

Immunity for councillors?

TESTIMONY OUTSIDE COUNCIL



Dikoko v Mokhatla CCT 62/05

Councillors' immunity from civil liability for anything they say in council is an important cornerstone of constitutional democracy and protects councillors from defamation actions. But the ambit of the immunity is not without limit.

This case concerns the ambit of the immunity afforded to municipal councillors from civil liability when they testify at a meeting of a provincial legislature or one of its committees.

Background

The Southern District Council in North West Province pays R300 towards each councillor's cell phone account. Any amount above that must be justified otherwise it is payable by the councillor and deductible from his/her salary. The Auditor-General of the province voiced his dissatisfaction with the unacceptable and long overdue excess of R3,200 on the cell phone account of Mr Dikoko, who was the Executive Mayor at the time. The Auditor-General sent letters to Mr Mokhatla, the Municipal Manager at the time, questioning Mr Dikoko's overdue indebtedness to the Council. Mr Dikoko was then called to appear before the North West Provincial Public Accounts Standing Committee to provide an explanation. He argued that his overdue indebtedness was caused by Mr Mokhatla deliberately changing the accounting procedures to exaggerate his indebtedness, thereby giving his political opponents a basis for an attack on his integrity.

Issue

Mr Mokhatla instituted a defamation action for damages in the High Court, pleading that his statement enjoyed privilege under the relevant legislation.

Arguments

Mr Dikoko raised two arguments in his defence. First, that sections 161 and 117 of the Constitution, section 28 of the Municipal Structures Act and section 3 of the North West Municipal Structures Act allow privilege to municipal councillors performing their functions outside of council. Second, that the North West provincial legislature's Powers, Privileges and Immunities Act (the Privileges Act) should be interpreted to provide privilege and immunity to those who are not members of a provincial legislature but appear before it to testify.

key points

- In holding the provincial executive to account, the provincial legislature may summon a mayor to appear before it.
- This can be a very useful tool for gathering first hand information on local government issues.
- However, it loses its usefulness if a mayor feels constrained from freely entering into a debate.
- There is therefore a strong case for a legislative amendment to section 28 of the Municipal Structures Act.

Section 28 of the Municipal Structures Act and section 3 of the North West Structures Act both make provision for freedom of speech and immunity from civil or criminal liability for anything said in council or one of its committees. Section 117 of the Constitution accords privilege to members of the provincial legislatures, and only to them. Section 2 of the Privileges Act provides privilege to members of the North West Provincial Legislature, expressly providing that it does not apply to non-members. Mr Dikoko also relied on section 10 of the Act, which provides that no person shall be liable for anything done under the authority of or within the legal powers of the provincial legislature.

High Court Decision

The High Court rejected Mr Dikoko's arguments, finding that the Standing Committee of the North West Provincial Legislature's meeting, though held in council chambers, was a meeting of the legislature and not the council. Accordingly, section 28 of the Structures Act was not applicable. The High Court found in Mr Mokhatla's favour and awarded him damages in the amount of R110 000 with costs.

Constitutional Court

In the Constitutional Court, Mr Dikoko argued that, even if the Standing Committee meeting was that of the provincial legislature and not council, his attendance at it was nevertheless part of the extended business of the council and therefore section 28 was applicable. Alternatively, that the protection afforded to members of the provincial legislature should be extended beyond members, to include officials and others who act as witnesses in the Standing Committee and on the authority of the provincial legislature.

The Court considered the purpose of privilege in a constitutional democracy: it promotes freedom of speech and expression, and full and effective deliberation, and removes the fear of repercussion for what is said, which in turn advances effective democratic government. The Court stated:

There is therefore much to be said for a conclusion that if a councillor participates in the genuine and legitimate functions or business of council, whether inside or outside council, the privilege afforded under the section 28 ought to extend to him or her.

However, given that Mr Dikoko's statement concerned only his personal finances and indebtedness to the council, it could not be viewed as constituting the real and legitimate business of the council. The Court therefore found it unnecessary to answer the question of whether the privilege afforded by section 28 ought to extend to councillors outside of council. The appeal therefore failed.

The Court considered the fact that an undesirable situation is created when councillors and others who participate in the same deliberations of provincial legislatures as witnesses, promoting the same role and functions of the legislature and advancing the same business of the legislatures, are not protected.

This does not seem to accord with the basic principle of fairness. The question is whether legislation should not have afforded the applicable privilege more equitably, not only to members but also to those who appear before the legislature or its committees as witnesses. This could have been done on the basis of a qualified privilege. Qualified privilege does not afford absolute immunity to the speaker and can be defeated if the person acts with an improper motive. It might be argued that this would be more in line with a Constitution which places much importance on the values of equality, human dignity and freedom.

Comment

If the power of provincial legislatures to summons anyone to testify before it is used vis-à-vis a mayor, it raises two important issues. First, it should be clear that the role of a provincial legislature is not to call a mayor to account. Mayors are accountable to their municipal councils, not to the provincial legislature. Provincial legislatures' role is, among other things, to hold the provincial executive to account. Second, in doing so, the provincial legislature may use its power so summon a mayor to appear before it. This can be a very useful instrument for the provincial legislature to obtain first-hand information on local government issues. However, it loses its usefulness as a method to gather information if a mayor feels constrained from freely entering into a debate.

