

Councillors can have their say

Privilege in council

Section 161 of the Constitution and section 28 of the Municipal Structures Act protect the freedom of speech of councillors (subject to the council's rules and orders) and grant councillors immunity against civil and criminal liability for anything they say in council.

The purpose of these sections is to encourage vigorous debate in the process of decision-making, which is at the core of a healthy democracy.

In *Swartbooij v Brink CCT 27/02* the Constitutional Court declared that councillors have immunity for what they say in council.

Facts

The Speaker of Nala Municipality produced a report in relation to a transaction between the agricultural society and the council's predecessor, Bothaville Town Council. The council expressed concerns about the propriety of

the transaction. The settlement agreement was signed by Brink, (who was the mayor at the time), and supported by Niewoudt. This transaction occurred just prior to the November 1995 elections.

Before Brink and Niewoudt could respond to the report and the allegations, the council decided that they should recuse themselves from all council meetings and refrain from communicating with council officials pending investigation by the police, the Auditor-General and the Public Protector.

After this council meeting, the mayor made public statements accusing Brink and Niewoudt of 'looting and stealing' municipal monies. These statements were incorrect in that they misrepresented the content of the report and the role of Brink and Niewoudt in the matter. Brink and Niewoudt requested the High Court to set aside the council's decisions and order the municipality to pay the costs.

High Court's decision

The High Court agreed with Brink and Niewoudt and, importantly, made a special ruling that the councillors who supported the decision should personally pay the costs of this application. This ruling was made on the basis of a common law rule that persons litigating on behalf of an organisation must personally pay the costs if their actions amounted to malice or improper conduct.

According to the High Court the production of the report by the Speaker, the statements made by council members in support of the resolution and their votes in favour were 'incompetent, malicious and to a degree racist'.

Constitutional Court judgment

Issue

The issue before the Constitutional Court was whether the councillors could be held responsible in their personal capacity for the costs of the application in the High Court as a result of comments and statements made during council meetings.

Immunity

Swartbooï and the other councillors invoked section 161 of the Constitution and section 28 of the Municipal Structures Act.

key points

- The nature of the resolution is not important for the question of whether or not participating councillors are protected by immunity.
- The purpose of immunity is to encourage open debate in the process of decision-making.
- Councillors who participate in decisions that prove to be unlawful also enjoy immunity.
- Statements made by a councillor outside of a council meeting fall outside of the immunity.
- Conduct is only protected if it is related to the council: statements must be made to the council, things must be produced before the council or submissions must be made to the council.

The former says that provincial legislation (within a national framework) may provide for privileges and immunities of council members. Section 28(1) of the Structures Act says that provincial legislation must provide for freedom of speech in the council and its committees, subject to the council's rules and orders.

Section 28(2) states, among other things, that councillors are not liable to civil proceedings for anything they say in the council or in committees. The same applies to anything they produce before or submit to the council or its committees, or anything that is revealed as a result thereof.

Until the provincial legislation is in place, this section applies to all municipal councils. At the time of the above council meeting, there was no such provincial legislation. Accordingly, section 28 of the Structures Act applied to the municipality at the time. (The Free State Privileges and Immunities of Municipal Councillors Act 2 of 2002 has subsequently come into force.)

The Constitutional Court held that the conduct of the councillors fell within the scope of section 28 of the Structures Act. The production of the report, the deliberations and votes were all 'said in', 'produced before' and 'submitted to' the council. This did not apply to the statements made by the mayor outside of the meeting (see below).

Immunity only for legislative functioning?

Brink and Niewoudt argued that the immunity does not protect the exercise of executive or administrative functioning. They alleged that it is limited to the legislative function of the council, in other words, deliberating and voting on a by-law. This would be in line with the history of parliamentary privilege as it came to South Africa from England.

The Constitutional Court disagreed and held that the scope of section 161 of the Constitution is not limited to the legislative function alone. The nature of a councillor's function is not important for the question of whether or not he or she is protected by immunity. It is therefore not important to decide in

The function or purpose of the committee might be relevant to the question whether a councillor is exempted from liability.

which category (legislative, executive or administrative) the disputed resolutions fell.

Immunity in committee meetings?

It was also argued that section 28 of the Structures Act exceeds the perimeters set by the Constitution. Section 28 includes conduct in committees in the immunity, while section 161 of the Constitution makes no mention of committees. In this case the conduct took place in full council so the Court did not need to address this issue. However, the Court hinted that the function or purpose of the committee might be relevant to the question of whether a participating councillor is exempted from liability for anything said or done in that committee.

No immunity in respect of unlawful acts?

Brink and Niewoudt also submitted that immunity couldn't apply to conduct in support of a

resolution that was later set aside. Unlawful acts, they said, are against the Constitution and deserve no protection by section 161 of the Constitution.

The Court dismissed this argument in sweeping terms. It cannot be, the Court said, that immunity protects lawful decisions only. If that were the case, the protection would be too limited to fulfil its purpose of encouraging vigorous and open debate in the process of decision-making. Any curtailment of immunity would compromise democracy.

The Constitutional Court agreed with most of the harsh criticism of the High Court against the councillors but said that this criticism did not deprive them of the immunity to which they were entitled.

Separation of powers

In its judgment, the High Court said that this cost order might serve to 'ensure that members of the council would consider their decisions more carefully in future'.

This statement attracted special attention by the Constitutional Court. The High Court wants to 'teach councillors a lesson', the Constitutional Court said, and it gave the High Court a taste of its own medicine in return: the statement was improper because it negated the separation of powers and amounted to judges trying to influence the conduct of the legislative and executive branch of government.

Statements outside a council meeting

As regards the mayor's statement after the council meeting, the Court 'assumed' that it fell outside of the protection of section 28. Conduct is protected if it is related to the council: statements must be made to the council, things must be produced before the council or submissions must be made to the council. The mayor's statement was therefore not protected.

However, because Brink's application concerned the run up to the council resolution and the statements were made *after* its adoption, they did not contribute in any way to the resolution.

If a separate case were made against the statements themselves (and not the resolutions), the mayor would not be protected by immunity.

Assessment

This judgment sends a clear signal to council about the function of the speaker.

It is the speaker's responsibility to maintain the integrity of the democratic process in council. If the democratic process is used for mudslinging, the courts may not intervene because, as the Court said, the freedom of speech to ensure open debate in council is a higher good.

However, the legitimacy of the democratic process will be tarnished and the trust of the voters in this process may be affected. The affirmation of councillors' immunity during meetings places an extra responsibility on the Speaker to ensure that it is not abused.

It is also important that the Constitutional Court refused to extend the immunity outside council (or committee) meetings. The conduct must be directly related to the council. It is (at least) safe to say that, if the content of the communication is not somehow meant for discussion or tabling in the council, immunity does not apply and councillors can be held responsible for that content in court.

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Invitation for contributions

We invite interested parties to submit articles on local government issues to this publication. Proposals and articles can be forwarded to gmettler@uwc.ac.za.