with. The exception governing officials acting in the course of their duties therefore does not apply in this case.

[41] Is the exercise of the discretion of the court *a quo* in making the costs order subject to attack on appeal? For this to be the case, there must have been misdirection or irregularity or the absence of grounds on which a court, acting reasonably, could have made the order.[22] In the *Swaartbooi* case the High Court issued a rule *nisi* requiring the individual councillors who had supported the impugned resolutions to show cause why they should not pay the costs *de bonis propriis**[23]*. They had no choice in the matter of opposing the confirmation of the rule *nisi* if they wanted to avoid paying costs. In the present matter all of the councillors of the municipality, other than the speaker who deposed to the founding affidavit, were joined as respondents since they were interested parties. No costs order was

sought against them unless they chose to oppose the application. The basis of seeking a costs order was not their support for the resolutions in the meeting concerned but their opposition to the application. The present appellants chose to oppose the application. I can find no better way of expressing their position than in the words of Mason J, in a context where a town council opposed the setting aside of a licence granted by it:

> With reference to the town council, they are a body who have perforce to decide matters of this kind. If they had done nothing but state that they gave their decision *bona fide*, and would submit to any order the Court might make, I should have had considerable difficulty in awarding costs against them, because they are not litigants in the ordinary sense of the word: they have no direct interest in the matter. But as a matter of fact they took upon themselves the position of an ordinary respondent, and instructed counsel to oppose the application. Having in a matter of this kind, of a civil nature, taken upon themselves the opposition, they are bound to undertake the responsibility of that position, namely, liability for costs.[24]

[42] The effect of what the second to ninth appellants say the court *a quo* should have done, viz. to make the respondent bear the costs, would be to burden the ratepayers they are elected to serve with the legal costs needlessly incurred by them. I cannot conceive how such an approach would be justified. The burdening of the appellants with costs cannot therefore be attacked on the basis of an improper exercise of the discretion of the court *a quo*.

[43] There is a problem with the order given by the court *a quo* which appears to have arisen by oversight. The order granted by Gyanda J was contained in two paragraphs. In paragraph 1 he confirmed the rule *nisi*. In paragraph 2 he ordered the second to ninth appellants to pay the costs of the application jointly and severally. The confirmation of the rule *nisi* in paragraph 1, however, resulted in the costs order in paragraph (iv) being granted. In this order all of the appellants were ordered to pay

the costs occasioned by the opposition to the application jointly and severally, the one paying the others to be absolved. Since the first appellant also opposed the application, a costs order to this effect was granted against it, along with the second to ninth appellants. However, in paragraph 2 of the order, the first appellant was excluded from the order and the costs were not limited to costs occasioned by opposition but encompassed the costs of the application as a whole. Both sets of counsel agreed that the granting of two irreconcilable costs orders should be set aside on appeal. Both likewise agreed that, since the respondent had only sought an order in terms of paragraph (iv) of the rule *nisi*, paragraph 2 of the order by Gyanda J should be set aside. However, since neither counsel dealt with the matter in their heads of argument, the success of the appellants on this aspect does not warrant any different costs order relating to the appeal.

[44] In the result:

1. The appeal is allowed in respect of paragraph 2 of the order of the court *a quo*, which paragraph is set aside.

2. The appeal against paragraph 1 of the order of the court *a quo* is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying the others to be absolved.

GORVEN J

I agree.

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SWAIN J

I agree, and it is so ordered.

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TSHABALALA JP

Date of Appeal	:	11 September 2009
Date of Judgment	:	25 September 2009
Counsel for the Appellants	:	Adv V I Gajoo SC
		Adv W S Kuboni
		Instructed by Garlicke & Bousfield Inc.
Counsel for the Respondent	:	Adv R J Seggie SC
		Instructed by Venn, Nemeth & Hart Inc.

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[1] *Moosa & Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) 180 H-J.

[2] 1999 (4) SA 947 (SCA) at para [11].

[3] In *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Beperk* 1957 (2) SA 347 (C) at 351G-352B.

[4] per Pickering J in *Gcali NO & Another v MEC for Housing & Local Government, Eastern Cape* 1996 (4) SA 456 (Tk SC) at 462F. This application was dealt with prior to the operation of the Local Government Transition Act, No. 209 of 1993.

[5] Per Watermeyer J in *De Villiers & Others v Beaufort West Municipality* 1924 CPD 501 at 504.

[6] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38J-39A.

[7] See footnote 2 supra.

[8] This has occasioned much debate over the requisite degree of proof required on this point. See eg. *Tattersall & Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228E-229A; *Cambridge Plan AG & Another v Moore & Others* 1987 (4) SA 821 (D).

[9] 2004 (3) SA 615 (SCA) at 624, para [19], per Streicher JA.

[10] At 705D-H

[11] 2005 (4) SA 199 (SCA) at 206, paras [14]-[16]

[12] 1998 (4) SA 935 (Tk) at 950I-951D

[13] 1990 (3) SA 425 (E) at 436F-H

[14] Per Tindall JA in *Barrett NO v Macquet* 1947 (2) SA 1001 (A) at 1012.

[15] My emphasis.

[16] *Eskom* case at 705H.

[17] per Watermeyer J in *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Beperk* 1957 (2) SA 347 (C) at 351G-352B.

[18] 2006 (1) SA 203 (CC)

[19] Para [18], page 211

[20] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) at 394f, para [41]. This addresses the situation under the Interim Constitution but the rationale applies equally to the functioning of municipal councils under the Constitution. See also *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at 350, para 60.

[21] *Klipriver Licensing Board v Ebrahim* 1911 AD 458 at 462

[22] *Rondalia Assurance Corporation of SA Ltd v Page & Others* 1975 (1) SA 708 (A) 720C-D

[23] At p 209 D-E

[24] *Alexander & Others v Boksburg Municipality & Jones* 1908 TS 413 at 419