

SOUTH AFRICA / JUDGMENT

Brummer NO v Mvimbi and Others (13535/2011) [2011] ZAWCHC 385 (28 September 2011) [2011] ZAWCHC 385

COURT

Western Cape High Court, Cape Town

BEFORE

J I Cloete

CASE / FILE NUMBER

13535/2011

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE HIGH COURT)

Case

no: 13535/2011

JOHAN

WICHARDT GREYLING BRUMMER N.O.

Applicant

v

LULAMA

LENNOX MVIMBI

First

Respondent

LUNGISWA

MONICA SEYISI

Second

Respondent

LENHARD

RICHARD JONAS

Third

Respondent

MPAKAMISI

MAC MBALI

Fourth

Respondent

SANDISO

ENOCH

GCABAYI

Fifth

Respondent

JAN

JACOBUS NOLAN STUURMAN

Sixth

Respondent

ADAM

BRENDON VAN RHYNER

Seventh

Respondent

MEMORY

BOOYSEN

Eighth

Respondent

ELAINE

ELIZABETH PAULSE

Ninth

Respondent

ANNELISE

RENATA

OLIVIER

Tenth

Respondent

NEVELLE

MARTHINUS DE WAAL

Eleventh

Respondent

CHARLES

LEON DREYER

Twelfth

Respondent

HEAD

OF THE LAW ENFORCEMENT UNIT,

Thirteenth

Respondent

BITOU

MUNICIPALITY

PROVINCIAL

COMMISSIONER OF THE SAPS,

Fourteenth
Respondent
WESTERN
CAPE
Coram
: J
I CLOETE AJ
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Nongogo Nuku
For 7th
– 12th
respondents
: not represented
For 13th
respondent
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respondent

: not
represented
Date(s)
of Hearing
: 7 and 8 September
2011
Judgment

delivered on : 28 September 2011
IN THE HIGH COURT OF SOUTH AFRICA
REPORTABLE
(WESTERN CAPE HIGH COURT, CAPE
TOWN)
Case no: 13535/2011
JOHAN WICHARDT GREYLING BRUMMER
N.O.Applicant
LULAMA LENNOX MVIMBI
.....First
Respondent
LUNGISWA MONICA SEYISI
.....Second
Respondent
LENHARD RICHARD JONAS
.....Third
Respondent
MPAKAMISI MAC MBALI
.....Fourth
Respondent
SANDISO ENOCH GCABAYI
.....Fifth
Respondent
JAN JACOBUS NOLAN STUURMAN
.....Sixth
Respondent
ADAM BRENDON VAN RHYNER
.....Seventh
Respondent
MEMORY BOOYSEN
.....Eighth
Respondent
ELAINE ELIZABETH PAULSE
.....Ninth
Respondent
ANNELISE RENATA OLIVIER
.....Tenth
Respondent
NEVELLE MARTHINUS DE WAAL
.....Eleventh
Respondent
CHARLES LEON DREYER

.....Twelfth

Respondent

HEAD OF THE LAW ENFORCEMENT UNIT,
BITOU MUNICIPALITY

.....Thirteenth

Respondent

PROVINCIAL COMMISSIONER OF THE
SAPS,
WESTERN CAPE

.....Fourteenth

Respondent

Heard: 7 and 8 September 2011

Court: Acting Judge J I Cloete

Delivered: 28 September 2011

JUDGMENT

CLOETE AJ:

Introduction

- [1] There are two matters before me. The first is the extended return date of a rule nisi issued in favour of the applicant in which he seeks amended final relief against the 1st to 13th respondents (the applicant no longer seeks relief against the 14th respondent). The second is a counter-application by the 1st to 6th respondents for certain declaratory relief.
- [2] It should be mentioned that despite the issue of a rule nisi against the 1st to 13th respondents, it was only the relief sought in respect of the 1st to 12th respondents that was ordered to operate as an interim interdict. The 1st to 6th and 13th respondents oppose the final relief sought against them by the applicant. The 7th to 12th respondents abide the decision of this court. The counter-application by the 1st to 6th respondents is opposed by the applicant.

Background

- [3] The Council of the Bitou Municipality has a history of being wracked by dissent. Since the Democratic Alliance ('DA') assumed power in that municipal area after the local government elections of May 2011 this dissent has continued unabated. This reflects in part longstanding political animosity between various of the key players in the Council which until May 2011 had been controlled by the African National Congress ('ANC'). The Council is presently comprised of 6 DA members (being the applicant and the 8th to 12th respondents), 6 ANC members (being the 1st to 6th respondents) and 1 member of the Congress of the People ('COPE') being the 7th respondent. COPE has formed a coalition with the DA to form a ruling majority in the local government of the Bitou municipal area.

