Case No

385/95 THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

NADASEN MAYAPPEN MOODLEY Appellant

and

THE TOWN BOARD OF THE TOWN COUNCIL OF UMZINTO NORTH Respondent

Coram: Mahomed CJ, Hefer, FH Grosskopf, Marais, Olivier JJA

Date of hearing: 13 May 1997

Delivered: 18 November 1997

JUDGMENT

MAHOMED CJ:

The appellant, who was at all material times the duly appointed Town Treasurer of the respondent Town Board, was the defendant in an action instituted by the | respondent in the court a quo, for the payment of damages sustained by the respondent in consequence of the act of the appellant in making a certain investment on behalf of the respondent.

It is common cause that the respondent had, on 31 January 1985, passed a resolution (subsequently approved by the then Administrator of Natal) in terms of which it delegated to the appellant certain powers to make investments on behalf of the respondent. This power was, however, not unqualified. It was limited to the power:

> "To invest monies of the Board, to best advantage, in accordance with the requirements of Sections 103(3)(d), 103(5), 103(9)(c), 125 and 145(4) read with Section 285 of Ordinance No. 25 of 1974 (Natal), provided that a monthly report of investments made, transferred and withdrawn shall be submitted to the Finance and General Purposes Committee."

On or about 7 August 1992 the defendant, purporting to act under such delegated authority, invested an amount of R 300 000, 00 of the funds of the respondent in a company called Supreme Holdings Ltd ("Supreme"). Supreme was subsequently placed in liquidation, resulting in damages to the respondent, which it sought to claim from the appellant. That claim was upheld by Magid J in the court a quo. It is contended on behalf of the appellant that this order was wrongly made.

The appellant did not timeously lodge with the Registrar copies of the record of the proceedings in the court a quo within the time stipulated by Rule 5(4) of the rules of this court. Rule 5(4) reads as follows:

> "(4) After an appeal has been noted in a civil case the appellant shall -
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> (a)... (b)...
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> (c) in all other cases within three months of the date of the judgment or order appealed against or an order granting leave to appeal;
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> (d) within such further period as may be agreed to in writing by the respondent

lodge with the Registrar six copies of the record of the proceedings in the Court appealed from and deliver such number of copies to the respondent as may be considered necessary: provided that...."

Judgment in this matter was handed down by the court a quo on 31 May 1995 and the order granting leave to appeal was granted on 21 July 1995. Therefore in terms of rule 5(4)(c) the record of the proceedings in the court a quo was required to be lodged with the Registrar and delivered to the respondent on or before 21 October 1995. The record was only lodged on 6 March 1996, approximately 4 months later than it should have been.

The appellant attempted to lodge the record of the proceedings with the Registrar of this court on 23 October 1995. In terms of Rule 6(2) the Registrar could, however, not accept such lodgement unless the appellant had before such lodgement entered into good and sufficient security for the respondent's costs of appeal, or unless the respondent had waived its right to such security. The difficulty which the appellant experienced in filing such security arose from the fact that all his assets had been attached at the instance of the respondent and he could not, therefore, raise the necessary funds timeously; nor could agreement be reached between the attorneys for the parties on the form of the security which was required or the amount thereof. Upon receiving the message that the attempt to

lodge the record on 23 October had been unsuccessful, the appellant's attorneys sought to obtain from the attorneys for the respondent a waiver of the respondent's right to security or, in the alternative, an extension of the period during which such security could be lodged. These attempts failed, but on 2 November 1995, within approximately a week after the date on which the record was required to be lodged, the appellant's attorneys wrote to the respondent's attorneys offering to provide security to the value of R25 000 in the form of a bank guarantee. No response was received to this letter or to a further letter from the appellant's attorneys dated 6 November 1995. On 9 November 1995 the appellant's attorneys called the attorneys for the respondent to resolve the difficulty. There was still no agreement on the amount of the security which was required and the appellant's attorneys therefore approached the Registrar of the court a quo to determine such amount.

