CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/02

GABRIEL NTLELI SWARTBOOI
AND SEVENTEEN OTHERS — Appellants

versus

LILIAN RAY BRINK — First Respondent

GERRIT NIEWOUDT — Second Respondent

NALA LOCAL MUNICIPALITY — Third Respondent

Heard on : 26 February 2003

Decided on : 3 April 2003

JUDGMENT

YACOOB J:

Introduction

[1] The appellants are elected councillors of the council of the Nala Local Municipality (the council), the third respondent. They took part in deliberations in relation to and voted in favour of two decisions that affected the rights of the first and second respondents (the respondents). The respondents, also members of the council, applied to the Free State High Court (the High Court) for orders against the council setting aside those decisions and directing the council to pay the costs on the scale as between attorney and client. The High Court set aside both decisions and concluded

that a special costs order was warranted. It took the view that it was fair in the circumstances for the members of the council to be called upon to pay the costs personally and issued a rule *nisi* (the rule) calling upon the appellants and other members of the council who supported the decisions that had been set aside to show cause why they should not be ordered to pay the costs of the proceedings on the scale as between attorney and own client. The High Court was not persuaded by the appellants' showing on the return day and ordered them to pay the costs of the application on the scale as between attorney and own client *de bonis propriis*.

[2] Having been refused leave to appeal by the Supreme Court of Appeal, the appellants applied for leave to appeal to this Court but only on the issue of the costs order against them. The council was not a party to the application. After hearing argument on the application this Court granted leave to appeal, joined the council as a party to the proceedings and gave the South African Local Government Association (SALGA) as well as all members of provincial executive councils and the national minister responsible for local government an opportunity to submit argument in the appeal.[1] Consequently, the member of the executive council responsible for local government in Gauteng filed written argument, while written and oral arguments were presented on behalf of the national minister for provincial and local government, SALGA and the council. This Court is particularly grateful to SALGA and to the

[1] *Swartbooi and Others v Brink and Another* 2003 (1) BCLR 21 (CC) delivered on 21/11/2002. The judgment containing reasons for granting leave to appeal will be handed down simultaneously with this judgment.

national and provincial governments that were not parties to the appeal for their helpful argument.

[3] The issues to be addressed in argument were defined in directions of this Court as follows:

> "a) Whether the determination of the circumstances (if any) in which it is appropriate for members of a municipal council to be ordered to pay, de bonis propriis, the costs of court proceedings concerning the validity of decisions of a municipal council is a matter within the jurisdiction of the Constitutional Court; and if it is,
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> b) i) The circumstances in which it is appropriate for members of a municipal council to be ordered to make payment of such costs; and
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> ii) Whether, in the circumstances of this case, the applicants ought to have been ordered by the High Court to pay the costs of the proceedings before it de bonis propriis."

This Court has held that the issues that have to be considered in this appeal raise a constitutional matter.[2] Accordingly the issues defined in b) i) and b) ii) of the directions remain for determination.

Summary of council decisions and their context

[4] The first of the two decisions set aside by the High Court was taken on 19 April 2001. It was made on the basis of a report produced by the speaker and immediately after deliberations within the council about the circumstances in which a claim made

[2] Judgment containing reasons for granting leave at paras 7-8.

by an agricultural society against the council's predecessor, the Bothaville Town Council had been settled and paid. This had been done shortly before the municipal council elections in November 1995 when the municipal structures in Bothaville were in the transitional phase and when the respondents were members of the Bothaville Town Council and the first respondent, its mayor. Concerns were expressed about the propriety of the transaction reflected by the settlement agreement signed by the first respondent. Without giving the respondents an opportunity to speak, the council decided in substance that the first and second respondents ought to "recuse" themselves from all council meetings and desist from communicating with council officials pending the matter being investigated by the South African Police Services, the Auditor-General and the Public Protector.

[5] Before identifying the second decision, it must be mentioned that on the next day, 20 April 2001, the mayor made a statement. That statement was incorrect in at least two respects. Firstly, it stated that a report presented to the meeting of 19 April 2001 (there is no doubt that this is a reference to the report concerning the settlement mentioned in the previous paragraph) "indicated clearly that there was a looting and stealing of the Municipal monies amounting to half a million in 1995". In truth, the report had done no more than point to certain circumstances which called for further investigation regarding the propriety of the transaction. Secondly, the statement was to the effect that the report established the complicity of the respondents in the act of stealing this money. The report had established nothing of the kind.