- [4] The applicant, a longstanding member of the DA who was elected Speaker at the meeting of the reconvened Council on 6 June 2011, blames the trouble on the 6 ANC members of the Council. He seeks a final order directing them, together with the 7th to 12th respondents, to adhere, subject to certain provisos, to directions given by him in terms of rule 24 of the Rules of Order Regulating the Conduct of Meetings of the Council of the Municipality of Bitou, published in Western Cape Gazette No. 6689 of 22 January 2010 (the 'Rules of Order'). The applicant also seeks a final order against the 13th respondent (the Law Enforcement Unit of the Bitou Municipality) directing it to enforce rule 24(2) of the Rules of Order by removing any member of the Council from a meeting if requested to do so by the applicant.
- [5] The 1st to 6th respondents blame the trouble squarely on the applicant and it is for this reason that they seek certain declaratory relief in respect of his conduct at two meetings of the Council held respectively on 29 June 2011 and 8 July 2011.
- [6] Although the two main protagonists in the dispute are the applicant ('Brummer') and the first respondent ('Mvimbi'), Brummer also seeks relief against the 2nd to 12th respondents by adopting a 'scatter shot' approach. He maintains that although the disruption was instigated by Mvimbi, and indeed virtually all of the conduct complained of is attributed to Mvimbi, because 'some of the other Councillors have at times reacted thereto' final relief should be granted against all of them. The 'other Councillors' to whom Brummer refers are the ANC Councillors. He makes no complaint against the DA or COPE Councillors. Brummer contends that by interdicting all of the Councillors, this will 'dispose of the need to determine who exactly was the cause of the disruption' at future meetings of the Council.
- [7] The unfortunate events which gave rise to this litigation are summarised below. At the outset it should be mentioned that there are a number of other allegations and counter-allegations in the papers but for purposes of this judgment the following appear to be the main areas of dispute.
- [8] The inaugural meeting of the new Council was called for 1 June 2011. Just hours before the meeting was to take place the Municipal Manager received a telefax from an attorney representing the ANC attaching a document which purported to be a copy of an unsigned notice of motion challenging the outcome of the local government election in Bitou. This missive caused the Municipal Manager to form the view that he had received a High Court interdict and led him to unilaterally postpone the inaugural meeting until 6 June 2011.
- [9] On that date, again just hours before the meeting was due to take place, the Municipal Manager received another telefax, purportedly from COPE, claiming that the 7th respondent had been expelled from that party. This caused another delay and the meeting could only proceed after the Independent Electoral Commission had confirmed that the 7th respondent was indeed the elected COPE Councillor. The meeting proceeded and amongst other office bearers Brummer was elected as the Council's Speaker.

[10] The next meeting was scheduled for 29 June 2011. This meeting concerned the powers of the elected office bearers. The system of delegations had to be revisited for this purpose and committees had to be established. After an initial verbal tussle between Brummer and Mvimbi as to how the COPE letter should be referred in the minutes of the previous meeting and whether Mvimbi was entitled to raise this issue as a point of order, Brummer proceeded to address what he regarded to be the inappropriate attire of certain Councillors. He complained that it had been a longstanding practice for male Councillors attending Council meetings to wear both

jackets and ties and that some of them were not wearing ties. Another verbal tussle ensued when Mvimbi objected, claiming that Brummer was wrong and that there had been no such longstanding practice. It related only to the wearing of jackets, not ties (it subsequently transpired that Brummer was wrong and that Mvimbi was right).

[11] After the Executive Mayor's address (in which ironically he expressed concern that the business of the Council which, in his words, had in the past been run as a 'circus' seemed at risk of following the same trend), the Municipal Manager raised the issue of yet another letter purportedly received from COPE a few hours before. This letter claimed that the 7th respondent was not the legitimate COPE representative on the Council.

[12] Brummer's reaction was to view that letter (and the previous communications) as a deliberate attempt by an unidentified force or forces to 'continuously' disrupt Council meetings. He was not going to stand for it any further. He would request the Municipal Manager to determine its true source and to institute whatever legal action was necessary 'against these people'.

[13] Mvimbi indicated that he wished to speak and said 'Thank you very much Mr Speaker. I hope you are not going to regard my statement as trying to make a circus of (sic) a mockery of this Council...'. Brummer took umbrage and immediately interrupted Mvimbi, informing him that 'You don't have space on this agenda to make statements. Can you be seated please?'. Mvimbi refused, stating that he wanted to 'report on the letter'.

[14] Brummer responded by asking him for the second time to be seated and when Mvimbi again stated that he wished to report on the letter, Brummer instructed him to leave the Council Chamber. When Mvimbi refused, Brummer informed him that if he did not leave he (i.e. Brummer) would have Mvimbi removed.