A strong case can thus be made for a legislative amendment to section 28. As the Constitutional Court said, "If a councillor participates in the genuine and legitimate functions or business of council, whether inside or outside council, the privilege afforded under section 28 ought to extend to him or her". If witnesses fear repercussion and are thus unwilling to testify, this could arguably defeat the very purpose of those committees (being to garner, verify and interrogate information) and could stifle, rather than advance, effective democratic government.

THE RIGHT TO Adequate housing?

UNLAWFUL EVICTION REVISITED

The City of Johannesburg (City) sought the eviction of over 300 people from six inner-city properties and sought to justify its eviction by invoking the provisions of the National Building Regulations and Building Standards Act 103 of 1977 (the NBRA). It also based its stance on provisions of the Health Act 63 of 1977 and its fire by-laws.

Arguments

The NBRA relates to a municipality's ability to exercise its statutory powers and duties to prevent dangerous living conditions in its area of jurisdiction. The City contended that the 'evacuation' of the occupiers from the properties in terms of section 12(4)(b) of the NBRA would promote public health and safety and reverse inner-city decay. The provisions of sections 12(1) and 12(4) of the NBRA provide for the issuing of notices by a municipality directing the demolition, alteration or evacuation of buildings when the applicant believes that they are, or may become, dangerous to life or property, or where the applicant deems it necessary for the safety of any person. Section 12(5) prohibits the occupation, without the applicant's written consent, of any building in respect of which a notice has been delivered.

The provisions of the fire by-laws allow the chief fire officer to issue notices to remedy fire hazards identified on premises and to empower the applicants to take such steps as are necessary, in the opinion of the chief fire officer, to remove the risk or danger. Section 20 of the Health Act directs local authorities to take all lawful, necessary and reasonably practicable measures to maintain their districts at all times in clean condition and prevent conditions that will, or could, be harmful or dangerous to the health of any person.

The occupiers in question opposed the applications on the basis that they were unlawful occupiers as defined in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and were therefore protected by its provisions. In particular, the requirement

City of Johannesburg v Rand Properties
2006 (6) BCLR 728 (W)

key points

- This case confirms again that the courts will not readily give effect to any legislation, including municipal by-laws, that are inconsistent with the constitutionally enshrined right of access to adequate housing.
- The duty of municipalities to promote a safe and healthy environment must be reconciled with the State's constitutional duty towards the poor and the destitute.
- The Court declared that the City of Johannesburg's housing programme failed to comply with the City's constitutional and statutory obligations.
- The City had failed to provide suitable relief for people in the inner city who were in a crisis situation.
- The Court ordered the City to devise and implement a comprehensive and co-ordinated programme to provide adequate housing for those in desperate need.

concerning suitable alternative accommodation in section 6 led to the conclusion that the relief sought would not be just and equitable in the circumstances.

Decision

The High Court (the Court) held that eviction was fundamentally a constitutional matter. The duty of municipalities to promote a safe and healthy environment had to be reconciled with the State's constitutional duty towards the poor and the destitute. The Court held that the mere establishment by a municipality that occupation was unhealthy or unsafe did not automatically require a court to make an

eviction order. It merely triggered the court's discretion. Where occupiers had been occupying buildings for some time, their claims had to be accorded some sympathy, unlike the situation of occupiers who deliberately invaded a building with a view to disrupting a housing regeneration programme contemplated by a municipality. The Housing Act required municipalities to, among other things:

- ensure that their inhabitants have access to adequate housing on a progressive basis;
- set housing delivery targets and perform these functions in a manner which gave priority to the needs of the poor in respect of housing development;
- have meaningful consultation with individuals and communities affected by housing development;
- ensure that housing development was economically, fiscally, socially and financially affordable and sustainable; and
- ensure that housing development was administered in a transparent, accountable and equitable manner and upheld the practice of good governance.

An emergency housing programme had been adopted nationally as a response to the ruling in the Grootboom case that the State's positive obligations in terms of section 26 of the Constitution included an obligation to provide temporary relief for persons in crisis or in a desperate situation. The programme required municipalities to investigate, assess and "plan pro-actively for" the emergency housing need in their areas of jurisdiction. Where an emergency housing need was foreseen, municipalities had to apply to the relevant provincial department of housing for funding for the necessary assistance.

The occupiers did not dispute that the City was entitled and obliged to eradicate dangerous living conditions within its area of jurisdiction.

The Court held that City was not permitted to exercise its powers and perform its functions and duties in relation to health and safety in a manner which would violate occupants' constitutionally guaranteed rights, in particular the right of access to housing, protection against arbitrary eviction and the right to dignity. This was especially so where the City had failed in its constitutional duty to provide any alternative adequate accommodation.



