

Councillors can have their say

IMMUNITY IN COUNCIL

For a democracy to be vibrant, councillors must have the freedom to speak their minds in council.

This freedom is protected by the Constitution and the Municipal Structures Act, which grants councillors immunity against civil and criminal liability for anything they say in council.



- The purpose of immunity is to encourage open debate in the process of decision-making.
- The nature of the resolution is not important for the question of whether or not participating councillors are protected by immunity.
- Councillors who participate in decisions that prove to be unlawful are not deprived of their 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.

key points



Photo: City of Cape Town, Karen Heugh-Coetzee

Immunity

The purpose of immunity is to encourage vigorous debate in the process of decision-making, which is at the core of a healthy democracy. (See *Local Government Bulletin* vol 5 issue 2 of 2003 for a discussion of *Swartboo v Brink* CCT 27/02.)

Section 161 of the Constitution states 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 its 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.

Thus far, the Free State has adopted the Privileges and Immunities of Municipal Councillors Act 2 of 2002. Gauteng adopted the Privileges and Immunities of Councillors Act 1 of 2002. The North West has the North West Municipal Structures Act 3 of 2000, which deals with the privilege and immunity of members of municipal councils in that province.

Extent of immunity

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. Any activity of the council, whether it is during the making of a by-law or making a decision on an administrative matter, is covered. 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. Consequently, all reports, deliberations and votes 'said in', 'produced before' and 'submitted to' the council fall within the scope of section 28 of the Structures Act. The conduct must be directly related to the council. Section 28 includes conduct in committees of council in the immunity.

Assessment

It is important to note that a councillor's right to freedom of speech and debate in a municipal council and its committees is not absolute. It is subject to the council's standing rules and orders as well as the Code of Conduct. This means that if a councillor's conduct does not respect the standing rules and orders, the councillor can be guilty of contempt of council and disciplinary action can be taken by the council against that councillor.

The councillors' immunity during meetings places an extra responsibility on the Speaker to ensure that it is not abused. If the democratic process is used for mudslinging, the legitimacy of the council will be tarnished and the trust of the voters in local democracy will be affected. It is the Speaker's responsibility to guard the integrity of the democratic process in council. If necessary, he or she must initiate an investigation into an alleged breach and recommend disciplinary action to be taken by the council.