[6] The second council decision in issue in the High Court was that of 24 April 2001, which suspended the first respondent without pay for one year. The reason given for this suspension was that she had sued the council for a sum of money that had been admittedly due to her for a long time. For reasons that are not clear from the papers, the majority of the members of the council formed the view that the court proceedings ought not to have been instituted by the first respondent because she was a member of the council and that this conduct had resulted in a breach of the council's code of conduct. As a result of the decision of 19 April 2001, the first respondent was not present at the meeting of 24 April. This decision was set aside because the first respondent was not given a hearing and because the municipal council had no power to effect a suspension without the approval of the provincial member of the executive committee responsible for local government in the Free State.

The applicability of section 28

[7] The appellants' main submission was that section 161 of the Constitution and section 28 of the Local Government: Municipal Structures Act No 117 of 1998 (section 28) were central to a decision about the circumstances in which members of the council should be liable personally for the payment of costs of court proceedings. The respondents did not expressly dispute this proposition but suggested that the liability of members of the council should be determined according to our common law rules regarding costs. Those common law rules, generally speaking, render an order for costs *de bonis propriis* by a person acting in a representative capacity

appropriate if their actions are motivated by malice or amount to improper conduct.[3] However, the respondents could not refer us to any case which held a municipal councillor liable for such costs.

[8] Section 161 is in chapter 7 of the Constitution. That chapter is concerned exclusively with local government. The section paves the way for privileges and immunities of municipal councils and their members to be provided for and reads:

> "161. Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members."

The privilege of members of the national assembly,[4] the national council of provinces,[5] as well as all provincial legislatures[6] are provided for differently from those of municipal council members. In their case, the basic privileges and immunities are set out in the Constitution and the national legislature may extend them.

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[3] *Regional Magistrate v Du Preez Walker* 1976 (4) SA 849 (A) at 853D and 855F; *Cooper v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA) at para 37; *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 44I/J-45A/B.

[4] Section 58(1) and (2) read:

"58. (1) Cabinet members, Deputy Ministers and members of the National Assembly—

(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and

(b) 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 Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation."

[5] Section 71, which is in terms similar to section 58, n 4 above.

[6] Section 117, which is in terms similar to section 58, n 4 above.

[9] Section 28 was enacted to give effect to section 161 of the Constitution and provides:

> "28 (1) Provincial legislation in terms of section 161 of the Constitution must provide at least—
>
> (a) that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as envisaged in section 160 (6) of the Constitution; and
>
> (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; or
>
> (ii) anything revealed as a result of 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."

Subsection (2) makes paragraphs (a) and (b) of subsection (1) applicable to a province that has not yet passed legislation envisaged by section 161 of the Constitution. The appropriate legislation in the Free State had not yet come into effect when the two resolutions under attack were adopted.[7] Section 28(1) was therefore operative in the Free State at the time.

[10] There are two separate issues that arise in relation to the interpretation of section 28(1)(b). The first relates to the scope of the liability that qualifies for immunity. Councillors are exempted from liability to civil or criminal proceedings,

[7] Free State Privileges and Immunities of Municipal Councillors Act No. 2 of 2002 was published and came into effect on 2 August 2002.

arrest, imprisonment or damages. They are not protected from liability that falls into any other category. The second relates to the nature of the protected conduct as well as the place, occasion or proceedings at which the conduct must occur if it is to be protected. Protected conduct is that described in sub-paragraph (b)(i) or anything revealed as a result of that conduct. The conduct is limited to anything that councillors have said, produced, or submitted. The conduct must bear a relationship to the council: statements must be made to the council; things must be produced before the council; submissions must be made to the council.

[11] This case has nothing to do with criminal proceedings, arrest, imprisonment or damages. It is, however, necessary to consider whether the liability of councillors in this case is liability to civil proceedings. The case brought by the respondents against the council in the High Court for the review of decisions of the council constitutes civil proceedings. The High Court order required the appellants and other members of the council who had supported the decisions that had been set aside to show cause why they should not pay the costs of those proceedings. This is part of civil proceedings. The rule made these members of the council parties to civil proceedings. No order for costs could have been made against the appellants unless they had been parties to civil proceedings at the time the order had been made. The order that the appellants should pay the costs of civil proceedings in which the respondents and the council had been parties rendered the appellants liable to civil proceedings within the meaning of section 28(1)(b).