[15] The meeting quickly descended into mayhem with both Brummer and Mvimbi becoming increasingly intractable. Brummer adjourned the meeting a few times to have Mvimbi removed, without success, since Brummer could not secure the assistance of either the 13th respondent or the police. At one point Brummer expressed that he was 'seriously pissed off. I expected the moment I saw that there were no ties on I expected problems. I knew it was coming.' Eventually the meeting had to be adjourned to 1 July 2011, with Brummer's direction that Mvimbi be barred from the meeting still in place.

- [16] On 1 July 2011 the meeting again descended into chaos. Brummer alleges that Mvimbi and the other ANC Councillors walked in late and immediately started shouting at him. Mvimbi denies this, claiming that Brummer has given a selective and inaccurate account, and that it was Brummer who wrongly accused the ANC Councillors of making it impossible for the Council to continue its business. When Mvimbi and his fellow ANC Councillors voiced their objection to this accusation, calling on Brummer not to lie, he announced that he would be adjourning the meeting. When Mvimbi and his fellow Councillors again voiced their objection, Brummer ignored their protestations and told them to be quiet. He then adjourned the meeting until 4 July 2011. His direction barring Mvimbi from the Council Chamber had still not been revoked.
- [17] It seems that over the weekend of 2 and 3 July 2011 Brummer enlisted the assistance of senior DA local government members to approach senior ANC local government members to try to resolve the impasse. It also seems that the DA members were unsuccessful in making contact with the ANC members concerned.
- [18] At the commencement of the meeting on 4 July 2011 Brummer read out a letter from Mvimbi's attorneys in which they demanded an undertaking that Mvimbi would be allowed to take up his seat in the Council Chamber under threat of court action. It appears that Brummer had in any event given consideration to the matter since the meeting of 1 July 2011 as he proceeded to inform Mvimbi that '...I am going to make a deal with you. I will give you five minutes to speak on the COPE issue and then you will also undertake at the same time that you will now behave yourself, and stick to the rules like everybody else...Do you find that acceptable?' This stance accords with an email sent by Brummer to Mvimbi's attorneys only one minute before the meeting commenced in which he made a proposal in virtually identical terms.
- [19] Brummer now contends that his proposal to Mvimbi was an agreement already reached before the meeting commenced. This is plainly wrong. Not only was Brummer's email only dispatched to Mvimbi's attorneys a single minute before the start of the meeting, but its opening paragraph contains the words 'I suggest as follows...' and Brummer's very words to Mvimbi in the meeting were 'I am going to make a deal with you...'. If an agreement was already in place, Brummer would have used different language.
- [20] In response to Brummer's proposal Mvimbi requested time to caucus with his fellow ANC Councillors, to which Brummer agreed. It seems that Mvimbi took a while longer than the stipulated period of 5 minutes which irritated the other Council members, including Brummer. On their return Mvimbi addressed the meeting. An exchange of words ensued between him and Brummer as to their respective perceptions of the other's threats of legal action. Brummer then repeated that Mvimbi would be allowed to speak on the COPE issue if he undertook to 'stick to the rules from now on'. He insisted that Mvimbi furnish that undertaking on the record.

- [21] Without doing so, Mvimbi briefly addressed the COPE issue. Brummer then again asked for the undertaking sought by him. Mvimbi replied that he had never promised to give such an undertaking, which in his view was in any event irrelevant since it went without saying that Councillors had to subject themselves to the Rules of Order. He said that he did not know why Brummer was harassing him. Brummer then accused him of reneging on the so-called agreement and adjourned the meeting to take advice.
- [22] Upon his return Brummer appeared satisfied that Mvimbi no longer needed to provide the undertaking upon which he had previously insisted. He appealed to Mvimbi and the other ANC Councillors 'to behave' and to work according to the Rules of Order.
- [23] Regrettably the matter did not end there. When the 4th respondent ('Mbali', a fellow ANC Councillor) wished to speak on the issue, asking from whom Brummer had taken advice and what that advice had been, the latter instructed him to be silent. Further words were exchanged between Brummer, Mvimbi, Mbali and other Councillors whose identity is unclear, culminating in Brummer saying 'Sorry, gentlemen, let me explain to you how, and I'll speak slowly so that you understand. If you will just be quiet so that you can hear what I say then maybe you will not get so confused.'
- [24] This somewhat offensive and patronising remark predictably resulted in vigorous objection from various ANC Councillors. It is not possible to determine all of their identities from the papers, although it seems that it was Mvimbi who told Brummer that 'You must teach yourself to listen and allow the people to speak so that you can understand what is...'. Brummer interrupted him, telling Mvimbi that 'I think I have done everything that I can to try and make this work, and it seems that as long as Councillor Mvimbi is here, we will not have order in this Council and I am not going to allow this to carry on any further.' He then adjourned the meeting to 8 July 2011.
- [25] Brummer launched the application for an interdict two days later, on 6 July 2011 for hearing on 7 July 2011, and on less than 24 hours' notice to the respondents. He submitted that the matter was fit and proper to be heard as one of urgency because '...the lawful functioning of the Council is necessary to ensure that the Bitou Municipality is properly managed and that Councillors feel free to do their job properly and openly. Much of the recent outbursts by Cllr Mvimbi have been comprehensively covered in the media, and the reputation of the Bitou Council as a constitutional body worthy of respect has already been compromised and will continue to be so compromised unless this action is comprehensively dealt with now. As I explained above, the meeting which has been adjourned on a number of occasions has now been scheduled for this Friday, 8 July 2011 on a time to be announced...There are a number of reasons why the meeting scheduled for this Friday cannot be adjourned again. Besides the issues mentioned in Annexure "C", the Council needs to approve a R5 million overdraft otherwise the Municipality will soon run out of money to make payments. The system of delegations needs to be adopted in terms of section 59(2)(f) of the Systems Act; the committees need to be established....Clearly effective relief cannot be obtained by way of a hearing in the ordinary course.'

