

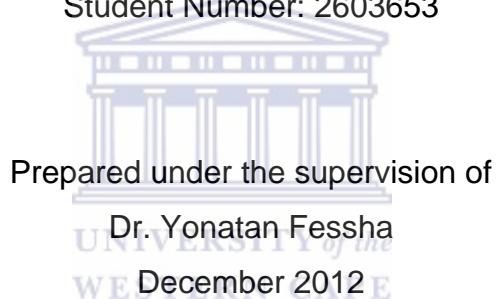
# A CRITICAL ANALYSIS OF INDIVIDUAL LIABILITY OF COUNCILLORS IN SOUTH AFRICA

Research paper submitted in partial fulfillment of the requirements of a Masters Degree (LLM) in Decentralisation and Good Governance at the University of the Western Cape.

By

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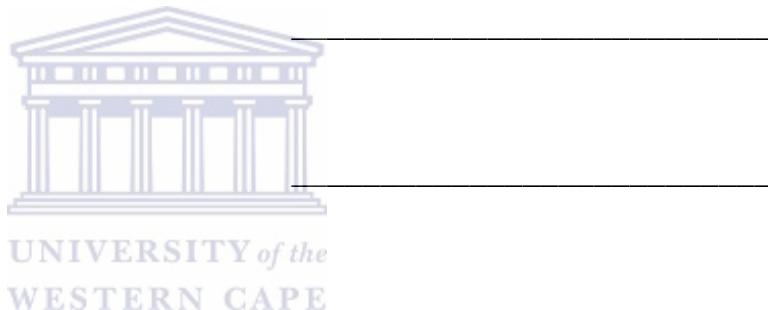
## **DECLARATION**

I, Sandile Tom, hereby declare that **A Critical Analysis of Individual Liability in South Africa** is my own work, that has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student:

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Signature:



Date:

Supervisor:

Dr Yonatan Fessha

Signature:

Date:

## **ACKNOWLEDGMENT**

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## KEY WORDS

- Councillors
- Individual liability
- Privileges and immunity
- The municipal council
- Committees of council
- Abuse of power
- Unlawful decisions
- Good faith
- Bad faith
- Municipal Structures Act
- Municipal Finance Management Act
- Partisan behaviour



## **ACRONYMS**

|       |   |
|-------|---|
| ANC   | African National Congress                                     |
| BLAs  | Black Local Authorities                                       |
| CEO   | Chief Executive Officer                                       |
| CogTA | Cooperative Governance and Traditional Affairs                |
| DA    | Democratic Alliance   |
| DPLG  | Department of Provincial and Local Government                 |
| IDP   | Integrated Development Planning                               |
| IFP   | Inkatha Freedom Party   |
| KMC   | Khayalami Metropolitan Council                                |
| LRA   | Labour Relations Act 66 of 1995                               |
| MEC   | Member of Executive Committee                                 |
| MFMA  | Local Government: Municipal Finance Management Act 56 of 2003 |
| MSA   | Local Government: Municipal Systems Act 32 of 2000            |
| NCOP  | National Council of Provinces                                 |
| REC   | Regional Executive Committee                                  |
| SALGA | South African Local Government Association                    |
| U.K   | United Kingdom  |
| WLAs  | White Local Authorities                                       |

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# **CHAPTER ONE**

## **Introduction**

### **1.1. General Background**

Councillors are elected to represent local communities in the municipal council and to provide sound and accountable leadership to their respective communities during their tenure as public servants. They bridge the gap between the community and the municipality. A municipal council “makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality”.<sup>1</sup> Furthermore, “the executive and legislative authority of the municipality is vested in the municipal council”.<sup>2</sup> This makes the municipal council not only the highest decision-making body of the municipality but also the most important institution within a municipality.

Needless to say that the efficiency of a municipal council is dependent on the performance of councillors within the municipality. Councillors play an important role in the decision-making processes of the municipality, both in council meetings or sessions and in the different committees of the council. All matters and questions before the council are decided by the majority of votes cast on a particular motion or issue.<sup>3</sup> This means that the majority of councillors present in a council meeting must vote in favour of such motion before a decision can be adopted. The law is, however, silent on the decision-making procedure or norms applicable to committees of the municipal council. Some municipalities have adopted rules of orders that provide for the procedure according to which their committees should make decisions and pass resolutions. Many other municipalities have not done so. In practice, however, the procedure for decision-making in committees of council is similar to that of the council.

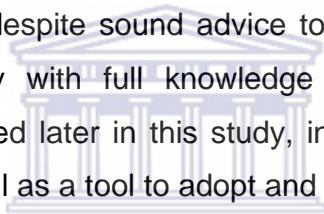
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<sup>1</sup> Section 160(1)(a) of the Constitution of the Republic of South Africa (“Constitution”).

<sup>2</sup> Section 151(2) of the Constitution.

<sup>3</sup> Section 30(3) of the Municipal structures Act 117 of 1998.

Municipal councillors in South Africa are usually deployed by political parties. It goes without saying that the political position or affiliation of councillors has a huge influence on the kind of decisions and resolutions councillors adopt. Often, councillors make decisions along party lines<sup>4</sup>. Sometimes their decisions are informed by personal interests that do not necessarily benefit the municipality or advance the best interest of the municipality. It is not uncommon that these decisions, either motivated by party discipline or personal interest, may also fall outside the bounds of law applicable to municipalities. This happens when councillors take decisions or adopt resolutions in blatant disregard of the rules applicable to decision-making in the municipal council. In other cases, decisions with major financial consequences on the municipality are taken without any professional advice whatsoever. In many instances, illegal decisions or resolutions are even adopted despite sound advice to the contrary. Councillors adopt unlawful decisions deliberately with full knowledge of their unlawfulness. Recent caselaw, which will be discussed later in this study, indicates that councillors use the "majority vote" rule of the council as a tool to adopt and support unlawful decisions.



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The increasing number of court cases dealing with applications to reverse council decisions on the basis of illegality indicates that these unlawful decisions eventually become a problem of the municipality and not just of those who made them. Recently, there have been quite a number of cases where a councillor or a party affected by an unlawful decision or resolution of the council has brought such unlawful decision to the attention of the courts, resulting in protracted and expensive legal disputes regarding the lawfulness of the decision taken by the municipal council. This situation subsequently affects the municipality negatively because when matters reach the court, it is the municipality that will, at least, incur expenses by way of paying costs of suit if the decision made by the council is set-aside on the basis of unlawfulness. Such costs are the fees charged by lawyers during protracted legal disputes and punitive costs orders should the decision be found to be unlawful.

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<sup>4</sup> By making reference to 'party lines' I mean that the councillor is mandated by the political party (that deployed him or her) to exercise his vote in a particular manner.

## **1.2. Statement of the problem**

The issue of illegal decisions begs the question of whether or not councillors can be held individually liable for the unlawful decisions they make in their meetings, be it in council or committees of council. As such, the question that this study seeks to answer is, how and to what extent can councillors be held individually liable for these unlawful decisions. This study is about the individual liability of councillors in South Africa. It examines and analyses whether individual liability of councillors can serve as a bulwark against the abuse of decision-making power that is vested in the municipal council.

The idea of holding councillors individually liable is not without controversy. Some claim that individual councillors can be held liable under common law liability for legal costs occasioned by their opposition to legal proceedings involving unlawful decisions. This applies when the unlawful decision taken by the council results in a court dispute. In terms of common law, councillors who vote in favour of unlawful decisions are individually and collectively liable for the cost occasioned by their opposition to legal action against the lawfulness of those decisions. Section 176 of the Local Government: Municipal Finance Management Act<sup>5</sup> also provide for liability of councillors under certain circumstances. On the other hand, councillors, when propelled to answer for unlawful decisions, argue that they are protected by section 28 of the Local Government: Municipal Structures Act, 117 of 1998 (herein after referred to as the "Municipal Structures Act"). Section 28 of the Structures Act provides for privileges and immunities of councillors from civil or criminal liability for any decision they have made in council or its committees.<sup>6</sup>

From the foregoing, it is clear that the grey area surrounding the individual liability of councillors warrants the need to define the scope and ambit of section 28 of the Structures Act in order to ascertain the circumstances under which it protects

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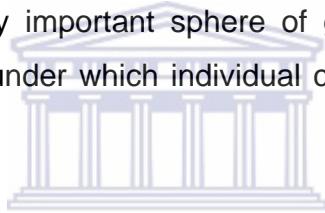
<sup>5</sup> Local Government: Municipal Finance Management Act 56 of 2003. The relevant provisions of this Act will be discussed later in the paper.

<sup>6</sup> Local Government: Municipal Structures Act 117 of 1998.

councillors from individual liability. It also warrants the need to define the circumstances in terms of which common law individual liability would apply to councillors. Furthermore, the circumstances under which section 176 of the Municipal Finance Management Act<sup>7</sup> is applicable to individual councilors also needs clarification.

### **1.3. Significance of the study**

The notion of individual liability is arguably one of the key measures of ensuring that bad political decision-making in local government does not defeat the object of good governance, which includes taking proper decisions and adopting sound resolutions at council level. This paper seeks to clarify the applicability of section 28 of the Municipal Structures Act to municipal councillors. This paper seeks to contribute to the government's fight against abuse of power in local government and to strengthen the integrity of this young but very important sphere of government by determining the conditions and circumstances under which individual councillors can be held liable for unlawful decisions they adopt.



### **1.4. Research methodology**

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The research is mainly based on desktop review of the relevant legislative framework dealing with individual liability. Case law, articles and books will also be used in the course of this research. The study will also explore how other jurisdictions deal with the issue of liability and immunity of councillors.

### **1.5. Literature review**

Few scholars have written on the individual liability of councillors in South Africa. Steytler and De Visser suggest that councillors should some howbe held individually liable for deliberately taking unlawful decisions, especially if advice to the contrary has been given to those councillors but was ignored.<sup>8</sup> De Visser further argues that councillors' immunity should not be used as a license to support illegal decisions that

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<sup>7</sup> Local Government: Municipal Finance Management Act 56 of 2003.

<sup>8</sup> Steytler N and De Visser J *Local Government of South Africa* (2009) 3-18.

are made deliberately.<sup>9</sup> Other than the contributions made by Steytler and De Visser, not much has been written on the topic in the South Africa context. As a result, there is still a lack of clarity on how, to what extent and under what circumstances individual councilors can be held liable. The notion of holding councillors liable or responsible for abuse of power in the context of voting obviously requires extensive academic discussion.

### **1.6. The structure of the study**

This study will be divided into 4 chapters. Chapter two provides an overview of local government in South Africa and pays particular attention to the role and function of councillors in local government. It will also examine and attempt to define the concept of individual liability of councilors. This chapter further analyses the provisions of section 176(2) of the Municipal Finance Management Act, focusing on the manner in which the section responds to the question of individual liability of councillors. This section is one of the few legislative provisions that expressly deal with individual liability of councillors in certain circumstances. This Chapter also focuses on the recent developments relating to individual liability of councillors in terms of the Systems Amendment Act.<sup>10</sup> It seeks to examine whether this Act adequately addresses the problem of abuse of decision-making power.

Chapter three discusses the nature and extent of privileges and immunities afforded to councillors by section 28 of the Structures Act. It highlights the effect that this section has on the notion of individual liability of councillors. This chapter is, to a large extent, based on case law that shed light on the interpretation of section 28 of the Structures Act.

Chapter four concludes the study by evaluating the individual liability of councillors in light of the analysis forwarded in the preceding chapters.

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<sup>9</sup> De Visser J 'Individual liability' (2008) 10(4) *Local Government Bulletin* 27.

<sup>10</sup> Local Government: Systems Amendment Act 7 of 2011.

# **CHAPTER TWO**

## **Individual liability of councillors**

### **2.1. Introduction**

The study, as indicated in the preceding chapter, aims at examining the individual liability of councillors in local government. In order to carry out such an examination, it is important to first explain and discuss the role and place of the municipal council and councillors in local government. With that in mind, the chapter will first discuss the pre-constitutional period of local government before proceeding to discuss the position of local government under the current constitutional dispensation. This chapter will also discuss the meaning of individual liability of councillors. It further analyses the individual liability of councillors with reference to the provisions of the Local Government: Municipal Finance Management Act ("MFMA").<sup>11</sup> This Act, which was enacted in terms of section 164 of the Constitution, deals with the financial management of local government. Of particular relevance to the question of liability of councillors is section 176 of the MFMA, which provides for liability of functionaries exercising powers and functions in terms of the MFMA.

Furthermore, the study will determine the scope of application of section 176 of the MFMA. It will discuss the functionaries to which the section applies with the aim of establishing whether or not, ordinary individual councillors are included in those functionaries. The chapter will also analyse the recent legislative developments that are intended to minimise abuse of power in local government. It will particularly focus on the Local Government: Systems Amendment Act.<sup>12</sup>

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<sup>11</sup> Local Government: Municipal Finance Management Act 56 of 2003.