[12] In making its costs order, the High Court relied on the conduct of the appellants in supporting the council resolutions that had been set aside. That conduct was 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. This conduct falls within the purview of section 28(1)(b). The words "said in", "produced before" and "submitted to" the council taken together are wide enough to cover all the conduct in the council that is integral to deliberations at a full council meeting and to the legitimate business of that meeting. The High Court also relied on the statement by the mayor outside the council a day after a meeting at which the first of the disputed resolutions had been taken. I will assume that that statement is not protected by section 28. I consider the effect of the statement later.

[13] The respondents submitted that the section must, in the context of our legislative history, be interpreted to protect only conduct integral to the legislative functioning of the council, not its administrative or executive decision-making. It is true that the history of absolute privilege with which we are concerned shows that parliamentary privilege came to South Africa from England and, as the term itself indicates, applied only to the legislature in the pre-constitutional era.[8] However, our Constitution is now the supreme law. It is true that the historical context has some relevance to the process of determining the ambit of privileges and immunities in our present constitutional and legislative order. I stress, however, that whether privileges and immunities are available in South Africa today, only to members of legislative

[8] *Poovalingam v Rajbansi* 1992 (1) SA 283 (A) at 289D – 291G; Section 75 of the Republic of South Africa Constitution, Act No 32 of 1961.

organs in the performance of their legislative functions, must be determined by reference to our Constitution and to section 28.

[14] The privileges and immunities accorded to national and provincial legislative structures by sections 58,[9] 71 and 117 of the Constitution are not accorded to provincial or national executives. Nevertheless, section 161 of the Constitution[10] empowers provincial legislation within the framework of national legislation to provide for privileges and immunities of municipal councils and their members without specifying the nature of the function for which privileges and immunities may be accorded. This despite the fact that the municipal council is vested with both the executive and legislative authority of the municipality.[11]

[15] The scope of section 161 is not limited to legislative function alone. The primary function of a municipality is to exercise administrative authority and to administer certain local government matters.[12] The by-law making power or legislative power is expressly granted for the sole purpose of the effective administration of those matters that a municipality has the right to administer.[13] Primary legislative power in respect of the functional area of local government is

[9] Above n 4.

[10] Above para 8.

[11] Section 151(2) provides:

> "(2) The executive and legislative authority of a municipality is vested in its Municipal Council."

[12] Section 156(1) of the Constitution.

[13] Section 156(2) of the Constitution.

located concurrently in the national or provincial legislative sphere for some functions[14] or exclusively in the provincial sphere for others.[15]

[16] The words of section 161 are clear. There is nothing in the other constitutional provisions which justifies a limited reading of this provision. The provisions of the Constitution must prevail. The fact that absolute privilege applied only to legislatures and only in respect of their legislative functions before the Constitution took effect is not in itself sufficient reason to limit the protection of section 28 to members engaged in the legislative functioning of the council. Section 28 likewise affords protection to a councillor without reference to the nature of the function. The precise delineation of a particular function of a council as being legislative, executive or administrative is not determinative of the bounds of protection afforded by the legislation in the context of the Constitution. The words of section 28 are certainly wide enough to exempt members of a municipal council from liability for their participation in deliberations of the full council.

[17] Section 28 exempts councillors from liability in relation to the council and its committees. The statutory provision may in this respect be of wider scope than the empowering provision of section 161 of the Constitution which does not refer to the committees of a council. It is unnecessary to go into the question as to whether it was the purpose of the legislature to afford protection for everything done or said by any

[14] Part B of Schedule 4.

[15] Part B of Schedule 5.

member of a council in any of its committees irrespective of the function or purpose of that committee. The function or purpose of a committee might well be relevant to the question whether a municipal councillor is exempted from liability for conduct which amounts to participation in the affairs of the committee of a municipal council in a particular case. In this case we are concerned with participation in the full council and need not consider participation in committee meetings.