The dispute was eventually resolved on 28 November 1995 when it was agreed between the parties and the Registrar of the court a quo that security should be furnished in the amount of R25 000 in the form of a bank guarantee. On 29 November 1995 the appellant's attorneys wrote a letter to the respondent's attorneys requesting them to formulate the required wording and the format of the security. This was received on 13 December 1995. It is alleged by the appellant's

attorneys that no further steps could be taken in the matter because of the intervention of the holiday period over Christmas and New Year. There was thereafter a further delay caused by two factors. The first was a letter from the Registrar of this court on 8 January 1996 advising the appellant's attorneys that the appeal had lapsed, followed by a another letter dated 23 January 1996 stating that the previous letter had been erroneous. The second factor was the appellant's belief that the entire dispute was going to be settled because some councillors in the respondent board were supportive of the appellant. When nothing positive transpired, however, both the record and the required security were formally lodged on 6 March 1996.

In the result the record was lodged some four months after the date on which it was required to be lodged in terms of Rule 5(4). The explanation for part of this delay is not very persuasive, but what is clear is that the appellant was determined to pursue the appeal which had serious consequences for him. In my view the degree of non-compliance is, in the circumstances of this case, not so substantial as to itself justify a refusal of the application for condonation for the appellant's failure to file the record of the proceedings timeously (Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362 G; National Union of Metalworkers of South Africa v Jumbo Products

CC 1996

(4) SA 735 (A) at 741 E-I). The decisive issue is whether the appeal has any prospects of success on the merits.

It was common cause between the parties in the proceedings before Magid J that the investment which the appellant made with Supreme was not an investment falling within any of the categories of investments contemplated by any of the sections of Ordinance 25 of 1974 ("the Ordinance") referred to in the resolution

adopted by the respondent on 31 January 1985. It was nevertheless contended that the respondent was precluded from claiming from the appellant the damages which it had sustained in consequence of this investment, by virtue of the provisions of section 99 of the Ordinance which read as follows:

> "No matter or thing done or omitted and no contract entered into by the council, and no matter or thing done or omitted by any councillor or officer or servant of the council or other person acting under the direction of the council shall, if the matter or thing were done or omitted or the contract was entered into in the scope of his or its authority for any of the purposes of this Ordinance or of any bylaw in force in the borough, irrespective of any alleged neglect or default, but excluding wilfulness, subject any such person personally to any action, liability, claim or demand whatsoever; and any expense incurred by the council or any such person as aforesaid shall be paid by the council out

of its revenues; provided that nothing in this section shall exempt any such councillor, officer, or servant or other person aforesaid from liability to be surcharged with the amount of any payment which may be disallowed by the auditor in the accounts of the

council."

The court a quo held that the appellant had failed to establish that he was relieved from liability by section 99. Counsel for the appellant contended that the court a quo had erred in coming to that conclusion.

It was common cause at the hearing that section 99 of the Ordinance could be of no assistance to the appellant if, in making the investment which he did, the appellant was not acting "in the scope of his authority" or if he was acting wilfully. Counsel for the appellant contended however that although the investment made by the appellant in Supreme was not an investment which fell within the terms of the resolution adopted by the respondent on 31 January 1985, the appellant was indeed acting "in the scope of his authority" within the meaning of that expression in section 99, and that his actions were not wilful.

It was contended that in making the investment which he did the appellant was acting "within the course of his employment" and that this amounts to an action

"within the scope of his authority" within the meaning of that expression in

section 99. In support of this submission we were referred to the case of Mhlongo and Another No v Minister for Police 1978 (2) SA 551 (A), and the following passage in the judgment of Corbett JA at 567B-G:

> "... Although the section speaks only of a State servant acting 'within the scope of his authority', the Courts appear to have treated this as embracing the concept 'within the scope of his employment' (see eg Thorne's case, supra at 51;African Guarantee and Indemnity Co Ltd v Minister of Justice 1959 (2) SA 437 (A) at 445A). In Sipatsa v Minister of Defence 1914 EDL 323 at 331 the Court, relying upon Lloyd v Grace Smith & Co 1912 AC 716 at 736, expressed the view that these phrases were commonly treated as being synonymous but it would appear that there is a distinction (see remarks of WATERMEYER CJ in Feldman (Pty) LtdvAW 1945 AD 733 at 736; and Atiyah op cit at 177-9). Nevertheless, it has never been suggested that the State escapes liability for a wrongful act committed by a servant in his capacity as such simply because the act fell outside the 'scope of his authority', when it was clearly within the 'scope of his employment'.
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> ... All members of the South African Police Force are prima facie servants of the State and consequently, when a wrongful act is committed by a member of the Force in the course or scope of his employment, the State is prima facie liable. It is then for the State to show that, in committing the wrongful act, the policeman was engaged upon a duty or function of such a nature as to take him out of the category of servant pro hac vice. In order for the duty or function to take him out of the category of servant it must be one

0 which is personal to the policeman in the sense that from its very nature the State is so deprived of the power to direct or control him in the carrying out of his duty or function that he cannot be regarded pro hac vice as the servant of the State...".