<sup>12</sup> Local Government: Systems Amendment Act, 7 of 2011.

## **2.2 The legal status of local government**

### **2.2.1 The pre-constitutional period**

South Africa's experience with local government dates back to 1910 with the formation of the Union of South Africa, which transformed four British colonies into provinces.<sup>13</sup> Each province enacted legislation that provided for the structures, functions, and powers of local governments in the province. Local government was, in the words of De Visser, 'subservient, racist and consequently illegitimate'.<sup>14</sup> Local government was racist in that local authorities were established according to racial lines. Affluent municipalities were located in white areas and these municipalities had a good revenue base and could impose rates and taxes. They further did not bear the financial burden of servicing disadvantaged black areas.<sup>15</sup> The apartheid government intensified institutional segregation by providing for the development of separate local authorities for each racial group (Blacks, Colored, Indians and Whites).<sup>16</sup> Local government was introduced as a responsibility of the provinces. Local government was subservient in that it required permission and approval from national and provincial government when it came to the exercise of its powers and functions. Furthermore, the local authorities existed in terms of provincial laws and their powers were dependent on, and curtailed by, these provincial laws. It, therefore, follows that because local government was very 'subservient', its council was not autonomous and was arguably not the highest decision-making body on local government matters. The subservient nature of local authorities continued to exist until the 1990's when the Interim Constitution of South Africa, Act 200 of 1993(the "Interim Constitution") was promulgated.

During the pre-constitutional stage of local government, it seems that the individual liability of councilors was arguably never an issue. This is because the council's decision-making powers were curtailed and subjected to the approval of provincial

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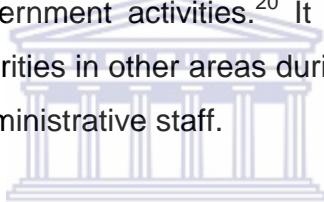
<sup>13</sup> De Visser J 'Republic of South Africa' in Steytler et al, *Local government and metropolitan regions in federal systems*(2009) 270.

<sup>14</sup> De Visser J (2009) 271.

<sup>15</sup> See De Visser J (2009) 270 – 271.

<sup>16</sup> De Visser J (2009) 271.

administrators. Since local government was very fragmented and segregated according to race, not all municipalities or local authorities had fully fledged councils or political municipal councils. Only White Local Authorities ("WLAs") had fully-fledged councils.<sup>17</sup> Management Boards and Local Affairs Committees technically governed Coloured and Indian areas. Both institutions relied on the administration of WLAs and/or provincial administration to provide services on its behalf. Typically, these Management Committees were established through elections, characterized by very low levels of voter participation and generally regarded as illegitimate.<sup>18</sup> African communities fell under the jurisdiction of Black Local Authority ("BLAs"). According to Nyalunga, these were beleaguered structures from their inception due to militant opposition from the black community and had a well-established reputation for inefficiency, graft and collaboration with white interests.<sup>19</sup> The leaders of BLAs were seemingly used as agents to administer local government activities.<sup>20</sup> It follows from this that there is a possibility that many local authorities in other areas during the pre-constitution stage did not have councillors but had administrative staff.



What is not clear was the approach that was followed in dealing with illegal decisions adopted and supported by councillors in council meetings.<sup>21</sup> It is not clear whether it was the function of the provincial and national government to oversee decisions taken by councillors as local government which, at the time, was a creature of provincial ordinances and national legislation. Most court cases during the pre-constitutional period of local government were against the municipalities and not the individual councillors. These cases dealt with the delictual claims against municipalities for negligence and breach of the general legal duty of care.<sup>22</sup> It is not clear if municipalities

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<sup>17</sup> Nyalunga D 'The Revitalisation of Local Government in South Africa' (2006) 1(2) International NGO Journal, 2. Also available online at <[www.academicjournals.org](http://www.academicjournals.org)> [accessed on 15 May 2011].

<sup>18</sup> Cameron R *The Democratisation of South African local government: A tale of three cities* (1999) 7.

<sup>19</sup> Nyalunga D (2006) 2.

<sup>20</sup> De Visser J (2009) 271.

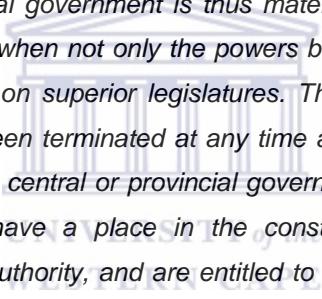
<sup>21</sup> This of course relates to municipalities that actually had fully-fledged municipal councils.

<sup>22</sup> *Butters v City of Cape Town Municipality* 1993 (3) SA 521 (C). In this particular case, the plaintiff claimed damages from the defendant in respect of bodily injuries which the plaintiff sustained in

were ever confronted with cases where councillors adopted unlawful decisions in council.

### **2.2.2. Constitutional period**

The Interim Constitution of the Republic of South Africa, Act 200 of 1993, ushered-in constitutional recognition for local government by acknowledging its autonomy and guaranteeing its revenue-generating powers as well as a right to a share in the nationally generated revenue.<sup>23</sup> It was clear at this stage that local government would be allowed to stand on its own and make its own mistakes as a sphere of government in the new South Africa. Local government was recognized in the Interim Constitution and its status was improved. The new status of local government was well articulated in *Fedsure Life Assurance v Greater Johannesburg*.<sup>24</sup> In that case Kriegler J remarked:

The constitutional status of local government is thus materially different to what it was when parliament was supreme when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That no longer is the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.<sup>25</sup>

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1990 when he fell into the Liesbeeck River canal and the public parking area at Rondebosch, and this canal was situated in the respondent property of which the respondent was the owner. The plaintiff alleged that the defendant municipality was negligent in not having provided a suitable barrier between the parking area and the canal. There may be other cases that dealt with claims for negligence on the side of municipalities such as the *City of Cape Town Municipality v Paine* 1923 AD 207 and *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A).

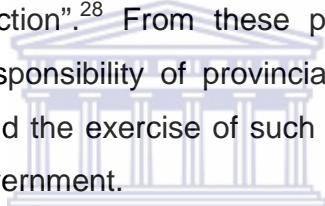
<sup>23</sup> De Visser J (2009) 272.

<sup>24</sup> *Fedsure life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (1999) (1) SA 374 (CC).

<sup>25</sup> *Fedsure life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (1999) (1) SA 374 (CC). 38.

This judgment reaffirmed the provisions of the Interim Constitution that posit local government as a fully-fledged sphere of government in the new multi-sphere government of South Africa.

Building on the constitutional recognition of local government in the interim Constitution, the Constitution of the Republic of South Africa, Act 108 of 1996 (the "Constitution"), firmly established local government's autonomy. The drafters of the Final Constitution dedicated a full chapter on local government, establishing it as a sphere of government.<sup>26</sup> By way of enhancing the autonomy of local government, the Constitution stipulates that "a municipality has a right to govern, on its own initiative, the local government affairs of its community".<sup>27</sup> It further states that "the national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its function".<sup>28</sup> From these provisions, it is clear that local government is no longer a responsibility of provincial government. It has a right to govern its community affairs and the exercise of such powers should not be interfered with by the other spheres of government.



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Local government, as a sphere of government that is closest to the people, must use its autonomy purposively to provide services and promote development.<sup>29</sup> The mandate of local government is contained in section 152 of the Constitution. According to section 152, the objects of local government include the provision of democratic and accountable government for local communities,<sup>30</sup> the provision of services to communities in a sustainable manner, the promotion of social and economic development, and a safe and healthy environment. Municipalities are instructed to strive to achieve these objects using their financial and administrative capacity.<sup>31</sup>

<sup>26</sup> Chapter 7 of the Constitution.

<sup>27</sup> Section 151(3) of the Constitution.

<sup>28</sup> Section 151(4) of the Constitution.

<sup>29</sup> Steytler N and De Visser J (2009) 27.

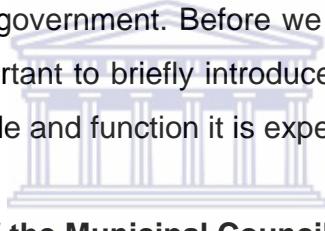
<sup>30</sup> This object is reiterated in section 4(2)(b) of the Systems Act which provides that the council has duty to provide without favour or prejudice, democratic and accountable government.

<sup>31</sup> Section 152(2) of the Constitution.

From the foregoing, it is clear that the mandate of local government is 'development-centered'. This mandate is further elaborated in section 153 of the Constitution, which creates a duty on a municipality to "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and promote the social and economic development of the community".<sup>32</sup> Municipalities have the duty to comply with the developmental duties enshrined in the Constitution.

### **2.3. The role and function of councillors in local government.**

Councillors play an important role in ensuring their local government effectively implements its development mandate. This study does not wish to provide an exhaustive list of the roles and functions of councillors. It simply highlights the major activities of councillors in local government. Before we discuss the role and function of councillors, it is, however, important to briefly introduce the municipal council, focusing on its structure as well as the role and function it is expected to perform.



#### **2.3.1. The role and function of the Municipal Council**

A municipality consists of political structures, administration and the community of the municipality.<sup>33</sup> Political structures of the municipality include the municipal council. In the following paragraphs, we will discuss the municipal council in order to determine its importance to local governance.

A municipal council is composed of councilors,<sup>34</sup> who are democratically elected by registered voters within the jurisdiction of a municipality.<sup>35</sup> As a political structure within a municipality,<sup>36</sup> it is vested with the legislative and executive authority of the

<sup>32</sup> Section 153(a) of the Constitution.

<sup>33</sup> Section 2(b) of the Municipal Systems Act.

<sup>34</sup> These councillors are either representing a political party or elected as independent members.

However, the latter manner of representation is very seldom.

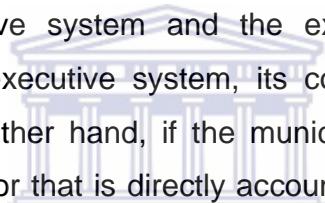
<sup>35</sup> SALGA 'Handbook for Municipal Councillor' (2006) 12. Available at

<[www.adac.co.za/articles/councillors - handbook](http://www.adac.co.za/articles/councillors - handbook)> [accessed on 1 Jun 2010].

<sup>36</sup> Municipal Systems Act section 1.

municipality. As indicated in chapter one, this structure is responsible for all decisions of the municipality unless it has delegated a specific power to a committee or another body.<sup>37</sup> Generally speaking, the role of the council includes making policies and by-laws through its legislative authority, monitoring implementation of those policies and intervening or taking corrective actions where necessary.<sup>38</sup> The function of the council may be defined as representation, providing leadership to its constituency in the municipal area, participating in decision-making and exercising delegated and statutory powers.<sup>39</sup>

The council exercises oversight over the municipal executive. The nature of the oversight depends on the particular executive system that a council has established. In this regard, there are two executive systems that are applicable in local government, namely the collective executive system and the executive mayor system. If the municipality has a collective executive system, its committee is accountable to the council at all times. On the other hand, if the municipality has an executive mayor system, it is the executive mayor that is directly accountable to the council and not the mayoral committee.



One of the contentious issues regarding the power of council to exercise oversight over the executive relates to the fact that the council has the power to subsequently remove the office bearers in these bodies if it is not satisfied with their work or for any other reason. This can be done by resolution adopted in a council meeting.<sup>40</sup> Steyter and De Visser<sup>41</sup> submit that the council's prerogative to appoint and fire its committees was

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<sup>37</sup> However, the delegation itself does not divest the council of its responsibilities of making decisions in the municipality. The council has the ability to revisit any decisions taken in terms of delegated authority or revisit the delegation of authority itself for further discussion on this see, Steyter N De Visser J'Local government' in Woolman, S et al *Constitutional law of South Africa*2 ed(2008) 22-37.

<sup>38</sup> SALGA (2006) 47.

<sup>39</sup> SALGA (2006) 47.

<sup>40</sup> Section 53 of the Municipal Structures Act.

<sup>41</sup> Steyter N and De Visser J (2009) 3-31.

clarified in *Marais v Democratic Alliance*.<sup>42</sup> In that case the Democratic Alliance told its mayor that it has lost confidence in his ability to function as mayor and urged the mayor to subsequently resign from his position. The court emphasized that Marais was a duly elected municipal official and only the municipal council has the power to remove him from office.<sup>43</sup>

From the foregoing, it is clear that the council is the highest decision-making body of the municipality and the rules applicable to this body regarding decision-making should be respected and applied at all times by those serving in this structure. This shows the crucial role that councillors play in ensuring that the powers and functions of the municipal council are used to advance the interests of the community. What are then the role and function of councillors in local government?

### **2.3.2. The role of councillors**

Councillors are elected to represent local communities and the interests of their respective political parties in the municipal council. They exercise all the powers and functions of the municipal council mentioned above. It goes without saying that councillors, as members of the council, have to work together in implementing and exercising the functions and powers of the council. Councillors are a link between the community and the council and are expected to be in close contact with their constituencies ‘on the ground’ and to keep the council informed of the real experiences and views of the residents within the municipality.<sup>44</sup> This process contributes to the enhancement of participatory democracy in the municipality as citizens have the right not only to elect their representatives but to participate actively in government decision-making on a continuous basis.