[18] For the purpose of this case it is therefore sufficient to say that section 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. It does not matter whether the resolution ultimately adopted by the full council after its deliberations can properly be classified as an administrative or an executive decision or a legislative act. It is therefore unnecessary to decide in which category the resolutions in issue in this case belong.

[19] It was also submitted on behalf of the respondents that section 28 protection should not apply to the conduct of members of a municipal council in support of resolutions subsequently set aside. The basis of the submission was that all unlawful acts of a municipal council are contrary to the Constitution[16] and that neither the Constitution nor section 28 could have contemplated protection for conduct of members of a municipal council in support of an unconstitutional decision.

[16] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 54-59.

[20] This submission is wrong. If it were correct, the protection would not be afforded for conduct of any councillor in support of a decision which had been set aside for any reason whatsoever. It would not then matter whether the member of the council knew that the resolution that was being supported would be or was inconsistent with the Constitution. A member of the municipal council would be liable even if she had no knowledge of the unconstitutionality of the resolution. On this interpretation, the section would protect only that conduct of members of the municipal council in support of lawful resolutions. There is no warrant for reading this limitation into the wide wording of the section. If the section were to protect only that conduct in support of lawful resolutions of a council, the protection would, in my view, be too limited to fulfil the purpose of the protection. That purpose is to encourage vigorous and open debate in the process of decision-making. This is fundamental to democracy. Any curtailment of that debate would compromise democracy. The protection is not limited to conduct in support of lawful resolutions.

[21] The appellants contended that section 28(2) prohibited any conduct referred to in that section being used as evidence in a court for any purpose whatsoever in any proceedings aimed at determining the civil or criminal liability of members for conduct inside or outside the council. They relied for this proposition on the *Church of Scientology* case in England[17] which was to the effect that evidence of what is said in parliament was not admissible as evidence even for the purpose of determining the

[17] *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER QBD 378 at 381 C/D and 382 C/D.

lawfulness of conduct outside parliament. This case has nothing to do with civil liability for conduct outside the council (except for the mayor's statement which is considered later) and therefore that issue does not arise. I assume in favour of the respondents that evidence of conduct in the proceedings of the full council is admissible for the purpose of deciding whether the conduct falls within the bounds of section 28 protected conduct, or to prove the requirements of civil liability for conduct within the council that is not protected by section 28.

[22] Interesting hypothetical questions were raised during argument concerning the outer limits of this protection. For example, whether members of a council would be protected from criminal liability if they admitted in the course of legitimate council proceedings that they had committed a serious criminal offence, or whether councillors would attract personal liability if they utilise the processes of the council for a party political or some other ulterior purpose. None of these issues arises in this case. There may be conduct that is so at odds with the values mandated by our Constitution that neither the Constitution nor the national legislature could conceivably have contemplated its protection. It is unnecessary to decide this issue here. The question is whether the nature of the conduct in this case is protected.

[23] The High Court did not consider section 28 at all but appears to have applied the common law rules in determining that the appellants should be liable for costs. It relied on what it considered to be the incompetent, malicious, and to a degree racist conduct of the members of the council in supporting the decisions that had been set

aside and on the impropriety of the decisions themselves. Most of the criticisms of the conduct of the councillors and the quality of the decisions that had been set aside were justified. However, had section 28 been applied, the correct conclusion would have been that these criticisms, as serious as they may be, did not serve to deprive the appellants of the benefits of the immunity they enjoyed under that section. The failure to apply section 28 constitutes a material misdirection. This Court is accordingly at large to consider the issue of costs.[18]

[24] The High Court also relied on the statement of the mayor. It was made on 20 April 2001 after and outside a meeting of the full council. It can be assumed in favour of the respondents that the statement does not constitute a document deserving of section 28 protection. Although the inaccuracy and excess of the statement does not reflect well on the integrity of the mayor's office, it was made after the meeting and did not contribute in any way to any of the decisions that were set aside. The statement does not constitute a reason for an order that he should pay the costs of the application to set aside the decisions of the council.