Mhlongo's case, however is distinguishable. The court in that case was dealing with the meaning of the expression "scope of his authority" in section 1 of the State Liability Act No 20 of 1957 which rendered the State liable for wrongs committed by servants of the State acting within their capacity and within the scope of their authority as servants. The court was concerned with the vicarious liability of the State arising from the acts of its servants. In that context the court ! came to the conclusion that although there was indeed a distinction between a servant acting "within the scope of his authority" and a servant acting "within the scope of his employment", both these phrases had come to be treated as being synonymous for the purposes of determining the liability of the State (Mhlongo's case at 567C-D and Masuku and Another v Mdlalose and Others(1997) 3 ALLSA 39 (A) at 352). In the present case what is in issue is not whether vicarious liability should attach to the council at all. The issue which needs to be determined concerns the liability of a councillor, officer or servant ("servant") of the council. Moreover there is a crucial difference in the objects of the two statutes. Section 1 of the State Liability Act in Mhlongo's case creates rights which might not have existed before by giving to plaintiffs a right to hold the State vicariously liable for

the delicts of its servants. Section 99 of the Ordinance does not create or expand any rights. It limits the rights which a council and third parties would at common law have against these servants of a council for damages caused by their negligent acts. It is a section invasive of a common law right and must for that reason be restrictively construed. (Rossouw v Sachs 1964 (2) SA 551 (A) at 562 D, R v Sachs 1953 (1) SA 392 (A) at 399 - 400; Dadoo Ltd and Other v Krugersdorp Municipal Council 1920 AD 530 at 552, Torwood Properties (Pty) Ltd v South African Reserve Bank 1996 (1) SA 215 (W) at 224 E.)

Section 99 can reasonably be interpreted in two ways. The one interpretation is that in an action brought by a council against its servant the servant can only escape liability if his negligent action was within the scope of his authority. If it is not within the scope of his authority it would not help him to prove that it was nevertheless within the course of his employment. On the alternative interpretation, the servant would escape liability if his negligent act was performed in the "course of his employment", even if it was outside the "scope of his authority". Because the section invades the common law right of a council to claim damages suffered by it in consequence of the negligent acts of its servants, it should be interpreted restrictively. On that approach the appellant must fail because it is common cause that the investment which he made was not within the

scope of the authority conferred on him in terms of the resolution of 31 January 1985. His authority to make investments was not in general terms. It was expressly limited to investments falling within the categories identified in the resolution. If he elects to make an investment on behalf of the council which exceeds the specific terms of that authority, he renders himself vulnerable to an action for damages suffered by the council in consequence thereof. He cannot be rescued by proving simply that he acted in the "course of his employment".

This conclusion is also supported by section 100 of the Ordinance which reads as follows:

> "The council may determine the circumstances in which it will indemnify or undertake the defence of or pay the legal costs or the costs and the amount of any court order or fine, of any of the officers or servants of the council in respect of any legal proceedings, whether civil or criminal, arising from any matter or thing done or omitted by such officer or servant in the course of his employment or duty under the provisions of any law." (My emphasis)

What is significant in this section are the words "in the course of his employment". Why should the lawmaker use this phrase in section 100 of the Ordinance and use the phrase "in the scope of his authority" in the immediately

preceding section if both phrases meant the same thing? The lawmaker cannot be presumed to use different words to convey the same idea simply for the purposes of literary variety. A change in language prima facie indicates a change in intention, especially where the change occurs in immediately successive sections within the same Ordinance. (Administrateur, Tranvaal v Carletonville Estates Ltd 1959 (3) SA 150 (A) at 155H; R v Sisilane 1959 (2) SA 448 (A) at 453E-F; Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947 (2) SA 1269 (A) at 1279.)

In the result the appellant has failed to bring himself within the protective ambit of section 99 of the Ordinance and is therefore liable to the respondent for the damages which the respondent sustained in consequence of the unauthorised action of the appellant in making an investment on behalf of the respondent which fell outside the terms of the authority conferred on him by the resolution of 31 January 1985.