To begin with, councillors serve in committees of the council. The committees of council are made up of a group of councillors who are usually designated to review or develop

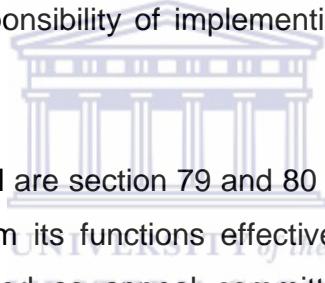
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<sup>42</sup> *Marais v Democratic Alliance* [2002] JOL 9241 (C).

<sup>43</sup> *Marais v Democratic Alliance* [2002] JOL 9241 (C) para 54.

<sup>44</sup> SALGA (2006) 49.

new policies relating to a specific issue. The executive committee is one committee that has a lot of influence in the manner in which the council leads the community or its constituency. This committee,<sup>45</sup> among other things, assists the municipality in identifying and prioritising the needs of the municipality,<sup>46</sup> recommends strategies, programmes and services to the council in order to address those needs through the Integrated Development Plan.,<sup>47</sup> and oversees the provision of services in a sustainable manner.<sup>48</sup> This is why this committee has to be established in terms of the Structures Act and the Constitution.<sup>49</sup> Because of the importance of this committee, the Structures Act provides that the executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in the same proportion that they are represented in the council.<sup>50</sup> What is important to note about this committee is that it is made up of councillors and these councillors bear the responsibility of implementing strategic programmes of the municipality.



The other committees of council are section 79 and 80 committees, which are designed to assist the council to perform its functions effectively and efficiently.<sup>51</sup> Section 79 committees are often configured as appeal committees and rules and disciplinary committees.<sup>52</sup> Section 80 committees are also appointed by the council but their chairpersons are appointed by executive committee or executive mayor if municipality uses the executive mayor system. Section 80 committees are linked to specific

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<sup>45</sup> It is submitted that the executive committee is the “principal committee” of the council, and the executive committee receives reports from other committees of council and forwards these reports with recommendation to the full council, see section 44(1)(a).

<sup>46</sup> Section 44(2)(a) of the structures Act.

<sup>47</sup> Section 44(2)(c) of the Structures Act.

<sup>48</sup> Section 44(3)(e) of the Structures Act.

<sup>49</sup> See section 160(8) of the Constitution.

<sup>50</sup> Section 43(1) and (2) of the Municipal Structures Act 117 of 1998.

<sup>51</sup> These committees are in Section 79 and 80 of the Municipal Structures Act.117 of 1998.

<sup>52</sup> Steytler N & De Visser J (2011) 3-42.

portfolios with names such "corporate services", "economic development" etc.<sup>53</sup> These committees report to the council.

As indicated in chapter one, councillors have the responsibility to make important decisions through voting and adopt resolutions on policy matters, legislation etc.<sup>54</sup> Because of the role and function of the council, councilors, as members of the council, are responsible for ensuring that the mandate of the council is implemented and realized.

It is common practice among councillors to first discuss and debate issues in party caucuses. Once a decision has been taken in the caucus, party members are usually expected to vote in the council according to party lines.<sup>55</sup> The process is very partisan in nature as councillors tend to impose the implementation of caucus 'resolutions' at all costs even if it means going against the legal framework established for holding meetings. This partisan behaviour, more often than not, negatively affects proper decision-making of the municipality.<sup>56</sup> According to De Visser *et al*, the decision-making of political structures is negatively affected by this very strict culture of party discipline.<sup>57</sup> Sometimes caucus resolutions are themselves illegal and ill-advised and councillors base their votes on the strength of these resolutions.<sup>58</sup> The question is then whether or not councillors can be held personally liable for abuse of power.

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<sup>53</sup> Steytler N & De Visser J (2011) 3-42.

<sup>54</sup> SALGA (2006) 50.

<sup>55</sup> SALGA (2006) 50.

<sup>56</sup> De Visser Steytler & May *A Study into the Functionality of Municipal Governance Arrangements* (2009) 34, available at [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za) [Accessed 25 September 2012].

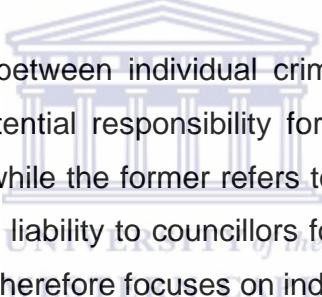
<sup>57</sup> De Visser Steytler & May *A Study into the Functionality of Municipal Governance Arrangements* (2009) 34.

<sup>58</sup> *Vuyo Mlokothi v Amothole District municipality*(1428/2008) [2008] ZAEHC 184; 2009 (6) SA 354 (ECD) (6 November 2008).

## **2.4. Individual Liability**

The Oxford Dictionary defines the term 'liability' as meaning a state of being liable. It posits that being liable is to be responsible in law for something that you have done or failed to do.<sup>59</sup> Briefly stated 'liability' entails a legal responsibility.<sup>60</sup> Individual liability, therefore, means to be personally responsible for something you have done or failed to do. A similar meaning was given to the term in the case of *Mayfield v First National Bank of Chattanooga*.<sup>61</sup> According to the Court,

*"[L]iability is a broad legal term which is usually held to include every kind of legal obligation, responsibility or duty, certainly all that are measured by money obligation. Liability may arise from contract, express or implied, from a duty imposed by law, or by judgment of a court, or as a consequence of tort committed."*<sup>62</sup>



A distinction has to be made between individual criminal liability and individual civil liability. The latter refers to potential responsibility for payment of damages or other court enforcement in a lawsuit while the former refers to punishment for a crime.<sup>63</sup> This study focuses on applicability of liability to councillors for unlawful decisions they adopt in council meetings. The study, therefore focuses on individual civil liability.

### **2.4.1. Rationale for individual liability**

As indicated above, the council is a deliberative assembly and decisions in this body are made through voting. Councillors are free to make their points and arguments in such meetings. What is problematic in this setting is the tendency of councillors to abuse such voting system and adopt unlawful decisions. This kind of conduct defeats the purpose for which such right was granted. This tendency further, results in a council that is dysfunctional and paralyses the decision making in the municipal council. The

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<sup>59</sup> Soanes C Stevenson A (2006) *Concise Oxford English Dictionary* (11<sup>th</sup> ed) 820.

<sup>60</sup> Soanes C Stevenson A (2006) 820.

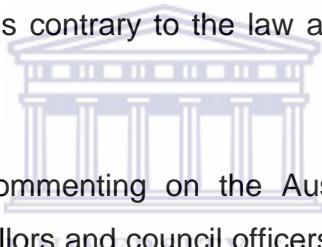
<sup>61</sup> *Mayfield v First National Bank of Chattanooga* 137 F. 2d 1113 (1943).

<sup>62</sup> *Mayfield v First National Bank of Chattanooga* 137 F. 2d 1113 (1943).

<sup>63</sup> Hill and Hill (2005) 1.

rationale for holding councillors individually liable is based on the idea that when there is a sanction imposed against voting for and supporting unlawful decisions, councillors would be reluctant in engaging in such activities as there will be a heavy price to pay.

The dearth of literature on individual liability of councillors in South Africa compels one to explore commentary from other jurisdictions. Lawson, commenting on the English local government framework, submits that councillors are not usually personally liable for decisions they take and that municipalities themselves would take responsibility for any such liability.<sup>64</sup> Lawson further submits that there are, however, a few circumstances where a council member, or officer, can incur such liability. For example, if a council member votes on a matter in which he has a personal financial interest, then he may incur a penalty. Secondly, councillors are liable if they are present at a meeting that discusses a proposal that is contrary to the law and they do not vote against the unlawful proposal.



Britten, on the other hand, commenting on the Australian local government legal framework, submits that "councillors and council officers are far from immunity from civil and criminal personal liability".<sup>65</sup> He states that in a limited number of cases, a councillor or a council officer has been found personally liable for such offences.<sup>66</sup> However, as the level of responsibility placed on individual councillors has increased, the potential liability that coincides with the undertaking of such responsibility is also amplified.<sup>67</sup> Therefore, according to Britten, municipal councillors can in certain circumstances be held individually liable for the unlawful decisions they take.

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<sup>64</sup> Lawson RW 'Councillors legal liabilities and obligations'(2004) available at:  
<http://www.bromleytransport.org.uk> [accessed on 02/07/2010] 4.

<sup>65</sup> Britten S 'Are you immune from liability? Councillors and council officers' personal liability' (2008) 14(2) *Local Government Law Journal* 100.

<sup>66</sup> Britten S (2008) 100.

<sup>67</sup> Britten S (2008) 108.

There are some legislative initiatives embarked upon by the legislature to attempt to tackle this growing problem of abuse of decision-making power. One of the legislative interventions that this study examines is section 176 of the MFMA.

#### **2.4.2. Scope of application of section 176 of the MFMA**

For the purpose of this study, as well as for ease of reference, it is important to reproduce the provisions of section 176:

- (1) *No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.*
- (2) *Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.*

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It is clear from the provisions of section 176(1) that the section applies to all those institutions and functionaries referred to therein. The institutions and functionaries mentioned in section 176(1) are not liable for any loss, provided that they have acted in good faith. Section 176(1), does not make specific reference to ordinary individual councillors. The question that arises then is whether or not councillors are covered by section 176(1). Answering this question would require one to discuss and explain the institutions and functionaries mentioned in section 176(1).

The first institution that is exempted from liability is a municipality. A municipality is defined as an organ of state within the local sphere of government exercising legislative and executive authority.<sup>68</sup> But this definition of municipality makes no reference to councillors. The only closest reference to councillors relates to the “political office bearers” who, as indicated above, are also exempted from liability for loss suffered.

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<sup>68</sup> Section 2 of the Municipal Systems Act 32 of 2000.

However, a “political office bearer”, according to the Municipal Systems Act, means the speaker, executive mayor, deputy executive mayor, mayor, deputy mayor or a member of the executive committee.”<sup>69</sup> From this, it is also clear that political office bearers are ‘special councillors’ and not ordinary councillors. The fact that only political office bearers are mentioned in section 176(1) does not support the argument that all councillors are covered under this particular section.

Another entity that is exempted from liability is a political structure. In terms of section 1 of the Municipal Systems Act, a political structure, in relation to a municipality, means, “[t]he council of the municipality or any committee or other collective structure of a municipality, designated or appointed in terms of a specific provision of the Municipal structures Act”.<sup>70</sup> As mentioned in chapter one, the council of the municipality is made up of councillors. But the term ‘council’ also makes no reference to individual councillors. The question is whether or not, by referring to political structures, the section is envisaging individual councillors or councillors as members of a collective body, the council. If a political structure envisaged in section 176(1) refers to councillors as a collective (as members of the council), then we are not referring to individual liability but collective responsibility.

This question warrants the need to explain what is meant by collective liability or responsibility. Collective responsibility, in the context of cabinet ministers, means “that ministers act in unison to the outside world and carry joint responsibility before parliament for the way in which each member exercises and performs powers and functions.”<sup>71</sup> This means that the cabinet as a whole is liable to parliament and not ministers in their individual capacity. By the same token, in the context of local government, the same argument applies to the municipal council, in that it is not individual councillors who are exempted from liability but the council as a collective

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<sup>69</sup> Section 1 of the Municipal Systems Act 32 of 2000.

<sup>70</sup> Section 1 of the Municipal Systems Act 32 of 2000.

<sup>71</sup> Rauntenbach IM Malherbe EFJ *Constitutional Law* 5ed (2009) 193.

body. That is of course, provided that the term 'political structure' is interpreted to refer to councillors as collectives.

In the case of *Willem Heyneke v Umhlathuze Municipality*,<sup>72</sup> the council of Umhlathuze Municipality adopted an unlawful resolution to place the municipal manager on paid special leave contrary to provisions of the Labour Relations Act 66 of 1995 ("LRA"). The court held that all the councillors who supported and voted in favour of the unlawful resolution were individually liable in terms of section 176 for the loss suffered as a result of the unlawful resolution they adopted. The court imputed liability to the individual councillors who supported the resolution and not the council as collective. In view of the *Willem Heyneke* case, this study contends that individual councillors are part of the functionaries mentioned in section 176(1). This means that they cannot be held liable for any loss or damage if they perform their functions in good faith.

#### **2.4.2.1. The meaning of good faith and its implications.**

From the foregoing, it is clear that section 176 applies to councillors as individual members of the council. From a reading of section 176(1), it is also clear that councillors do enjoy immunity from personal liability. This immunity is not, however, absolute. Councillors are not liable under section 176(1) only if they can prove that the conduct that resulted in loss or damage to the municipality was done in 'good faith'. The question is, then, what is meant by 'good faith'.

