

Privileges and immunity of councillors: How far do they go?

ANC Umvoti Council Caucus and Others v Umvoti Municipality 2010
(3) SA 31 (KZP)

During a council meeting of the Umvoti Municipality on 24 April 2008, ANC councillors requested time to caucus and Mr Maharaj, the speaker, called a lunch recess to allow them to do so. Later, the speaker summoned all the councillors back to the council chamber. The afternoon proceedings became chaotic and the speaker unsuccessfully attempted to call the proceedings to order. The mayor left the council chamber, saying that he was unwell, and the speaker, without formally adjourning the proceedings, followed him to see if he needed assistance. In the speaker's absence and without an acting speaker having been elected, certain resolutions were taken.

Later, the ANC office (Inkosi Bhambatha region) sent a letter to the municipality asking that those resolutions be implemented. The speaker brought an urgent application on behalf of the council asking the Court to declare the resolutions invalid as the council was not properly constituted at the time they were made. Consequently, an order was granted calling upon the ANC Umvoti council caucus and others to give reasons why the resolutions should not be nullified. The Court ordered the municipality to pay costs of the application, but stated that any person opposing the orders would have to pay the costs of such opposition. The ANC Umvoti council caucus was later ordered to pay the costs after they opposed the orders. The Court granted

them leave to appeal against the order on costs and also to challenge the authority of the speaker to bring the action on behalf of the council.

In its judgment, the Court agreed that there was no legislation or government policy that directly authorised the speaker or manager to bring court actions on behalf of the municipality. However, it dismissed the appeal on the grounds of a procedural rule, which had not been followed, that required a different procedure when challenging the standing or capacity of a party to bring legal proceedings on behalf of an artificial person.

On the question of liability for costs, the Court held that the meeting that had passed those resolutions had not been properly constituted, and therefore the councillors had not been participating in deliberations of the full council on the legitimate business of that council. This meant that the councillors were not afforded immunity under section 28(1)(b)(i) of the Municipal Structures Act, and were therefore personally liable for the costs. The court also found no protection under common law.

This case is a salutary reminder that each municipal council must delegate, in writing, the power to institute litigation on behalf of the municipality, or pass a special resolution empowering an official to do so each time such need arises. The judgment makes it clear that immunity is limited to what transpires in properly constituted meetings.

Municipalities' obligations in eviction cases

Drakenstein Municipality v Hendricks and Others 2010 (3) SA
248 (WCC) Case No 254/2009

Landlessness and homelessness are serious challenges that still face many people in South Africa. In this regard, section 26 of the Constitution guards against the arbitrary eviction of any person from his or her home. Section 4(2) and (7) of the

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Act 19 of 1998) (PIE) mandates the courts to make an order evicting an unlawful occupier if it is just and equitable to do so.

Municipalities have unique obligations in cases of eviction of unlawful occupants of land under PIE. These obligations were

a subject of determination in *Drakenstein Municipality v Hendricks and Others*. This case dealt with an appeal by the Drakenstein Municipality against seven identical judgments. Each of these judgments directed that under the provisions of section 4(2) and (7) of PIE, there was an inferred automatic obligation on a municipality to provide a report to court on the conditions of the evictees and possible alternative accommodation.

The Court held that where it would be costly and time-consuming to investigate matters in eviction cases and report to court, a municipality would usually be absolved of that obligation. This was particularly so where the relevant information could have been obtained from the litigants without the need for a full investigation and report. At all times, however, it remained open for the court to determine whether

the municipality should in fact provide any information in cases relating to eviction.

The Court reasoned that where the persons in occupation of land whose eviction was sought were 'genuinely homeless and desperately poor and needy', there was an obligation on a municipality to fully investigate and report to court. The Court concluded that since Hendricks and others could not be categorised as 'genuinely homeless and desperately poor and needy', there was no obligation on the municipality to investigate and report to the court.

This case explains the role of municipalities in cases of evictions under PIE in the context of section 26 of the Constitution, which may be waived where certain conditions do not exist. These conditions are: the proven homelessness and indigence of the person against whom the eviction order is sought.