On this approach it becomes unnecessary to consider whether the appellant was required by the section to establish that he acted "under the direction of the council" within the meaning of section 99 in making the investment which he did. On the interpretation favouring the case of the respondent, a servant in the position

of the appellant would have to establish that he acted "under the direction of the council"; on the appellant's interpretation it is only "any other person" (i.e. a person other than a councillor, officer or servant) who needs to act "under the direction of the council" before he can claim the protection of the section. But, on either interpretation a servant who has not acted "in the scope of his authority" would fail to secure the protection of section 99, in any claim made against him arising from acts performed by him on behalf of the council.

My conclusions also make it unnecessary to consider whether the appellant in this case acted "wilfully", although there is considerable support for the inference that he acted in good faith, and that his actions could not properly be described as being wilful.

For the purposes of this judgment I have assumed in favour of the appellant that section 99 of the Ordinance is indeed of application in a case where a council seeks to make a claim against one of its own servants and that, on a proper interpretation of the section, it is not confined to claims made by a third party. In view of the conclusion to which I have come, it is unnecessary to debate the correctness of this assumption. The question as to whether or not section 99 of the

5 Ordinance applies in a claim made by the council against one of its own servants

is left open.

The appeal must therefore fail for the reasons which I have given. It does not follow, however, that the appellant's application for condonation should also fail. His degree of non-compliance with the Rules was not substantial and although he has failed on the merits the argument advanced on his behalf can not be said to have had no reasonable prospects of success..

Order

In the result:

1. The appellant's application for condonation, for his failure to lodge the record timeously in terms of the Rules of this court, is granted.

2. The appeal is dismissed with costs.

MAHOMED CJ

CONCUR:
HEFER JA
F H GROSSKOPF JA
OLIVIER J A

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Respondent
COUNCIL OF UMZINTO NORTH

CORAM: Mahomed CJ, Hefer, FH Grosskopf, Marais et Olivier JJA

HEARD: 13 May 1997

DELIVERED: 18 November 1997

J U D G M E N T

MARAIS JA/

MARAIS JA:

In my view this appeal should be upheld and appropriate consequential costs orders made. This being a minority view I shall try to be as brief as the need for an adequate explanation for my inability to side with the majority permits. It seems appropriate to consider first the question which the majority leaves unanswered, namely, whether sec 99 is applicable at all to claims against the appellant brought by the respondent board itself as opposed to claims sought to be brought against the appellant by third parties. Appropriate because, if the answer is that it is not applicable to the former class of claim, no further questions need be considered and the appeal must fail; if the answer is that it is applicable, the reasons why that is so will be of considerable

relevance in considering the next question which will arise, namely, what is meant by the words "in the scope of his ..... authority".

Sec 99 cannot be construed in isolation. That much is

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trite. A fortiori is that so when the provision itself contains a proviso which can only be understood by reading another provision impliedly incorporated in the proviso. That provision is sec 181 which deals with the Director-General's power of disallowance and surcharge. It is a lengthy provision but it is regrettably necessary to quote it in full for, in my view, it is destructive of the contention that the respondent council is in no way inhibited by sec 99 in proceeding against an officer or

servant to recover damages suffered as a consequence of a failure to carry out a specific duty.

I quote it as it read in August 1992 which is the relevant period in this case.

"Sec 181. Director-General's power of disallowance and surcharge -

(1) Where upon consideration of the auditor's report, the Director-General is of the opinion that -

(a) any payment or exemption was made without due authority according to law or a charge has been improperly incurred or a payment or charge is not duly vouched by a council;

(b) any deficiency has occurred in collecting, accounting for, receiving, issuing or preserving any money or other property of or under the control of a council, or for which the council concerned is responsible;

(c) the failure to carry out a specific duty has caused damage or loss to the council,

then if a proper explanation is not furnished by the town clerk within a period specified by the Director-General, he may disallow the amount assessed by him of any money improperly paid or charge improperly incurred, or payment or charge not duly vouched or deficiency or damage or loss as aforesaid, such amount being hereinafter referred to as a disallowance.

(2) If the council is dissatisfied with a disallowance

imposed in terms of subsection (1) it may make application to the Administrator for relief therefrom, setting out in detail its reasons for requesting such relief. If the Administrator is satisfied that in all the circumstances relief should be granted, he may grant relief in whole or in part as he may deem fit and the disallowance shall be removed or reduced accordingly.