The term 'good faith' is not defined anywhere in the MFMA and a proper understanding of this term is important in the determination of liability in terms of the section 176. It is derived from the translation of the Latin term *bona fide* and courts often use the two terms interchangeably.<sup>73</sup> The Encarta Dictionary (English U.K) defines the term to mean "an honest intent"; "an intention of behaving honestly"; "the intention of behaving in an

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<sup>72</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC). This case will be discussed in greater detail later in this chapter.

<sup>73</sup> <http://legal-dictionary.thefreedictionary.com/good+faith>.

honest and sincere way".<sup>74</sup> Good faith is also defined as an "abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others."<sup>75</sup>

One way to understand the term 'good faith' is to appreciate its opposite, namely bad faith (*mala fide*). Councillors would be individually liable for the loss suffered by the municipality if they acted in bad faith. De Ville, referring to organs of state, argues that, bad faith exists if the organ of state claims to be acting for one purpose but knowingly acts for another private or public interest out of, say, spite or ill will or to benefit the organ or its relations.<sup>76</sup> Wiechers also observes that, "bad faith can be presumed on a balance of probabilities if the evidence clearly indicates that the organ of state not only misconceived its powers and misjudged the facts, but should also have realised or did in fact realise that it was performing an invalid act."<sup>77</sup>

From the foregoing, it is apparent that bad faith consists of two components. First, in order for bad faith to exist, there must be unlawful conduct on the part of an organ of state. However, the unlawful conduct is not enough to establish the existence of bad faith. It must also be demonstrated that the organ or person had knowledge that it is performing an invalid act or its conduct is unlawful.

In the case of *Willem Heyneke*<sup>78</sup>, bad faith on the part of councillors in the decision-making process of Umhlathuze Municipality was at the heart of the matter. On 23 September 2009, the Chief Whip wrote a letter to the council of the municipality, requesting it to place Mr. Heyneke on special leave pending an investigation into causes of what is termed the "cash crisis" and other concerns of the municipality. These other concerns involved allegations of fraud in land sales and deviations from council policy. The Speaker consulted Mr Heyneke and the latter agreed to be placed on

<sup>74</sup> The Encarta Dictionary: English (U.K.).

<sup>75</sup> The Encarta Dictionary: English (U.K.).

<sup>76</sup> De Ville JR *Judicial Review of Administrative Action in South Africa* (2003) 175.

<sup>77</sup> Wiechers M *Administrative Law* (1985) 257.

<sup>78</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC).

special leave on the understanding that it will be for a short period of time. In a council meeting, a majority decision was taken to place the Mr Heyneke on special leave. This resolution did not enjoy a smooth passage. Certain councillors opposed the resolution on procedural and substantive grounds. When the speaker placed the matter on vote, the DA and IFP members refused to be party to the decision. Twenty-eight councillors left the meeting and thirty-one remained to vote in favour of the resolution. In the same meeting, the council reviewed and declared unlawful two decisions taken by Mr Heyneke, namely the decisions to appoint human resources and administrative managers on the basis that he exceeded his authority as he had delegated the power to appoint these managers to the Deputy City Manager. The council did not charge Mr Heyneke for misconduct on the two unlawful decisions he took. It, instead, placed him on special leave pending investigations into the 'cash crises'.

The principal issue was whether the resolution regarding special leave was lawful. The Court discussed the law applicable to special leave and held that leave, according to the policy, is 'granted to' and not 'issued against' employees. The council may prescribe the period and conditions of special leave but not special leave itself.<sup>79</sup> The Court held that the resolution is unlawful because the employee's contract, read together with the legislation and the policy on special leave, do not allow the municipality to impose leave on him. Furthermore, the Court stated that the municipality's proclaimed purpose of the imposition of special leave, namely to conduct investigations, is not the true purpose.<sup>80</sup> The court went on to deal with the existence of bad faith in the resolution of placing the applicant on special leave. According to the Court,

- a. *[t]hose responsible for the decision to put the employee on special leave have an ulterior motive for the following reasons:*
  - i. *The municipality decided to put the employee on special leave pending investigations before determining the reasons for such investigations.*
  - ii. *The municipality did not apply its mind to the special leave resolution.*<sup>81</sup>

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<sup>79</sup> *Willem Heyneke v Umhlathuze Municipality*JOL 25625 (LC) para 31.

<sup>80</sup> *Willem Heyneke v Umhlathuze Municipality*JOL 25625 (LC) para 130.

<sup>81</sup> *Willem Heyneke v Umhlathuze Municipality*JOL 25625 (LC) para 130.

According to the Court, ulterior motive and bad faith can sometimes overlap because they encompass a range of elements such as fraud, unreasonableness, arbitrariness, dishonesty, a failure to apply one's mind, etc.<sup>82</sup> The Court went on to say that the connection between the special leave and the disciplinary proceedings evidences bad faith. In finding bad faith on the part of the council, the court found that

*[t]he special leave is a façade for suspending the employee pending misconduct proceedings. By putting the employee on special leave and persisting with it, knowing that it is for the purpose of effectively suspending him for the acts of misconduct that he has been found guilty on is bad faith.<sup>83</sup> Further, the municipality used the power aimed at benefiting employees as a weapon against the employee. It misconstrued and misused its power for the purpose not authorised in law and continues to do so despite being alerted to the unlawfulness and continued misuse of power is bad faith.<sup>84</sup>*

The special leave resolution, according to the Court, was irrational, unreasonable and disproportionately prejudicial to the employee, Mr. Heyneke, and the public interest.<sup>85</sup>

In light of the above, it is fair to conclude that the existence of bad faith in the conduct of councillors performing acts in terms of the MFMA is central to the possible liability of councillors in terms of section 176. In other words, if an unlawful resolution was adopted by the council in bad faith, the councillors who supported such an unlawful resolution (with the full knowledge of its unlawfulness) would be held individually liable. However, if the said resolution was adopted in good faith even though the resolution is unlawful, councillors would be exempted from any liability.

#### **2.4.2.2. The consequences individual liability of councillors**

Now that we have established that councillors can incur personal liability if it is shown that they acted in bad faith, the question that should be answered is what

<sup>82</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 58.

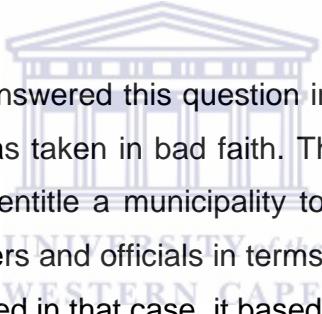
<sup>83</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 91.

<sup>84</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 92.

<sup>85</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 92.

consequences, if any, flow from such liability. Section 176(2) of the MFMA, enunciates the consequences that flow from the liability provided for in section 176(1) of the MFMA. It provides that office bearers and functionaries are liable for the loss or damage if such loss or damage is suffered as a result of negligent or deliberate actions by these individuals. The municipality may recover the loss or damage suffered from the functionaries mentioned in section 176(2).

The problem is that section 176(2) of the MFMA, only mentions political office bearers or officials, and officials of municipal entities. Does this mean that the municipality may recover the loss or damage suffered only from these persons and not from the other institutions referred to in section 176(1)? Put differently, the question is whether the municipality may recover the loss or damage suffered from ordinary councillors as well.<sup>86</sup>



The Court in *Willem Heyneke* answered this question in the affirmative. In this case, it was clear that the resolution was taken in bad faith. The Court held that bad faith and unlawfulness are grounds that entitle a municipality to recover any loss or damage it suffers from political office bearers and officials in terms of section 176.<sup>87</sup> When the court considered the relief to be granted in that case, it based its decision on section 176(2) of the MFMA. The Court decided that all those councillors responsible for placing the applicant on special leave must be held accountable for their actions.<sup>88</sup> The municipality was mandated by the court to establish the following:

*which councillors and officials were responsible for the decision; the extent of each person's responsibility for the special leave; the amount the municipality should recover from each person; and the reasons for electing not to recover from any person.*

The Court warned that even though the councillors who voted to place the applicant on special leave constitute a majority in the council and as such might not be enthusiastic

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<sup>86</sup> Meaning those councillors who are not office bearers.

<sup>87</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 135.

<sup>88</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 139.

about recovering losses from themselves, they are publicly accountable for the decisions in terms of section 176 of the MFMA. The court went on to say that if the councillors do not do what is required by statute, they could be in contempt of the order.”<sup>89</sup>

It follows from the *Willem Heyneke* case that section 176 allows municipalities to recover loss or damage caused by bad decision-making by the structures listed in the section including councillors. The application of section 176(2) is not restricted to the persons listed in section 176(2). The municipality can also recover the loss or damage suffered from individual councillors.

Finally, the individual councillors who voted in favour of the unlawful resolution were found individually liable for the votes cast. Therefore, individual liability in terms of section 176 arises when a councillor or councillors have voted in support of an unlawful resolution and had knowledge of the unlawfulness of the said resolution. In addition to the knowledge of unlawfulness, if municipality suffers loss as a result of such resolution, then individual liability would arise. The *Willem Heyneke* case is instructive in determining the consequences of liability of councillors and other functionaries on the basis of section 176. If the councillor's action or omission resulted in a financial loss for the municipality, the councillor is ordered to pay for the loss suffered by the municipality as a result of the councillor's actions. This, for example, may include legal costs if the matter ended up in court.

In addition to liability of councillors envisaged in section 176 of the MFMA,<sup>90</sup> there are recent legislative developments that are intended to minimize abuse of decision-making power in local government. One such legislative milestone is the Local Government: Municipal Systems Amendment Act, 7 of 2011. In the next section the study examines

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<sup>89</sup> *Willem Heyneke v Umhlathuze Municipality* JOL 25625 (LC) para 137.

<sup>90</sup> Section 176(2) of the MFMA, makes it clear that the liability under the MFMA does not exclude or replace any liability under common law. Thus if the functionaries and institutions mentioned in the section could be liable at common law, such liability is not replaced by the provisions of section 176 of the MFMA.

whether the amendments introduced by the Act address the problem of abuse of decision-making power in local government.

## **2.5. The Local Government: Systems Amendment Act, 7 of 2011**

The Local Government: Systems Amendment Act, 7 of 2011 (the "Act") amends certain provisions in the Municipal Systems Act and addresses the various inconsistencies that exist in the current Municipal Systems Act. The Act was introduced to provide *inter alia*, for procedures and competency criteria for the appointment of municipal managers and managers directly accountable to municipal managers, to require all staff systems of the municipality to be consistent with uniform standards determined by the Minister by regulation, to bar municipal managers and managers directly accountable to them from holding political office in political parties and to regulate duties, remuneration, benefits and other terms of employment for municipal managers and managers directly accountable to them.<sup>91</sup> The municipal council appoints senior management of the municipality and there are provisions that the council ought to follow in exercising its decision-making powers appointing senior managers in terms of the Act. This study focuses on the provisions that prohibit councillors from taking decisions or purporting to take decisions in a manner that is contrary to the provisions of the Act.

Section 14 of the Act amends Schedule 1<sup>92</sup> of the Municipal Systems Act<sup>93</sup> by inserting the following provisions after item 2 Schedule 1 of the Municipal Systems Act: "a councilor may not vote in favour of a resolution before the council or a committee of the council which conflicts with any legislation applicable to local government." There is, thus a clear legal prohibition on councillors prohibiting them from voting in favour of unlawful decisions. What is the possible impact of this provision on the decision-making power of the councillors? Put differently, the question is: what are the consequences that flow from voting in favour of resolutions that are in conflict with "any legislation applicable to local government".

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<sup>91</sup> The Preamble to the Local Government: Systems Amendment Act 7 of 2011.

<sup>92</sup> Schedule 1 of the Municipal Systems Act contains the Code of Good Conduct for Councillors.

<sup>93</sup> Local Government: Municipal Systems Act 32 of 2000.

As indicated earlier, section 14 is an insertion to Schedule 1 of the Municipal Systems Act. As such, the consequences flowing from voting contrary to "any legislation applicable to local government" are provided for in item 14 of Schedule 1 of the Municipal Systems Act. Item 14 of Schedule 1 deals with procedures that the council may follow if it is alleged that a councillor has breached any provision of the Code of Good Conduct for Councillors. In terms of item 14, a municipal council may investigate and make a finding on any alleged breach of a provision of the Code.<sup>94</sup> Alternatively, the council may establish a special committee to investigate and make a finding on any alleged breach and make appropriate recommendation to the council.<sup>95</sup> If the council or the special committee finds that the said councillor or councillors have breached a provision of the Code<sup>96</sup> (by, for instance, voting in favour of a resolution which conflicts with any legislation applicable to local government), the council may issue a formal warning to the councillor,<sup>97</sup> and it may reprimand the said councillor.<sup>98</sup> The Code further provides that council may request the MEC for Local Government in the province to suspend the councillor for a certain period.<sup>99</sup> Furthermore, the council may fine the councillor and request the MEC to remove the incumbent from office.<sup>100</sup>

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It is important to note that section 14 of the Act not only prohibits voting in support of resolutions in conflict with the Municipal Systems Act but voting in conflict with *any*<sup>101</sup> legislation application to local government. As such, if councillors vote in favour of resolutions that are in conflict with the MFMA, the Structures Act, the Constitution and other legislation applicable to local government, they would not escape liability in terms of the Code.