Interference by councillors in tenders compromises the process

Thabo Mogudi Security Services CC v Randfontein Local Municipality and Another (08/19424) [2010] ZAGPJHC 35 (7 May 2010)

Members of the mayoral committee of Randfontein Local Municipality, in a meeting which was also attended by members of the municipality's tender adjudication committee, insisted that a tender to provide security services to the municipality be awarded to Thabo Mogudi Security Services, the company that had received the highest score from the bid evaluation committee. The municipal manager decided to set aside the tender process and start it afresh because this act by members of the mayoral committee was a breach of section 117 of the Municipal Finance Management Act (Act 56 of 2003). The municipal manager had also decided previously, based on a prior onsite inspection, that the company did not fulfil the specifications. The decision was communicated to the company and a new tender was advertised. The company did not participate in the second bid. Instead it took the matter to court.

The company requested the Court to set aside the municipal manager's decisions not to accept the company's tender and to invite new tenders. It contended that the municipal manager should have afforded it an opportunity to explain before deciding that the company did not meet the specifications. It also argued that it had been disadvantaged in the second tender because its price had been disclosed in the previous bid. It further maintained that the municipal manager's decision was not a result of the mayoral committee's interference, as she had decided previously to reverse the tender process. The company

also maintained that section 117 of the MFMA had not been breached as the provision prohibited municipal councillors only from membership of or attendance at a meeting of

a committee dealing with a tender, neither of which had happened in this case.

The municipality argued that the company did not meet the specifications. It also maintained that the tender process had been compromised by the intervention of members of the mayoral committee.

The Court held that the company had met the specifications. However, the decision of the municipal manager to start the bid process afresh after the interference of the members of mayoral committee was correct, as the intervention would have compromised the whole process. Members of the mayoral committee 'by their actions at the meeting of the mayoral committee, ... plainly transgressed section 117'. Even though the company was disadvantaged in the second tender by the previous disclosure of its prices, the disadvantage to the company was 'insignificant', considering the fact that the bid process had been compromised. In the end, the Court dismissed the application.

Comment

The objective of section 117 of the MFMA is to prevent political interference in tender processes. If councillors interfere in this process, even without being members of a committee dealing with tenders or attending a meeting of such a committee, the tender process may still be compromised.

Court orders municipality to buy private property unlawfully occupied by homeless

Ekurhuleni Municipality v Dada N.O. (280/2008) [2009] ZASCA 21 (27 March 2009)

Driven by floods, some 76 families moved from an informal settlement to a neighbouring property owned by the Islamic Dawah Movement Trust located within the Ekurhuleni Metropolitan Municipality. The Trust applied to the Witwatersrand Local Division of the High Court for an eviction order against the occupiers and joined the Ekurhuleni municipality as a respondent to the proceedings.

The occupiers opposed the application and argued that the municipality was obliged, in terms of section 26(2) of the Constitution, to provide them with access to adequate housing and to take reasonable measures to provide them relief. They then requested the Court to declare that the municipality indeed bore this obligation and to stop the Trust from evicting them until such time as the municipality honoured its obligations.

The municipality responded by saying that the objectives of the Constitution were to be achieved in an ordered, properly prioritised and progressive manner.

The High Court held that the municipality had failed to discharge its constitutional duty and ordered the municipality to purchase the property from the applicant for R250 000 within 30 days and to provide essential services to the occupiers of the property.

On review, the Supreme Court of Appeal stated that the High Court's decision was against the principle of 'judicial deference'. This principle means that when an administrative action is of a technical nature, in which courts have no proficiency, it must be left for administrators to decide. The High Court had failed to have regard to such principles. The judge of the High Court had had 'a preconceived notion' that it was time 'to get things moving' as the order was not requested by the parties.

The Supreme Court of Appeal said that the High Court had been correct in concluding that the municipality had not properly dealt with the problem of informal settlement. However, the solution it had adopted was beyond its power. Even if the High Court had been of the view that the occupiers were entitled to bypass the statutes enacted by Parliament to implement the rights under chapter 2 of the Constitution, it should have considered the case under section 38 of the Constitution and granted appropriate relief. Accordingly, the order of the court was not 'appropriate relief'.

Comment

This decision emphasises the need to balance the judicial enforcement of basic rights with the municipality's financial and other constraints. In particular, it checks the temptation on the part of the courts to compel municipalities to provide services with no regard to the financial constraints under which they operate.



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