(3) Where, within a period to be specified by the Director-General, no relief has been obtained in terms of subsection (2) and no disallowance has been recovered in terms of subsection (7) and the Director-General is of the opinion that any councillor or employee is personally responsible because of his negligence or misconduct for making good to the council the disallowance or part thereof, he may, subject to the provisions of subsection (6), surcharge such a councillor or employee with the amount requiring adjustment and shall thereupon inform the council of such surcharge and all necessary particulars.

(4) Where the Director-General is of the opinion that more than one person is responsible for the whole or any part of a disallowance not adjusted as aforesaid, he may subject to the provisions of subsection (6) surcharge pro rata such of the persons responsible and shall thereupon inform the council of the surcharge and all necessary particulars.

(5) (a) Should any person surcharged by the Director-General feel aggrieved, he may within one month from the date of the surcharge or such longer period as the Director-General may in any particular case allow, appeal against the surcharge to the

Administrator.

(b) Any such appeal shall be forwarded through the council which shall as soon as possible forward the appeal to the Administrator together with its recommendations thereon, and the Administrator, after due enquiry, may relieve the appellant either wholly or partially of the amount surcharged or may sue or direct the council to sue him in any court of competent jurisdiction for the recovery of any amount in respect of which relief is not granted, and the council, if so directed, shall sue such person according to law. Any such suit may be brought on behalf of the Administrator by the Director-General, and he shall be paid by the council his reasonable costs and expenses incurred in such proceedings.

(c) In addition to any action that the Administrator may take or direct a council to take in terms of paragraph (b), he may, if he is satisfied that the surcharge was attributable to the negligence or misconduct or any officer of the council, order the council to take disciplinary action against that officer in terms of the relative conditions of service and the council shall upon such direction forthwith give effect thereto which it shall have power to do and shall report the result thereof to the Administrator.

(d) Any person against whom a surcharge has been raised, may apply to any court of competent jurisdiction within a period of one month after he has been notified in writing by the Director-General of the surcharge, or of the decision of the Administrator in terms of paragraph (a), or within such further period as the

court may allow, for an order setting aside or reducing the surcharge, and such court may on such application, if not satisfied on the merits of the case that the surcharge was rightly imposed, or that the amount thereof is correct, make an order setting aside the surcharge or reducing it, as the case may be.

(e) The amount of any surcharge not appealed against as herein provided, or if appealed against, the amount in respect of which relief is not granted, shall be a debt due to the council from the person against whom the surcharge was made.

(6) If any councillor or employee liable to a surcharge ceases to be a councillor or employee, as the case may be, he shall be discharged from such liability and surcharge unless the surcharge is made before the expiry of three years from the date on which he ceased to be a councillor or employee.

(7) Every disallowance or surcharge raised by the Director-General in terms of this Ordinance, shall be recovered by the council unless relief has been granted in terms of subsections (2) and (5). Nothing herein contained shall prevent the council from taking proceedings for the recovery of any disallowance or surcharge by way of action or any other competent procedure in any court of competent jurisdiction.

(8) (i) Any amount included in the charges in the accounts of a local authority which has been disallowed or surcharged by the Director-General shall be held in suspense in the accounts pending adjustment in terms of this Ordinance.

(ii) Any disallowance or surcharge not in respect of a

charge in the accounts shall be introduced into the accounts and be held in suspense therein pending adjustment in terms of this Ordinance.

(9) For the purpose of this section, the persons making or authorising an illegal payment shall include all councillors or the members of any committee of the council who were present at the time when the resolution authorising such payment was carried and who notwithstanding that any such irregularity was pointed out to them, did not cast their votes against that resolution and cause such votes to be recorded in the minutes, but shall not include the council or a committee thereof in its corporate capacity."