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<sup>94</sup> Schedule 1 of the Municipal Systems Act, Item 14(1)(a) of the Code of Good Conduct for Councillors.

<sup>95</sup> Item 14(1)(b)(i) and (ii) of the Code of Good Conduct for Councillors.

<sup>96</sup> Item 14(2) of the Code of Good Conduct for Councillors.

<sup>97</sup> Item 14(2)(a) of the Code of Good Conduct for Councillors.

<sup>98</sup> Item 14(2)(b) of the Code of Good Conduct for Councillors .

<sup>99</sup> Item 14(2)(c) of the Code of Good Conduct for Councillors .

<sup>100</sup> Item 14(2)(d) and (e) of the Code of Good Conduct for Councillors.

<sup>101</sup> My emphasis added.

It is submitted that section 14 of creates another form of liability of councillors in addition to liability for legal costs which flow from legal proceedings and section 176 of the MFMA. The kind of liability introduced by section 14 of the Act and item 14 of the Code flows from action taken by the council itself. The council is in a position to discipline the transgressing councillor(s). In terms of item 14 of the Code, the council is empowered to discipline its own members for abuse of voting power. Wigley refers to this power of the council as the Authorisation Model.<sup>102</sup> In terms of this model parliament has the authority to investigate the conduct on its members, charge its members for voting in a certain manner and ultimately discipline the incumbents or recommend legal proceedings against them.<sup>103</sup> The adoption of this model is commendable as it contributes to the attempt to root out abuse of decision-making power vested in the municipal council and its committees. As such, the provisions of section 14 of the Act will go a long way in ensuring sound decision-making in local government.

The wordings of item 14 of the Code suggest that the implementation of the measures envisaged in the latter are left to the discretion of the council. This is evident from the use of the term 'may' in item 14. From a practical point of view, the council can decide to act or not act against a certain councillor(s) even though the incumbent(s) have breached the provisions of the Code. In municipalities where the majority councillors are members of the same political party, it may be difficult to implement provisions of item 14 of the Code. If the majority councillors vote in support of a resolution which conflicts with any legislation applicable to local government, the council may have problems in investigating the alleged breach as it would have to pass a resolution authorizing the investigation, which can only be taken by way of majority voting. The study contends that the alleged transgressors may not be enthusiastic to adopt a resolution that

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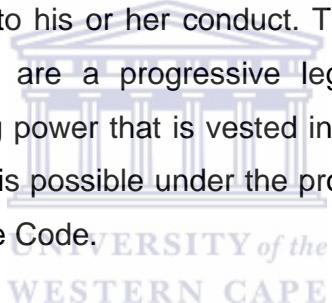
<sup>102</sup> Wigley S 'Parliamentary Immunity: Protecting Democracy or Protecting Corruption?' 11 (1) *The Journal of Political Philosophy* available at <[www.bilkent.edu.tr/~wigley/SimonWigleyParliamentaryImmunity.pdf](http://www.bilkent.edu.tr/~wigley/SimonWigleyParliamentaryImmunity.pdf)> [accessed on 20/02/2011] (2003) 37-38.

<sup>103</sup> Wigley S (2003) 37-38.

appears to challenge their actions, making the measure less effective.

## **2.6. Concluding remarks**

This chapter has examined the provisions of section 176 of the MFMA and concluded that the section creates statutory liability for individual councillors and other functionaries mentioned in the section. It is further established that liability created by section 176 is individual liability for the loss or damage suffered by the municipality resulting from the conduct of a councillor or another functionary. It appears that individual liability provided for in this section would not apply to every situation where unlawfulness and bad faith exists. Individual liability in terms of section 176 would only apply if the councillor in question was performing a function in terms of the MFMA. Thus if a councillor was not performing an act in terms of the MFMA, the provisions of section 176 would not find application to his or her conduct. The developments introduced by the Systems Amendment Act are a progressive legislative move towards proper exercise of the decision-making power that is vested in the council. It is submitted that individual liability of councillors is possible under the provisions of section 14 of the Act read together with item 14 of the Code.



# CHAPTER THREE

## Privilege and immunity of councillors

### 3.1. Introduction

In chapter 2, the study explored the applicability of the provisions of section 176 of the MFMA to individual councillors and concluded that the provisions of the said section do apply to councillors. The study also concluded that liability, in terms of section 176 of the MFMA, is only restricted to acts performed in terms of the Act. In chapter 2 the study went on to analyse the legislative developments brought about by the Systems Amendment Act in so far as they are relevant to the determination of liability of councillors. Further, the legislative developments introduced by the Act, go a long way in ensuring that abuse of decision-making power vested in the council is minimised.

However, it would be unfair to expect councillors to be flawless and not err in making decisions in council on behalf of the municipality. To guard against an untenable situation of imputing liability on councillors for the performance of their functions, the legislature established legal framework affording privileges and immunities to councillors. This chapter discusses the nature and extent of privileges and immunities afforded to councillors in section 28 of the Municipal Structures Act. It seeks to determine the conduct of councillors that is not subject to liability. In order to achieve its objective, the study commences the discussion by briefly touching on the rational basis for privileges and immunities. It then proceeds to discuss section 28 of the Municipal Structures Act in order to determine the scope and extent of privileges and immunities councillors enjoy at local government level.

The study will also highlight the major problems that seem to fuel and influence abuse of decision-making power in local government. The study contends that partisan

behavior or party discipline as well as political party contestations are some of the major obstacles to the proper functioning of the municipal council.

### **3.2. Definition of privilege and immunity**

For the purposes of achieving conceptual clarity, it is necessary to define these concepts at the outset. Curzon defines immunity as "freedom or exemption from some obligation, penalty, or power of another."<sup>104</sup> Similarly, Stewart states that immunity refers to "freedom from obligation or duty, especially exemption from legal liability."<sup>105</sup> On the other hand, privilege is defined as "a right or immunity in connection with legal proceedings upon a person by virtue of his position."<sup>106</sup> According to Curzon, the word 'privilege' refers to "a special right or immunity, conferred to some person or body, e.g. members of parliament."<sup>107</sup> Curzon further submits that "it is protection attaching to certain statements, which would otherwise be defamatory, so that no action lies even though the statements might have been false and malicious e.g. statements made in debates in parliament."<sup>108</sup> From the foregoing, it is apparent that the words 'privilege' and 'immunity' refer to the same thing, namely the protection enjoyed by members of legislative assemblies when executing their functions. They can, thus be used interchangeably.

### **3.3. Rationale for affording privilege and immunity**

Parliamentary immunity is a long standing practice in the world. Its recognition can be traced to as early as 1689 in the English Bill of Rights. Article 9 of the Bill that "declares

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<sup>104</sup> Curzon LB *Dictionary of Law* 6 ed (2002) 208.

<sup>105</sup> Stewart WJ *Collins dictionary of law* 2 ed (2001) 200. A similar definition is provided in Oxford Dictionary. Immunity is defined as "a freedom or exemption from an obligation, a penalty, or an unfavourable circumstance.

<sup>106</sup> Stewart WL (2001) 310.

<sup>107</sup> Curzon LB (2002) 333.

<sup>108</sup> Curzon LB (2002) 333. A similar definition is provided in the Concise Oxford English Dictionary (11<sup>th</sup> ed) ("Oxford Dictionary"). The Oxford Dictionary defines the word 'privilege' as "a right, advantage, or immunity, belonging to a person, class or office." It is "the freedom of members of a legislative assembly when speaking in its meetings."

the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.”<sup>109</sup> The nature of the work of members of legislative assemblies warrants protection in the form of privileges and immunities.

Today, legislative representative assemblies have a multitude of functions that require immunity (i.e. the oversight, legislative, representative, and disciplinary functions). Privileges and immunities guarantee the integrity of parliament’s procedure and discourse, as well as the integrity of its elected members and its officials.<sup>110</sup> It is now well-established that legislative assemblies require certain privileges and immunity from legal action in order to discharge their responsibilities effectively.<sup>111</sup>

*“The institution of parliamentary immunity is designed to ensure the proper operation of a parliament: It confers specific rights and privileges to members of parliament, most importantly the privilege of freedom of speech. Indeed, freedom of expression is the working tool of members of parliament which enables them to do their job as representatives of the people, legislating, adopting the budget and overseeing the activities of the government. If they cannot speak out, criticize the government and investigate and denounce abuses because they fear reprisals by the executive branch or other powerful actors, they cannot live up to their role. Freedom of speech enables them to raise questions affecting the public good which might be difficult to voice elsewhere owing to the possibility of court action. They require immunity to freely express themselves without obstruction and without fear of prosecution or harassment of any kind.”<sup>112</sup>*

From the foregoing, it is evident that freedom of expression in deliberative assemblies, such as parliament, is of paramount importance to ensure proper functioning of

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<sup>109</sup> A discussion document for the Rules Committee, (1999)7, available at <[www.pmg.org.za/.../19990905-joint-subcommittee-powers-and-priv](http://www.pmg.org.za/.../19990905-joint-subcommittee-powers-and-priv)> [accessed on 14 May 2010]. See also Article 9 of the English Bill of Rights of 1689.

<sup>110</sup> A discussion document for the Rules Committee, (1999) 7.

<sup>111</sup> A discussion document for the Rules Committee, (1999)7.

<sup>112</sup> Inter-Parliamentary Union 'Parliamentary – Immunity' (2006) 3, available at <http://www.docstoc.com/docs/7228192/>.

parliament. It is important to note that what is emphasized here is the instrumental role of freedom of expression in legislative assemblies. For members of parliament to effectively perform their oversight, legislative and representative functions, it is necessary that they enjoy privilege and immunity from legal action resulting from the performance of their functions and business of parliament. It is also clear that freedom of expression is instrumental to the work of legislative assemblies for proper functioning and effective discharge of their duties.

Even though immunity is in principle intended to promote active deliberations within legislative bodies such as the council, it is not immune from abuse by those entitled to it. According to Simon Wigley, the problem posed by immunity is that it affords each representative greater scope to pursue their own personal and political interest over and above that which is made possible simply by their position of influence.<sup>113</sup> Wigley further maintains that it is this undemocratic possibility that might incline citizens to wish for the immunity to be curtailed.<sup>114</sup> The abuse of the parliamentary immunity has led many countries to reduce the scope of immunity while a vast number of other jurisdictions are considering doing so. According to Wigley, the principal reason behind this trend is that the only telling way to prevent the decision-making process from falling prey to the quest for self-enrichment, election success and other unintended possibilities, is to render elected representatives vulnerable to the threat of legal inquiry and sanction.<sup>115</sup>

Contrary to the view of reducing the scope of immunity enjoyed by members of legislative assemblies, there is an argument that insists on providing absolute parliamentary immunity. This argument rests on the fact that immunity is intended to promote free debate and expression. Subjecting councillors to the full thrust of legal inquiry for action taken in the course of their mandate is not a plausible approach either. In view of this conundrum, Wigley suggests that the problem that democracies face is

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<sup>113</sup> Wigley S (2003) 23.

<sup>114</sup> Wigley S (2003) 23.

<sup>115</sup> Wigley S (2003) 24.

one of striking the right balance between protecting elected representatives from legal inquiry and limiting the possibility that they will neglect their democratic purpose.<sup>116</sup>

### **3.4. Privilege and immunity in South Africa**

In South Africa, privileges and immunities of members of parliament, for both national and provincial government, are provided for in the Constitution in sections 58, 71 and 117. Section 58 provides for privileges of cabinet members, deputy Ministers and members of the National Assembly. Section 71 provides the same for the Delegates to the National Council of Provinces ("NCOP") and persons referred to in sections 66<sup>117</sup> and 67<sup>118</sup> of the Constitution. On the other hand, section 117 provides privileges to members of a provincial legislature and permanent delegates to the NCOP. It is submitted that South Africa affords privileges and immunities to legislative assemblies for similar reasons advanced above, namely to allow members of deliberative assemblies to discharge their function properly.<sup>119</sup>

The privileges and protection envisaged in section 58 of the Constitution were put to a test in the case of *De Lille and Another v Speaker of the National Assembly*.<sup>120</sup> De Lille, who was then a member of the National Assembly, made a statement in the assembly suggesting that certain members of the African National Congress ("ANC") had been informers for the pre 1994 apartheid government. The ANC then used its parliamentary majority to pass a resolution suspending De Lille as punishment for her controversial statement. The suspension imposed against De Lille was not authorised by the rules of the assembly. The court held that the resolution was unconstitutional as it violated De Lille's right to freedom of speech in the Assembly.<sup>121</sup> Justice Hlophe held that the freedom of expression envisaged in section 58 of the Constitution was not subject to

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<sup>116</sup> Wigley S (2003) 24, para 3.