The Court made an order declaring that the City's housing programme failed to comply with its constitutional and statutory obligations. The City had failed to provide suitable relief for people in the inner city of Johannesburg who were in a crisis situation or otherwise in desperate need of accommodation and further had failed to give adequate priority and resources to such people. The order directed the City to devise and implement, within its available resources, a comprehensive and co-ordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who were in a crisis situation or otherwise in desperate need of accommodation.

Comment

This decision confirms the constitutionally entrenched right to adequate housing. This right has also been enshrined in international human rights instruments. The judgment also confirmed that the previous insensitive and oppressive order, through which evictions were exercised in an inhuman and arbitrary fashion, could not pass constitutional muster. The Court also emphasised that the culture of *ubuntu* has an important role to play because it expresses compassion, justice, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. Municipalities must take heed that the courts will not readily give effect to any legislation, including municipal by-laws, if they are inconsistent with the constitutionally enshrined right of access to adequate housing.

Lehlohonolo Kennedy Mahlatsi
Municipal Manager: Metsimaholo Local Municipality
Sasolburg

A secret ballot?

Breede Valley Onafhanklik vs The Municipal Manager: Breede Valley Municipality Case No. 3390/006

The Municipal Structures Act provides that the election of office-bearers must take place in a secret ballot. However, it does not stipulate what the consequences would be if every councillor did not, in fact, cast his or her vote in secret.

Issue

The newly elected council of Breede Valley Municipality elected its office-bearers on 29 March 2006. As there was no political party with an outright majority, negotiations towards a coalition preceded the election. The African National Congress and the Independent Democrats entered into a coalition agreement.

In order to cement this agreement, these parties agreed on a 'monitoring system' to be applied during the vote at this meeting. The councillors belonging to the two parties would be seated next to one another. Furthermore, each councillor would show his or her ballot paper to his or her neighbour to ensure that voting took place in accordance with the coalition agreement.

The municipal manager chaired the meeting until the speaker had been elected, in accordance with the Municipal Structures Act. The municipal manager, being aware of the existence of this 'monitoring system', addressed the councillors on the issue. He indicated that he had ensured that councillors could choose to exercise the vote in secret but that he could not force them to do so, or prevent them from waiving their right to secrecy. Voting proceeded and the council elected representatives of the two abovementioned parties into office.

Arguments

Two other councillors took issue with the lack of secrecy in the ballot and brought the matter before the Cape High Court. At the centre of the dispute were two questions:

1. does the law instruct the municipal manager to enforce secrecy or merely to facilitate it?

key points

- This judgment sends out a stern warning to all municipalities to ensure that councillors cast their votes in the election of office-bearers in secret.
- However, it can be argued that the judgment does not appreciate the context of a council decision to elect office-bearers which is different from a general election.
- The Court's argument is based on the general right to a secret vote, which applies to citizens electing their political representative onto legislative bodies.
- In contrast, the election of office-bearers is a decision of the municipal council.
- It could also be argued that the law deliberately does not deal with the specifics of the election as it is the municipality's task to regulate this.

2. What are the legal consequences of an election of office-bearers that was not conducted in secret?

In order to understand what a secret ballot is, the High Court took guidance from the Municipal Electoral Act 27 of 2000, which spells out the electoral procedures for general elections.

It also looked at the general right to vote as a fundamental right. Furthermore, the Court made specific reference to section 19 of the Constitution which contains the right to vote for any legislative body in secret.

Decision

The Court upheld the argument that the municipality did not comply with the Municipal Structures Act. It held that the municipality is obliged to ensure that the requirements of the

Act are met. Similarly, the councillors themselves are under a duty to cast their votes in the prescribed manner, i.e. in secret. The municipal manager was expected to enforce the secrecy.

On the second question, the Court held that the way the election was conducted defeated the provisions of the Municipal Structures Act.

The Court did not see it as a councillor's prerogative to waive his or her right to secrecy as the secrecy requirement is an issue of public law. The Court amplified this argument by commenting that the waiver of secrecy could, for example, put pressure on others to do the same.

The consequence of an election that was not conducted in secret is therefore that the election and council decision is invalid.

The High Court set aside the election and ordered that a new election must be called.

Comment

This judgment sends out a stern warning to all municipalities to ensure that councillors cast their votes in the election of office-bearers in secret.

The judgment is not, however, without its difficulties, as is also highlighted by the dissenting judgement of Moosa J.

For example, it can be argued that the judgment does not appreciate the context of a council decision to elect office-bearers which is different from a general election. The Court's argument is based on the general right to a secret vote, which applies in the first instance to citizens electing their political representative onto legislative bodies.

In contrast, the election of office-bearers is a decision of the municipal council. Local government's electoral system does not



Photo: PictureNET

guarantee an outright majority in each municipal council: coalitions may be necessary.

The enforcement of party discipline so as to operationalise coalitions is in itself not inherently anti-democratic. The law should be reluctant to treat it as such.

It could also be argued that the fact that the law does not deal with the specifics of the election is deliberate: it is the municipality's task to regulate this in a by-law or resolution dealing with internal procedures and the consequences of breaches thereof.

The matter has been taken on appeal by the Breede Valley Municipality. We will keep you abreast of any developments in this regard.

Dr Jaap de Visser
Local Government Project
Community Law Centre, UWC