When this provision is read with sec 99 what emerges quite clearly, so it seems to me, is this. Notwithstanding the qualified immunity conferred by sec 99, a councillor or an employee may yet be sued by the council for loss caused by his or her negligence or breach of duty even though no wilfulness was involved in his or her act or omission. However, that can only happen in the circumstances set forth in sec 181. I shall not repeat

them; they are there to see and are plain enough not to require elucidation. What needs to be emphasised is that their clear import is that a council cannot sue a councillor or employee in any court unless the Director-General has made a disallowance or has surcharged the councillor or employee and any appeal to the Administrator against the surcharge or any application to court to set it aside or reduce it has failed. The existence of these elaborate provisions circumscribing the power of a council to sue a councillor or employee is, to my mind, quite inconsistent with the notion that sec 99 has nothing to do with claims by a council against its employees and that it may proceed against them in total disregard of the provisions of sec 181. On the contrary, the existence of those provisions shows that the wide meaning which

should prima facie be given to the wide language in which sec 99 is couched is indeed the correct meaning and that there is no justification for seeking to limit its application to claims by third parties.

It was suggested that the use of the word "personally" in sec 99 pointed to a contrary conclusion. The argument ran thus: if action by the council against its own servants was intended to be governed by sec 99, the inclusion of the word "personally" in the phrase "subject any such person personally" would have been unnecessary because the liability could only be personal; if, on the other hand, only actions by third parties were intended to be covered, the use of the word "personally" would be quite understandable in that it would emphasise that only the council (vicariously) and not its servant (personally) can be held liable for

the tatter's acts or omissions. I see little substance in the point. Apart from the fact that its weight is miniscule when compared with the weight of the wide language of sec 99 and the import of sec 181, there is good reason for the use of the word "personally" even if sec 99 is also to apply to actions brought by the council against its employees. It is this: particular officers or servants of the council may have to be cited in litigation by third parties in their official capacities in circumstances where the council itself is not necessarily vicariously liable for their decisions or actions. Sec 99 does not prohibit a third party from doing so. What it does prohibit is any attempt to hold such a person personally liable. The use of the word "personally" thus entails no redundancy even if sec 99 is applicable to claims by the council against its servants.

A further factor is this: to shield an employee of a council against legal action by a third party without shielding him or her in any way against any legal action taken by the council against him or her in the exercise of a right of recourse after the council has had to pay the third party would serve so little purpose that I cannot imagine that time and energy would have been spent in placing the provision on the statute book. All the more so when third parties are more likely to look to a council for recompense rather than its employee.

It is necessary to record how this particular issue arose in order to deal with certain other matters alluded to by counsel. At the hearing of the appeal the court raised the question whether or not sec 99 was applicable to a claim by the respondent board (as opposed to a claim by a third party) against the appellant. Counsel

were not prepared to deal with it and leave was given to them to furnish supplementary heads of argument in due course. That was then done. The appellant drew attention inter alia to sec 181 in support of his contention that sec 99 did govern claims by a council or board against its own employees. The respondent contended the contrary but also disputed the appellant's right to rely upon sec 181 in that it had not been pleaded by way of defence. The appellant countered by denying that it was necessary to plead sec 181 but added that, if it was necessary, an appropriate amendment of the plea should be granted, there being no conceivable prejudice to the respondent which had admitted that no disallowance or surcharge had been made in terms of sec 181.

I think the answer to all this is that no amendment of the plea is necessary. The appellant's defence rested squarely upon

sec 99 and his interpretation of it. He is quite entitled to point to the provisions of sec 181 in support of the interpretation of sec 99 for which he contends. If he is right in his interpretation of sec 99 he is entitled to invoke it in his defence; if he is wrong, sec 181 will not provide him with an alternative defence. To put the matter another way, if he is right in his interpretation of sec 99 he cannot be sued by the respondent on the cause of action which it has pleaded. If the respondent were then to seek to found an alternative claim on the provisions of sec 181, it would have to plead the necessary investitive facts.

The respondent contended that the object of sec 181 was to enable the Director-General to compel a local authority to go to court to recover unauthorised payments or compensation for damage or loss suffered by reason of an employee's failure to carry

out a specific duty and not to preclude a local authority from recovering a loss before such a loss is disallowed under sec 181. While it is certainly one of the objects of the provision, it is, to my mind, quite clear when it is read with sec 99 (as it must be), that it is also intended to place constraints upon a local authority's freedom of action in suing employees.

As for the rationale which probably underlies provisions of this sort, one may usefully read the article entitled "The Liability of the Crown for Torts of its Servants" by HDJ Bodenstein in 1923 SALJ 410 at 419-421.

My conclusion therefore is that sec 99 is applicable to claims by a council against its own employees.