<sup>117</sup> The persons referred to in this section are Cabinet Ministers and Deputy Ministers.

<sup>118</sup> The persons referred to in this section are part time representatives of the NCOP.

<sup>119</sup> Inter-Parliamentary Union 'Parliamentary – Immunity' (2006) 2-3.

<sup>120</sup> *De Lille and Another v Speaker of the National Assembly* 1998 (7) BCLR 929 (C).

<sup>121</sup> *De Lille and Another v Speaker of the National Assembly* 1998 (7) BCLR 929 (C) 35.

general limitation under section 36 of the Constitution, but could be limited only in terms of the rules and orders of the Assembly.<sup>122</sup>

As noted by Chaskalson *et al* the strict reading and application of section 58 by the court in the above case has to be commended.<sup>123</sup> This is so because freedom of speech in parliament is essential to the political process. Chaskalson *et al* says that the proper functioning of representative democracy depends on members of parliament having the freedom to speak openly in parliament.<sup>124</sup> Any issue which is placed beyond the protection of freedom of speech in parliament is an issue which cannot be addressed by the political process. If members of parliament do not know what they can or cannot say in parliament without exposing themselves to liability, they will tend towards self-censorship. It is submitted that this will be detrimental to the proceedings and debates in parliament.<sup>125</sup> This shows how instrumental freedom of speech is to the functioning of parliament. Further, it is clear that parliamentarians require protection in the form of immunity from legal inquiry in order to engage in the business of parliament. This study is not going to discuss privileges and immunities afforded to members of national and provincial parliaments. The primary focus of this paper is local government, the municipal council, in particular. In the ensuing paragraphs, we discuss and analyse privileges and immunities at local government level.

### **3.5. Privilege and immunity at local government level: legislative framework**

As indicated in chapter one, the legislative and executive authority of the municipality is vested in the municipal council.<sup>126</sup> This means that the municipal council serves both as the legislature and the executive. Section 161 of the Constitution provides provincial legislation with the framework of national legislation may provide for privileges and

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<sup>122</sup> *De Lille and Another v Speaker of the National Assembly* 1998 (7) BCLR 929 (C) 35.

<sup>123</sup> Chaskalson M and Klaaren J 'National government' in Chaskalson et al *Constitutional Law of South Africa* (1999) 3-28B.

<sup>124</sup> Chaskalson M and Klaaren J (1999) 3-28C.

<sup>125</sup> Chaskalson M and Klaaren J (1999) 3-28C.

<sup>126</sup> Section 151(2) of the Constitution.

immunities of municipal councils and their members. This national legislative framework is provided by the Municipal Structures Act.

Prior the enactment of the Municipal Structures Act, there was no legislation that gave effect to the content of privileges and immunities contemplated in section 161 of the Constitution. The content of the privileges and immunity of councillors depended on the interpretation of the provisions of the Constitution as a whole. This was clear in the *Waters v Khayalami Metropolitan Council* ("KMC") decision.<sup>127</sup> In that case the Witwatersrand Local division was asked to decide on the legality of the KMC's resolution to exclude councillor Mike Waters, the applicant, from council meetings for a period of 36 days. The disciplinary action was taken by the council in reaction to a statement made by the councillor in which he declared that information provided by the Chief Executive Officer (CEO) was incorrect. One of the issues to be determined by the court was freedom of expression within the framework established for local government by the Constitution. The Court held that whether or not the statement made by the councillor was true is immaterial. In deciding the case, the Court emphasized the importance of freedom of speech in councils' debates. According to the Court, free speech is a democratic principle and it should be promoted in councils' debates. According to the Court, [t]o censure the applicant in the fashion complained of, for labeling information supplied by the CEO as 'incorrect', is to stifle freedom of expression and to restrict debate in council meetings. "This," according to the Court "militates against the fundamentals of democracy."<sup>128</sup>

What should be noted from the foregoing is the fact that the court held that the councillor's conduct was protected under the general constitutional right of freedom of expression in deliberative assemblies such as the council. In the absence of legislative framework that provides for the protection or immunity of certain conduct of councillors from any legal action, the court relied on the general constitutional framework established for local government. The court reasoned that one of the objects of local

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<sup>127</sup> *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W).

<sup>128</sup> *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W): 491C-D.

government is to provide democratic and accountable government.<sup>129</sup> Freedom of speech and the culture of open debate in the municipal council are essential to achieve democracy in local government, the court concluded.

It goes without saying that freedom of expression in deliberative assemblies, such as the municipal council, is an important principle. This makes freedom of expression one of the rationales for affording privilege and immunity to councillors. The next section traces the move towards specific protection granted by the provisions of section 28 of Municipal Structure Act. It seeks to determine the scope and extent of privilege and immunity afforded to municipal councillors.

### **3.5.1. Section 28 of the Municipal Structures Act**

The enactment the Municipal Structures Act, containing section 28, dealing with privilege and immunity of councillors, signifies a transition from the protection of councillors based on the general right to freedom of expression, to more specific protection. Section 28 provides the national framework for provincial legislation on privileges and immunities of councillors. It provides that the provincial legislation, in terms of section 161 of the Constitution, must provide *at least*.<sup>130</sup>

- (a) *that councillors have freedom of speech in a municipal council and in its committees, subject to the rules and orders as envisaged in section 160(6) of the Constitution;*<sup>131</sup>
- (b) *that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-*
  - (i) *anything that they have said in, produced before or submitted to the council or any of its committees; or*<sup>132</sup>
  - (ii) *anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.*<sup>133</sup>

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<sup>129</sup> *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W): 491 E-I.

<sup>130</sup> My emphasis.

<sup>131</sup> Section 28(1)(a) of the Municipal Structures Act.

<sup>132</sup> Section 28(1)(b)(i)of the Municipal Structures Act.

<sup>133</sup> Section 28(1)(b)(ii) of the Municipal Structures Act.

Section 28(2) further states that in provinces, where the provincial legislation has not yet been enacted, section 28(1) of the structures Act applies as the basis for privileges and immunities of councils and councillors.<sup>134</sup> To date, only three provinces, namely Gauteng,<sup>135</sup> North West<sup>136</sup> and Free State,<sup>137</sup> have promulgated the relevant provincial legislation on privileges and immunities of councillors. The Western Cape province has published the Privileges and Immunities Bill for public comment on 2 July 2010.

In terms of section 28, councillors have a guaranteed right to freedom of speech in the municipal council and its committees. The significance of affording freedom of speech to legislative assemblies cannot be overemphasized. In addition to the general freedom of expression provision in the Constitution;<sup>138</sup> councillors are now guaranteed freedom of speech in council business. However, freedom of speech in the council is not unlimited as it is subject to rules and orders established by the council.<sup>139</sup> The power of the council to establish these rules and procedures is envisaged in section 160(6) of the Constitution. Section 160(6) provides that:

*A municipal council may make by-laws which prescribe rules and orders for-*

- (a) *its internal arrangements;*
- (b) *its business and proceedings; and*
- (c) *the establishment, composition, procedures, powers and functions of its committees.*

This means that if the council has adopted and passed by-laws which prescribe rules and orders that regulate the manner in which councillors may exercise their freedom of expression in council meetings and business, councillors have to exercise their freedom of expression according to those rules and orders. The rules and orders, however, should be guided by the Constitution and they should not confer upon the council, greater power than what is provided for in the Constitution.

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<sup>134</sup> Section 28(2) of the Municipal Structures Act .

<sup>135</sup> Gauteng: Privileges and Immunities of Councillors Act 1 of 2002.

<sup>136</sup> North West Structures Act 3 of 2000.

<sup>137</sup> Free State: Privileges and Immunities of Municipal Councillors Act 2 of 2002.

<sup>138</sup> Section 16 of the Constitution.

<sup>139</sup> Section 28(1)(a) of the Municipal Structures Act.

### **3.5.1.1. The scope of privilege and immunity**

The important issue relating privilege and immunity pertains to the nature of the protected conduct as well as the place, occasion or proceedings at which the conduct must occur if it is to be protected.<sup>140</sup> Section 28(b)(ii) relates to immunity for anything revealed as result of the protected conduct in section 28(b)(i). The first case to test the provisions of section 28 is *Swartbooi and others v Brink and another*.<sup>141</sup> In this case, the council of Nala Municipality ordered two councillors, Brink and Niewoudt, to temporarily ‘recuse’ themselves from all activities of the council and desist from communicating with council officials pending an investigation into an allegedly improper transaction in which these councillors were allegedly involved in. Following this decision, the Mayor made public statements about these councillors outside the council meeting, relating to issues which were under investigation. The two councillors then approached the High Court for an order setting the resolution of the council aside. The High Court set the resolution aside<sup>142</sup> and it also ordered all the councillors who supported the resolution to personally pay the costs of the application. In the Constitutional Court, the appellants’ main submission was that section 161 of the Constitution and section 28 were central to a decision about the circumstances in which members of the council should be personally liable for the payment of costs of court proceedings.<sup>143</sup> The appellants argued that they are immune from personal liability according to section 28 of the Municipal Structures Act. The Court discussed the applicability of section 28 to appellants and had to consider a number of arguments raised by the respondents.

One of the issues that the Court had to determine was whether the provisions of section 28 are applicable to all decision-making of the municipal council, including legislative, administrative and executive decision-making. In this case, the respondents submitted

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<sup>140</sup> Section 28(1)(a) of the Municipal Structures Act.

<sup>141</sup> *Swartbooi and others v Brink and another* (2) 2003 (5) BCLR 502 (CC).

<sup>142</sup> The reason for setting the councils’ decision aside was because the municipal council had no power to effect suspension of councillors without approval of the MEC responsible for local government in the province of Free State.

<sup>143</sup> *Swartbooi and others v Brink and another* (2) 2003 (5) BCLR 502 (CC) para 7.

that section 28 must, in the context of our legislative history, be interpreted to protect only conduct that is integral to the legislative functioning of the council. The protection, they argued, does not extend to administrative or executive decision-making of the council.<sup>144</sup> The Court disagreed with this argument. The Court noted that the legislative history of absolute privilege shows that parliamentary privilege came from England to South Africa and it applied only to the legislature and not the executive. But in South Africa, privileges and immunities derive from the Constitution, the supreme law of the Republic.<sup>145</sup> In terms of the Constitution, the protection offered to councillors does not depend on the nature of the councillor's functioning.<sup>146</sup> Furthermore, section 161 of the Constitution does not specify the nature of the function for which privileges and immunities may be accorded. Therefore, the protection afforded to councillors in section 28 cannot be limited to legislative functioning of council only. It also applies to administrative and executive decision-making functions of the council. Thus, according to the *Swartbooi* case, the nature of the functioning of the council is immaterial in determining the application of section 28 to the conduct of councillors.

In relation to this, it must be noted that an issue was raised on whether the protection envisaged in section 28, extends to conduct in committees of the council. In the *Swartbooi* case it was argued by the respondents that section 28 exempts councillors from liability in relation to the council and its committees. This protection, the respondents argued, exceeds the parameters set by the Constitution, in that it provides a wider scope than the empowering provision of section 161 of the Constitution which does not refer to the committees of a council.<sup>147</sup> The Court saw no need to address this issue as the conduct took place in a full council meeting. The Court, however, gave an indication that the function or purpose of a committee might well be relevant to the question whether a municipal councillor is exempt from liability for conduct which

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<sup>144</sup> *Swartbooi and others v Brink and another* (2) 2003 (5) BCLR 502 (CC) para 13.

<sup>145</sup> *Swartbooi and others v Brink and another* (2) 2003 (5) BCLR 502 (CC) para 13.

<sup>146</sup> *Swartbooi and others v Brink and another* (2) 2003 (5) BCLR 502 (CC) para 14-16.

<sup>147</sup> *Swartbooi and others v Brink and another* (2) 2003 (5) BCLR 502 (CC) para 17.

amounts to participation in the affairs of the committee of a municipal council in a particular case.<sup>148</sup>

More controversial is the issue of whether the conduct of councillors would enjoy the same protection if it is performed outside the council meetings. The Court in *Swartbooi*, ruled that the statements made by the mayor outside the council meeting fell outside the protection offered by section 28 of the Municipal Structures Act. The Court, however, indicated that such conduct (i.e. statements made inside council meetings) would be protected only if it bears a relationship to the council. The Court went on to say that statements or submissions must be made to the council or items must be produced before the council<sup>149</sup> and councillors must be participating in the affairs of a full council in the cause of legitimate business of the council.<sup>150</sup>

This case illustrates the rational basis for affording immunity to councillors in respect of certain acts and votes in the municipal council, which is, in the words of Justice Yacoob, "to encourage vigorous and open debate in the process of decision-making."<sup>151</sup> Furthermore this is fundamental to democracy, and any curtailment of debate would compromise democracy.<sup>152</sup> Based on that, the Court decided that immunity contemplated in section 28 does not apply to statements made outside the council. The question that follows is whether statements or conduct of councillors before provincial bodies are also excluded from the protection provided for in section 28. The case of *Dikoko v Mokhatla*<sup>153</sup> is particularly relevant in answering this question.