[25] The High Court was also motivated by the perception that the costs order against the appellants might serve to ensure that members of the council would consider their decisions more carefully in the future. This reasoning evinces an intention to teach municipal councillors a lesson. It says to them: "You must be

[18] *Ward v Sulzer* 1973 (3) SA 701 (A) at 707A; *Rondalia Assurance Corporation of SA Ltd v Page and Others* 1975 (1) SA 708 (A) at 720C/D; *Blou v Lampert and Chipkin, NNO, and Others* 1973 (1) SA 1 (A) at 15E-G; *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-F; *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 53-54.

punished appropriately for your wrongdoing so that you may learn a lesson and not do it again." This is an improper approach and reflects an improper purpose. It trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the legislative and executive branch of government. Courts have the power to set aside executive and legislative decisions that are inconsistent with the Constitution. They cannot attempt, by their orders to punish municipal councillors and, in so doing, influence what members of these bodies might or might not do. This motive of the High Court constitutes a dangerous intrusion into the legislative and executive domain.

[26] There is accordingly no legal basis to saddle any of the appellants with civil liability. The order that the appellants should pay the costs must be set aside. This involves the setting aside of the rule *nisi* contained in paragraph 2 of the High Court order dated 10 December 2001.

The appropriate costs order

[27] The order for costs having been set aside, the council must be ordered to pay the costs of the High Court proceedings. The respondents had asked for costs on the scale as between attorney and client. In the leading case concerning attorney and client costs Tindall JA said:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure

> more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."[19]

In essence this Court must try to achieve fairness to both sides.[20] The papers show considerable ineptness on the part of the third respondent. The reasons that motivated the decisions that were set aside were far from clear. In any event, the decisions were so obviously unfairly taken that their invalidity ought to have been conceded. The respondents ought not to have been put to the inconvenience and expense occasioned by the effort to justify decisions that were untenable. To make matters worse, it was contended by the council before the High Court that the respondents ought to pay the costs occasioned there on the scale as between attorney and client. This is a case in which the respondents should be reimbursed for their litigation expenses so that they will be less out of pocket than they would be if party and party costs were awarded. I accordingly conclude that it is fair that the council be ordered to pay the respondents costs in the High Court on the scale as between attorney and client.

[28] The respondents were entitled to be represented in this Court to ensure that their interests were protected. This is because it would not necessarily have followed that, if the council had been ordered to pay the costs in consequence of the High Court order having been set aside, the respondents would have been awarded costs on the scale as between attorney and own client. The council in its written argument persisted in contending for the correctness of the decisions that had been set aside by

[19] *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.

[20] *Ward v Sulzer* above n 18 at 706G

the High Court. The council should be ordered to pay the respondents' costs of the proceedings in this Court. The appellants are entitled to their costs in the appeal. The difficult question is, however, whether these costs should be paid by the respondents or the council. On the one hand the respondents were the only parties to the appeal that unsuccessfully supported the judgment of the High Court and vigorously disputed the appellants' contention that the council should bear the costs of the High Court case. On this basis, they might be ordered to pay all the appellants' costs. On the other hand, as I have already mentioned, the respondents have suffered much as a result of the decisions of the council and their aftermath. It will be unfair if they are ordered to pay all the appellants' costs. The council should pay some of them. It is accordingly just that the respondents and the council pay one half of the appellants' costs respectively. The national minister of provincial and local government, SALGA, and the member of the executive council responsible for local government in Gauteng staked no claim for costs against any party and no order need be made in relation to their costs.

The Order

[29] It is ordered:

1. The appeal is allowed.
2. The first and second respondents are ordered to pay half of the appellants' costs.
3. The third respondent is ordered to pay half of the appellants' costs.

4. Paragraph 2 of the order made by the High Court on 10 December 2001 is set aside and replaced by the following order:

   Die tweede respondent word gelas om die koste van hierdie aansoek te betaal op die skaal soos tussen prokureur en klient.

5. The third respondent is ordered to pay the first and second respondents' costs in this Court.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J and O'Regan J concur in the judgment of Yacoob J.

For the applicants:	D. Marais instructed by Ramsurjoo & Du Plessis Inc, Johannesburg.
For the first and second respondents:	J.C. Heunis SC instructed by Symington & De Kok, Johannesburg.
For the third respondent:	P. Pauw SC and P.M. Mtshaulana instructed by Brink Roux Attorneys, Wesselsbron.
For the South African Local Government Association and Minister for Provincial and Local Government:	Vincent Maleka SC and Malebo Habedi instructed by Maserumule Attorneys, Johannesburg.