The next question is whether the appellant acted "in the scope of his . . . . . authority for any of the purposes of (the)

Ordinance or of any bylaw in force in the borough" within the meaning of sec 99. If he did, and subject to the proviso and the provisions of sec 181, he is immune from legal action. If he did not, he is liable to be sued by the respondent.

That the words "in the scope of his authority" are linguistically capable of being construed as equivalent to the words "within the scope of his employment" is settled by the decision of this Court in Mhlongo's case (cited by the majority). Whether or not they should be so construed in their contextual setting in this particular case remains to be considered.

There are a number of points which need to be noted and of which account must be taken. First, the provision confers no immunity from legal action upon the council itself. The council itself is obviously not one of the "any such person(s)" who are not

to be subjected "personally to any action, liability, claim or demand whatsoever" of which the provision speaks. Secondly, the categories of persons who, but for the provision, are envisaged as potentially liable personally either for matters or things done or omitted by the council or any contract entered into by the council, or for matters of things done or omitted by themselves, include both persons who are employees of the council and persons who are not. An "officer or servant" of the council is an employee. A "councillor" is not. Nor are "other person(s) acting under the direction of the council" necessarily employees of the council. Yet it is plain that a qualified immunity from legal action is intended to be conferred upon both those who fall into the category of employees of the council and those who do not. Thirdly, the considerations I have mentioned obviously precluded the use of an

expression such as "within the course and scope of his or its employment" because they would not have covered the categories of persons who were not employees of the council. On the other hand, the use of the expression "in the scope of his or its authority" was sufficiently elastic to cover all these categories of persons. The use of that terminology in the particular context does not, in my view, convey that something other than "within the course and scope of his employment" is intended where the person concerned is an officer or servant of the council. Indeed, when one considers the many and varied categories of employees likely to be found working for councils and whose acts and omissions might, but for sec 99, have rendered them personally liable, the confinement of the expression "in the scope of his . . . . authority" only to cases where the act done or omitted was done or omitted within the four

corners of expressly or impliedly given authority strikes me as

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subversive of the manifest purpose of sec 99. These employees

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range from Town Clerks to streetsweepers. What, one may ask, is the express or implied "authority" of a streetsweeper, or a labourer, or a driver of a vehicle? Such "authority" as he or she may have, is certainly not authority to wield his or her broom or pickaxe negligently or to drive negligently the vehicle assigned to him or her. Cf the remarks of Jansen JA in Mjuqu v Johannesburg City Council 1973 (3) SA 421 (A) at 441 F. If the expression "in the scope of his .... authority" is to be confined in the manner which finds favour with the majority, it would follow that

employees who acted in that manner would not be immune from legal action even at the instance of third parties. In what circumstances then would they benefit from the provision, if not in

those? It is not easy to conceive of any. Furthermore, what is one to say about cases where employees genuinely misunderstand instructions given to them, and in giving effect to them, negligently cause damage to a third party? Have they no immunity because they did not act within the scope of their authority in the sense contemplated in the majority judgment, even though they were acting within the course and scope of their employment and did not wilfully disregard their instructions? Consider the case of a labourer employed by a local authority to dig holes in public pavements to gain access to electric cables and to cover the holes overnight with stout timber boards. He is shown where the boards are stored and is instructed that he is not to use a particular batch of boards isolated from the rest because dry rot has set in and they are no longer safe. Some weeks later, forgetful of the prohibition,

he inadvertently uses one of the boards he was forbidden to use. A pedestrian falls through the board and suffers injuries. The employee has clearly neglected to abide by the instructions given to him and has used a board which he had been expressly prohibited from using. Yet, for reasons to be given anon, his conduct in so doing was not wilful. If one interprets the words "in the scope of his ..... authority" in the narrow sense, his act of using that particular board (and that is the act which caused the loss) was not in the scope of his authority for he was expressly forbidden to use it. Despite the fact that he was clearly acting within the course and scope of his employment he would not be immune from legal action taken by the pedestrian. In principle, the case postulated is no different from the case with which we are concerned. I am loath to attribute any such intention to the

legislature if doing so would result in employees hardly ever, if at all, becoming entitled to the immunity which sec 99 is intended to confer.

With respect, I do not derive any assistance in interpreting sec 99 from the fact that in sec 100 the expression "in the course of his employment" is used. Sec 100 is confined to officers and servants who are of course employees of the council. I have explained why the same phrase could not be used in sec 99. However, non constat that in sec 99 the expression "in the scope of his . . . authority" was intended to mean something different when the immunity from legal action of an officer or servant of the council is under consideration.