*Dikoko v Mokhatla* was concerned with the ambit of the immunity offered to municipal councillors from civil liability when they testify at a meeting of a provincial legislature or

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<sup>148</sup> *Swartbooi v Brink and Another*(2) 2003 (5) BCLR 502 (CC) para 17.

<sup>149</sup> *Swartbooi v Brink and Another*(2) 2003 (5) BCLR 502 (CC) para 10.

<sup>150</sup> *Swartbooi v Brink and Another*(2) 2003 (5) BCLR 502 (CC) para 16.

<sup>151</sup> *Swartbooi v Brink and Another*(2) 2003 (5) BCLR 502 (CC) para 16.

<sup>152</sup> *Swartbooi v Brink and Another*(2) 2003 (5) BCLR 502 (CC) para 20.

<sup>153</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

one of its committees.<sup>154</sup> Mr Dikoko was the Executive Mayor of the South District Council in the North West Province. The Auditor-General of the province voiced his dissatisfaction with the unacceptable excess of R3,200 on the cell phone debt of Mr Dikoko. Mr Dikoko was then called to appear before the Provincial Standing Committee on Public Accounts to provide an explanation for this. In this committee, Mr Dikoko said that his overdue indebtedness was caused by Mr Mokhatla deliberately changing accounting procedures to exaggerate his indebtedness thereby giving his political opponents a basis for an attack on his integrity.<sup>155</sup> Mr Mokhatla instituted a defamation action for damages in the High Court. Mr Dikoko raised two arguments in his defence. First, that section 161 and 117 of the Constitution, section 28 of the Structures Act and section 3 of the North West Municipal Structures Act<sup>156</sup> extend privilege to municipal councillors performing their functions outside of the council. Secondly, that the North West provincial legislature's 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. These arguments were rejected by the High Court which held that section 28 is not applicable to proceedings before provincial committees. Mr Dikoko took the matter to the Constitutional Court. In the Constitutional Court, Mr Dikoko argued that even if the standing committee was that of the provincial legislature and not the council, his attendance was, nevertheless, part of the extended business of the council and therefore section 28 ought to apply to his conduct.<sup>157</sup>

The Constitutional Court opined that the purpose of privilege in a constitutional democracy is to promote freedom of speech and expression, and full and effective deliberation.<sup>158</sup> The Court stated that, "there is therefore much to be said for the conclusion that if a councillor participates in the genuine and legitimate functions or business of the council, whether inside or outside council, the privilege afforded under

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<sup>154</sup> Baatjes R Local government Bulletin 2007 Vol 9 No 1.

<sup>155</sup> Baatjes R (2007) 634.

<sup>156</sup> Act 3 of 2000.

<sup>157</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 22.

<sup>158</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 30.

the section 28 ought to extend to him or her".<sup>159</sup> The Court found that the statements made by Mr Dikoko only concerned his personal finances and indebtedness to the council. These statements concerning his overdue cell phone account could not in any way be viewed as constituting the real and legitimate business of the council.<sup>160</sup> The Court ultimately decided that Mr Dikoko's statements before the standing committee do not enjoy immunity under section 161 of the Constitution and section 28 or section 3 of the North West Structures Act.

Of importance to note in this case is the possible application of section 28 to conduct of councillors outside the council. This, however, would happen in very limited and exceptional circumstances. Clearly, the conduct must constitute the real and legitimate business of the council. However, this conduct can only enjoy immunity if it pertains to the real and legitimate business of the council. The question is then what constitutes real and legitimate business of the council.

An insight into what constitutes the real and legitimate business of the council can be found in the case of *ANC Umvoti Council Caucus and others v Umvoti Municipality*.<sup>161</sup> During a council meeting of the Umvoti Municipality, ANC councillors requested time to caucus and the Speaker called a lunch recess to allow them to do so. Later, the Speaker summoned all the councillors to the council chambers. During this meeting, the proceedings became chaotic and the Speaker unsuccessfully attempted to call the meeting into order. The mayor left the council chamber, saying that he was unwell, and the Speaker, without adjourning the proceedings, followed him to see if he needed help. In the absence of the speaker and without an acting Speaker being elected, the council took certain resolutions. The mayor was removed from his position and a new mayor

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<sup>159</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 40.

<sup>160</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 40.

<sup>161</sup> *ANC Umvoti Council Caucus and others v Umvoti Municipality* 2010 (3) SA 31 (KZP). The KwaZulu-Natal High Court acted as both the court of instance and court of appeal.

was appointed.<sup>162</sup> Based on these facts the municipality approached the court for an order declaring the resolutions of the council invalid.

The municipality contended that these resolutions were not taken by the council because, at the time they were taken, the council was not properly constituted. The court a quo ruled in favour of the municipality and held that the resolutions were not valid because the meeting was not properly constituted. The court ordered the municipality to pay costs of the application but stated that any person opposing the application would have to pay for the costs occasioned by such opposition. The ANC Umvoti council caucus decided to appeal this finding before a full bench of the High Court and were granted leave to appeal.

At the appeal, it was argued on behalf of the appellants that the councillors were not liable to pay costs by reason of the provisions of section 28(1)(b)(i) of the Structures Act. On this argument, the Court reasoned that the councillors were indeed not liable to civil proceedings within the meaning of those words in section 28(1) in light of the *Swartbooi* case.<sup>163</sup> The second question to be determined was whether the councillors in question were participating in deliberations of the full council in the cause of legitimate business of that council. If so, based on the reasoning in *Swartbooi*, the appeal against the cost order must succeed since the councillors would be protected by the provisions of section 28. On this question, the Court held that because of the fact that the council was not properly constituted when the resolutions were taken by the councillors, it could not be argued by the appellants that the resolutions complained of were part of the legitimate business of the municipality because the gathering at which the resolutions were adopted was not the council.<sup>164</sup> The Court went onto say that the matter at hand is distinguishable from that dealt with in the *Swartbooi* case where the resolutions were taken at a properly constituted council meeting. In the present matter, the resolutions were not part of the legitimate business of the council of the municipality.

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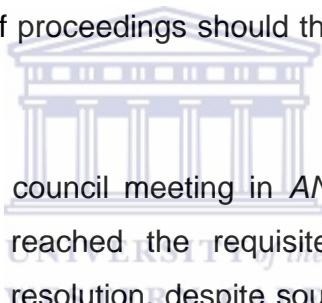
<sup>162</sup> See a summary of the case in the Local Government Bulletin Vol 12(2) (2010) 25.

<sup>163</sup> *ANC Umvoti Council Caucus and others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para 36.

<sup>164</sup> *ANC Umvoti Council Caucus and others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para 39.

The Court, thus, decided that the conduct of members of the Umvoti Council caucus or the appellant councillors was not protected by the provisions of section 28.

The manner in which the Court, in the above case, dealt with the applicability of section 28 to certain acts by councillors should be commended. From this case, it can be argued that the applicability of section 28 to particular conduct would depend on the circumstances of each scenario. Councillors cannot rely on the provisions of section 28 if they are not participating in the affairs of a full council in the cause of legitimate business of the council. Consequently, if councillors are not following legally prescribed rules (such as basic requirement of reaching a quorum for adopting resolutions) in conducting their council meetings, they cannot be regarded as engaging in the legitimate business of the council. Further, ignorance of the law is not an excuse as they will be liable in court for costs of proceedings should they choose to defend their illegal actions.



It is submitted that even if the council meeting in *ANC Umvoti Council Caucus and others v Umvoti Municipality* reached the requisite quorum and the councillors proceeded to adopt an unlawful resolution, despite sound advice to the contrary, those councillors would not be protected by the provisions of section 28 of the Structures Act, as their conduct was deliberate and wilful. Liability will then be an inevitable consequence of such conduct by the councillors. Therefore, even if the council had reached the requisite quorum, they should incur individual liability if they adopt unlawful resolutions with full knowledge of the unlawfulness of their actions.

### **3.5.1.2. Privilege and immunity and unlawful decisions**

There are arguments that councillors should be individually subjected to legal inquiry for adopting unlawful resolutions. Now that it has established that privilege and immunity *inter alia*, applies to actions performed before the council relating to and relevant the council and in the course of legitimate business of the council. The issue is now whether the protection envisaged in section 28 should apply to conduct that is unlawful and later set aside by the courts. The respondents in the *Swartbooi* case raised this argument

because the High Court had found that the resolution by the council to suspend the two councillors was unlawful as the council did not have the powers to suspend a councillor. This argument was rejected. The Court reasoned that this argument would limit the application of section 28 to lawful acts only. According to the court it would not matter whether the member of the council knew that the resolution that is being supported is inconsistent with the Constitution or law. Consequently, if the provisions of section 28 apply to lawful acts only, a member of the municipal council would be liable even if he or she had no knowledge of the unconstitutionality or legality of the resolution.<sup>165</sup> The Court went on to say that if the section were to protect only lawful resolutions of the council, such interpretation would be too limited to fulfil the purpose of the protection, which is to encourage open and rigorous debate in the council.<sup>166</sup> This study contends that the protection envisaged in section 28 would not extend to unlawful acts where the councillors had knowledge of the unlawfulness and were advised but ignored such advice. This argument is in line with the finding of the Court in *Willem Heyneke v Umhlathuze Municipality* which was discussed in chapter 2. Clearly, a situation where councillors have knowledge of the unlawfulness of their conduct but proceed to adopt the unlawful resolutions would evidence bad faith in the said conduct. Bad faith as explained in chapter 2 results in individual liability and it is doubtful whether the protection envisaged in section 28 would extend to cases where there is presence of bad faith.

In this regard the judgement in *Kitshoff v Speaker of the West Coast District Municipality*<sup>167</sup> is instructive. This case supports the argument advanced in this study, namely, that the protection envisaged in section 28 does not extend to unlawful resolutions adopted by councillors despite advice to the contrary. This case dealt with individual councillors' personal liability for voting in support of wrongful decisions.<sup>168</sup> In

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<sup>165</sup> *Swartbooi v Brink and Another* (2) 2003 (5) BCLR 502 (CC) para 20.

<sup>166</sup> *Swartbooi v Brink and Another* (2) 2003 (5) BCLR 502 (CC) para 20.

<sup>167</sup> *Kitshoff v Speaker of the West Coast District Municipality* Case no. 7136/2008 Western Cape High Court, unreported.

<sup>168</sup> Steytler N and De Visser J (2009) 3-17.

this case, the issue related to the composition of the council of the West Coast District Municipality. Floor-crossing resulted in changes in the council of Saldanha Bay Local municipality, one of the local municipalities in the district. As a result the composition of the district council and its political structures were also set to change. The Speaker of the district council was required by law to convene a meeting at which the district council was to re-compose its political structures. The Speaker refused to do so and had to be compelled by the High Court to convene the meeting as required by the Municipal Structures Act. The court ordered the speaker to personally pay for the costs of the application.<sup>169</sup> When the meeting eventually took place, as per court order, there was a dispute as to who were legitimate representatives of Saldanha Bay Municipality. At the meeting, the Speaker of the district council made a ruling regarding the composition of the delegation from Saldanha Bay Municipality which is illegal. In addition to the illegality of the resolution, it was contrary to the provisions of the Municipal Structures Act. Further the resolution was supported by the majority of the councillors present at the meeting. This ruling was based on political expedience and contrary to the provisions of the Structures Act. Nevertheless, the meeting continued accordingly. Once in Court, the Speaker and those councillors who supported him conceded that they had been wrong and agreed to pay the costs of the court case. The dispute eventually turned on whether they had to pay the full costs. The Court ruled that it saw no reason why the councillors, who were frustrated by the illegal ruling, had to bear the costs themselves.

In this case, none of the councillors, who participated and supported the unlawful decision, raised their privilege and immunity in terms section 28 as a defence. As a result, the court did not deal with that argument. However, Steytler and De Visser submit that in this case the offence was deliberate and wilful and taken against advice to the contrary and as such the incumbent councillors were rightfully sanctioned.<sup>170</sup> They further submit that in the *Kitshoff* scenario, the councillors' vote for the unlawful act bears no relevance to freedom of expression or debate, which was clearly the case in

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<sup>169</sup> See Steytler N and De Visser J (2009) 3-17, for the discussion of this case.

<sup>170</sup> Steytler N and De Visser J (2009) 3-18.

the *Swartbooi* scenario. Finally, Steytler and De Visser submit that even if the councillors would have raised the defence of immunity, it should not have protected them from individual liability for supporting the Speakers' strategy to prevent the council from following the law in conducting the council meeting.<sup>171</sup>

From the foregoing, it is clear that if decisions at council level are taken in total disregard of the law and against advice to the contrary being offered to councillors, councillors should not hide behind the veil of privilege and immunity offered in section 28 of the Municipal Structures Act. It is submitted that this is the correct approach of dealing with unlawful resolutions adopted by councillors. In support of the above argument by Steytler & De Visser, the study suggests that act of imputing liability to councillors for unlawful resolutions involves two elements of analysis. In terms of the first element, there must be resolution adopted and it must have been unlawful. The unlawfulness of the resolution is not enough to warrant liability. There must be knowledge on the part of the incumbent councillor that the action being taken is unlawful. If these elements are present at the time that the resolution is taken, then the argument of liability should prevail and councillors should not be allowed to enjoy from the protection offered by section 28 of the Municipal Structures Act.