I grant that sec 99 is invasive of common law rights and that it should therefore not be accorded a more extensive

interpretation than it plainly conveys. However, as against that, it is also so that where interference with the common law is plainly intended and the purpose of such interference is equally plain, an interpretation which would virtually nullify its operation in respect of officers and servants of the council is to be avoided.

I consider that the context in which the expression "in the scope of his . . authority" is used in sec 99 militates against the narrow interpretation of those words to which the majority of the court subscribes. The appellant was an officer and servant of the board. Investing the board's funds was admitted to be an important part of the duties he was employed to perform. In making the investment in question he was undoubtedly acting within the course and scope of his employment. The fact that in truth, and unbeknown to him, he had not been authorised to make

this particular investment can no more convert his act of investment into an act which was not done within the course and scope of his employment, than the fact that a chauffeur who has been told not to drive negligently by his employer, yet does so, can convert his act of driving into an act which was not done within the course and scope of his employment.

Furthermore, once it is appreciated that the immunity conferred by sec 99 is not absolute and is qualified yet further by the provisions of sec 181, and that a negligent failure by an employee to carry out his duties properly may yet expose him or her to a claim by the council in terms of sec 181, there is even less reason to be reluctant to give the words "in the scope of his . . . authority" the wider meaning given to them in Mhlongo's case.

What seems to me to be reasonably plain from sec 99

and sec 181 is a discernible policy which, in broad terms, amounts to this. The persons listed in the provisions are to be personally immune from legal action taken by third parties provided that they did not behave wilfully and were acting within the scope of their authority in the sense I have described. That such persons may have been negligent is per se not enough to deprive them of that immunity vis-a-vis third parties. Subject to the same qualifications, those persons are also to be provisionally personally immune from legal action taken against them by a council. The immunity is provisional because action by the Director-General in terms of sec 181 may yet result in such a person being sued by the council for damages caused by his or her negligence. But whether or not such a person is to be exposed to such a claim is not something which it is within the power of a council to decide; the decision is the

Director-General's subject to an appeal to the Administrator or, if the person concerned resorts to litigation in terms of sec 181 (5)(d), the court's. In this way a dual purpose is served: the persons listed in the provisions are protected against unduly vengeful proceedings brought against them by a council and the ratepayers are protected from unduly tolerant inaction by a council in recovering damages from an employee who has been negligent in a high degree in performing his or her duties.

When all these circumstances are taken into account it seems to me that a negligent but non-wilful failure by a town treasurer to remain within the four corners of specifically prescribed investments when investing a council's funds in the course of his employment, does not amount to an omission which was not "in the scope of his authority" within the meaning of sec

99.

In discussing the problem I have used the terminology of sec 99 and sec 181. The respondent is of course not a council but a town board. However sec 272 and sec 285 make it plain that these provisions are applicable mutatis mutandis to town boards and their members, officers, and servants.

The last question is one of fact: was the appellant's investment in Supreme "wilful" in the sense contemplated by sec 99? The court a quo found that it was. It concluded that "wilfulness" in sec 99 means "intentional wrongdoing with knowledge of its wrongfulness". I have no doubt that mens rea is indeed a necessary element of the wilfulness of which sec 99 speaks. Cf Citrus Board v SA Railways and Harbours 1957 (1) SA 198 (A) at 204 E-205A.

Despite some seemingly contradictory utterances by the appellant when giving evidence, his evidence as a whole and the probabilities inherent in the situation satisfy me that the appellant did not act wilfully in the sense that he made the investment well knowing that he was not entitled to make the particular investment. In short, he had been assured by an investment broker with whom the respondent board had dealt for some years that other local authorities had invested in that particular manner and that the Administrator had approved of local authorities doing so. He believed the broker. That he may have been neglectful in failing to verify that with those who were in a position to confirm or deny it does not deprive him of the qualified immunity which sec 99 confers upon him. Again, because this is a minority judgment, I shall not lengthen it by spelling out in detail why I do

not agree with the court a quo's finding that the appellant acted wilfully.

I should add that I am in agreement with the majority that condonation of the late filing of copies of the record should be granted.

R M MARAIS JUDGE
OF APPEAL