### **3.6. Explaining unlawful council decisions**

The proper functioning of the municipal council and the sound decision-making of a municipality should be a concern and a matter of interest to all members of the municipal council irrespective of their political party allegiance. It was contended in chapter 2 that the partisan behaviour of councillors is one of the reasons why decision-making process in municipal councils is often poor. According to De Visser *et al*, the very strict culture of party discipline negatively affects the functioning of the municipality.<sup>172</sup> The Overview Report on the State of Local Government indicates that party political factionalism and polarisation of interests have contributed to the

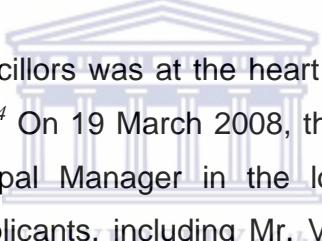
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<sup>171</sup> Steytler N and De Visser J (2009) 3-18.

<sup>172</sup> De Visser Steytler & May (2009) 34.

progressive deterioration of municipal functionality.<sup>173</sup> It is contended that this partisan behaviour weakens and sometimes undermines the decision-making process in local government.

In most of the cases discussed throughout this study, particularly in the cases of *Willem Heyneke v Umhlathuze Municipality* and *ANC Umvoti Council Caucus and others v Umvoti Municipality*, there is evidence that proper decision-making was hindered by politics of factionalism and the strict culture of party discipline. In the *Willem Heyneke* case, members of a certain political organisation voted in unison supporting an illegal act. They voted in that manner despite advice to the contrary. Similarly, in the *ANC Umvoti Council Caucus* case, party discipline and polarisation of interests have contributed to the failure of the council to properly decide a burning issue at hand.



The partisan behaviour of councillors was at the heart of the matter in *Vuyo Mlokoti v Amathole District municipality*.<sup>174</sup> On 19 March 2008, the Amathole District Municipality advertised the post of Municipal Manager in the local press. The advertisement attracted more than twenty applicants, including Mr. Vuyo Mlokoti ("Mlokoti") and Mr. Mlamli Zenzile ("Zenzile"). A short-listing process was undertaken from which it became apparent that Mlokoti and Zenzile were the two most outstanding candidates. Thereafter, an assessment of the relative strengths and weaknesses of the two candidates was undertaken by an interviewing panel. The interviewing panel recommended Mlokoti as the best suitable candidate for the position. The interviewing panel, upon consideration of the Recruitment Policy and other factors, came to the decision that Mlokoti outweighed Zenzile on almost every criteria used by the panel and Mlokoti had vast experience in the field of local government as he also served as a Municipal Manager of the Municipality for two years before serving in the Municipal Demarcation Board. The recommendations of the interviewing panel were based on the municipality's Recruitment Policy in terms of which the best suitable and qualified candidate must be appointed for the position in question.

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<sup>173</sup> Comparative Governance and Traditional Affairs (2009) 10.

<sup>174</sup> *Vuyo Mlokoti v Amathole District municipality* (2009) 30 ILJ 517 (E).

The ANC caucus in the municipality held a special meeting with the regional executive committee ("REC") of the ANC and the REC instructed the caucus to vote for Zenzile despite latter not being better qualified than Mlokoti. The caucus was also advised by the mayor not to proceed with the appointment of Zenzile because he is not the best candidate in the scenario. The mayor sort two legal opinions in this regard and presented them to the caucus. Notwithstanding these opinions, the caucus still decided to proceed with Zenzile. The caucus further took a decision that the two opinions should not be produced before the council meeting because they went against their preferred candidate.

The council of the Amathole District Municipality resolved to appoint Zenzile to the position and, on 23 June 2008, it informed Mlokoti that his application had been unsuccessful. In the council meeting, the council did not conduct a vote on these names but merely recorded its majority party's nomination being Zenzile. After being informed by the council that his application has been unsuccessful, Mlokoti applied to the Court for an order reviewing and setting aside the decision of the Municipality and substituting it with an order that he be appointed as municipal manager of the municipality.

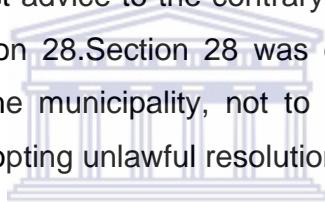
The Court held that the conduct of the council in not conducting a vote on the issue was procedurally flawed and contrary to the provisions of the Structures Act. Furthermore, voting in council was necessary especially when there was opposing views. According to the Court, failure to conduct a vote resulted in nullity of the resolution.<sup>175</sup> Furthermore, the Court, in terms of municipality's Recruitment Policy, read with the provisions of section 195 of the Constitution and section 67 of the Local Government: Municipal Systems Act, stated that a fair and efficient selection process must be followed in order to ensure that all candidates are selected "*objectively and on merit.*" The Court went on to say that the municipality correctly pointed that in the absence of any objectively justifiable basis to reject the best candidate, the municipality was obliged to appoint him. Mlokoti was, without doubt, the best candidate. There was no objectively justifiable

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<sup>175</sup> *Vuyo Mlokoti v Amathole District municipality* (2009) 30 ILJ 517 (E) para 30.

basis on which Mlokoti could be rejected in favour of Zenzile. He was and is therefore entitled to be appointed.<sup>176</sup>

In this particular case, members of the ANC caucus were not held to account for the financial damage that has been caused to the municipality by the decision to appoint a candidate contrary to the recruitment policy of the municipality and other legislation. It is difficult to imagine why immunity contemplated in section 28 should extend to acts of councillors such as the ones in the *Mlokoti* case above. It is clear from the *Mlokoti* case that the councillors belonging to the caucus were advised as to the legality of their resolution and they decided to act against such advice, following the strict culture of party discipline at all cost. This case then leads us to support the argument advanced by Steytler and De Visser, who suggest that councillors who take decisions in total disregard of the law and against advice to the contrary, should not hide behind the veil of immunity contained in section 28. Section 28 was created to promote debate and democracy in the council of the municipality, not to be used as a shield protecting councillors from deliberately adopting unlawful resolutions.



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**3.7. Concluding remarks**

In this chapter, the importance and the rational basis for affording privileges and immunities to councillors was discussed and it became apparent from the discussion that privilege and immunity in municipal councils is an essential tool to ensure achievement of democracy in local government. That being the case, section 28 was ideally introduced to protect councillors from potential individual liability that may arise when they exercise or perform their functions. It goes without saying that freedom of speech is central to protection afforded to councillors in section 28. However the judgements that were passed after the *Swartbooi* case correctly indicate that the immunity contemplated in section 28 is not without limits. Certain conducts are not worthy of protection or immunity such as the total disregard of the law in council meetings. From the discussion of the case law, it became apparent that voting in council meetings should be guided and legally justifiable.

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<sup>176</sup> *Vuyo Mlokoti v Amathole District municipality* (2009) 30 ILJ 517 (E) para 34.

In addition to determining the scope of application of section 28, the study attempted to investigate the real reason behind the failure by councillors to abide by rules of proper decision-making in local government. In so doing, the study suggested that partisan behaviour of councillors could be one of the main reasons for such deterioration in the decision-making. The study further argued that this partisan behaviour leads to abuse of power and in most situations, decisions that are influenced by party discipline eventually end up before our courts. Municipalities suffer financially in defending these deliberately unlawfully adopted resolutions. It is therefore suggested that liability of councillors for the costs of legal proceedings is another alternative form of liability in the event of legal proceedings regarding unlawfully adopted resolution.



## **CHAPTER FOUR**

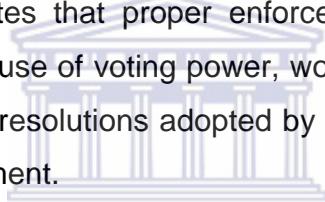
### **Conclusion**

This study is inspired by the deplorable state that the local government sphere finds itself, particularly, in relation to the poor decision-making capacity of councillors. Abuse of decision-making power necessitated the need to strengthen legislative framework on voting and adopting resolutions in local government. The move towards strengthening the legislative framework is manifested by the introduction of the Systems Amendment Act. This legislative move without doubt suggests that local government is indeed facing serious challenges in the decision-making process. This study argues that individual liability of councillors is one of the solutions to the challenge of abuse of decision-making power in local government.

This study has assessed how the current legal framework for local government enables or constrains the competence of the municipal council and its committees to exercise their decision-making powers in the course of providing leadership to their local communities. The study also demonstrated how such decision making power is abused by councillors and how this abuse weakens proper functioning and, ultimately, results in dysfunctional local government. The study then proceeded to discuss individual liability of councillor in light of the provisions of section 176 of the MFMA. The aim of such an examination was to determine the scope of application of section 176 to individual councillors. The study established that this section creates statutory liability for individual councillors and other functionaries mentioned in the section. We further established that liability created by section 176 is not liability for costs of the legal proceedings. It is liability for the loss or damage suffered by the municipality resulting from the conduct of a councillor or another functionary. It is, however, indicated that individual liability provided for in this section would not apply to every situation where unlawfulness and bad faith exists. Individual liability in terms of section 176 would only apply if the councillor in question was performing a function in terms of the MFMA. Thus

if a councillor was not performing an act in terms of the MFMA, the provisions of section 176 would not find application to his/her conduct.

In addition to an investigation of section 176 of the MFMA, I discussed the legislative developments brought about by the Systems Amendment Act, particularly focusing on provisions relating to abuse of power. The developments introduced by the Systems Amendment Act are a progressive legislative move towards ensuring proper exercise of the decision-making power that is vested in the council. These developments provide an alternative legislative solution to the liability established in terms of section 176 of the MFMA. The study highlighted that the enforcement of the provisions of section 14 of the Act and item 14 of the Code depends solely on the municipal council itself. It is the council that must be bold enough to enforce the Code in case of a breach of section 14 of the Act. The study postulates that proper enforcement of item 14 of the Code, particularly with reference to abuse of voting power, would surely reduce the number of court cases regarding unlawful resolutions adopted by the council. It will further reduce abuse of power in local government.



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The study explored the limits of immunity afforded to councillors in terms of section 28 of the Municipal Structures Act, with view of demonstrating that such immunity is not absolute and does apply to every situation. The study commenced this exercise by discussing the rational basis for affording privileges and immunities to councillors. From such discussion, the study concluded that privilege and immunity in municipal councils is an essential tool to ensure the advancement and achievement of democracy in local government. That being the case, section 28 was ideally introduced to protect councillors from potential individual liability that may arise when they exercise or perform their functions. The Constitutional Court in *Swartbooi* laid a foundation on how courts should interpret the provisions of section 28 regarding immunity of councillors. Judgements that were passed after the *Swartbooi* case cautioned against blanket application of section 28 to all unlawful conduct of councillors. Judgements such *Kitshoff, Dikoko v Mokhatla and ANC Umvoti Council Caucus and others v Umvoti Municipality*, lead me to conclude that the immunity contemplated in section 28 is not

without limits. From these cases, it is clear that certain conducts do not qualify for protection or immunity, such as the total disregard of the law in council meetings. From the discussion of the case law, it became apparent that voting in council meetings should be guided and legally justifiable. During the course of such exploration, we identified another form of liability of councillors, namely liability for the costs of legal proceedings. This form of liability, the study contended, arises in the event that an unlawfully adopted resolution is challenged in court and same is set aside by the court.

In addition to determining the scope of application of section 28, the study attempted to investigate one of reasons behind the failure by councillors to abide by rules of proper decision-making in local government. In so doing, the study suggested that partisan behaviour of councillors could be one of the main reasons for bad decision-making. The study further argued that this partisan behaviour leads to abuse of power in that councillors would do anything to advance the demands or interests of their political party, even if it means adopting unlawful resolutions. As was seen in the case of *Vuyo Mlokoti v Amathole District Municipality* and to some extent in *ANC Umvoti Council Caucus and others v Umvoti Municipality*, decisions that are influenced by party discipline are eventually reviewed and set aside by our courts.

It is believed that the imputation of individual liability on councillors for abuse of power will go a long way in improving the decision-making process in local government. Individual liability will restore public confidence as regards the decision-making of the council. It is argued that the threat of individual liability will ensure behavioral patterns, such as party discipline, do not adversely affect decision-making in the council. It is believed that the threat of individual liability would ensure that even councillors influenced by the culture of party discipline do not vote in support of resolutions that are in conflict with any legislation applicable to local government. Individual liability will help to promote a culture of sound decision-making in local government as well as good governance. With the threat of individual liability, it is contended, that councillors will endeavour to be diligent in casting their votes and act in good faith in the exercise of their functions.

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