- [26] After hearing argument Yekiso J postponed the application to 13 July 2011, but directed the 1st to 12th respondents to adhere to directions given by Brummer in terms of rule 24 of the Rules of Order until that date.
- [27] The saga continued at the reconvened meeting on 8 July 2011. Mvimbi alleges that Brummer refused a request by an ANC Councillor for a short adjournment of the Council so as to allow a caucus during the debate in respect of a certain resolution. Brummer refused the ANC Councillor's request on the basis that 'the relevant Rule applicable could not be cited'. Brummer's response is that he had previously (on 4 July 2011) granted the ANC Councillors an opportunity to caucus for an 'agreed' 5 minutes. They remained away for 25 minutes and thus wasted 20 minutes of Council time. When a request to caucus was made by the ANC Councillors on 8 July 2011, Brummer was not going to allow them to again use 'this strategy' so that they could prevent him from continuing the meeting 'for however long they felt like'. As he had apparently 'learnt his lesson' on 4 July 2011, when the informal request for a caucus came again on 8 July 2011 he insisted that the request be formally put as a motion in compliance with rule 49 of the Rules of Order. This rule permits the adjournment of Council for a specified time, upon the expiration of which the Speaker is compelled under rule 4 thereof to continue with the meeting, irrespective of whether all members are present, provided that there is a quorum. Brummer is clear that he required the ANC Councillors to adhere strictly to the letter of the Rules of Order. He contends that this was not an overly technical approach since in his view they were going to some lengths to raise technicalities themselves and 'exploiting loopholes like agreeing to a "brief adjournment" of 5 minutes and then taking 25 minutes in the knowledge that nothing could proceed without their presence'.
- [28] Yet again the matter did not end there. Mvimbi claims that notwithstanding that he had duly indicated opposition to an urgent motion introduced by Brummer in terms of rule 6 of the Rules of Order, Brummer treated the motion as unopposed in terms of rule 14 thereof. When Mvimbi objected, Brummer refused to consider his objection on the basis that he (i.e. Brummer) had already moved on to the next item of business and directed Mvimbi to be quiet.
- [29] Brummer claims that he did not notice Mvimbi's raised hand and that in the circumstances he acted correctly by treating the motion as unopposed and moving on to the next item of business. (It should be mentioned that the motion in question related to the withdrawal of the Municipality's petition to the Supreme Court of Appeal against a High Court judgment in a case between the Municipality and Memory Booysen, the 8th respondent. Brummer now contends that inasmuch as it was subsequently established that the Municipality's petition to the Supreme Court of Appeal had by that date been dismissed, the manner in which he dealt with the motion is irrelevant.)
- [30] Mvimbi concedes that although he has 'in certain instances' conducted himself in a manner inconsistent with the Rules of Order, his interactions cannot be considered in isolation of the many instances in which Brummer has conducted himself in a manner completely

inconsistent with the obligation imposed upon a presiding officer in a legislative assembly, namely to be scrupulously impartial. And whilst the 1st to 6th respondents concede that they have not been blameless in what they consider to be the cut and thrust of political manoeuvring, they contend that it is the conduct of Brummer himself as Speaker of the Council that has been the source of most of the disruptions in its functioning. They say that Brummer has treated the 6 ANC Councillors in general and the leader of the ANC caucus, Mvimbi, in particular with a mixture of suspicion and contempt. They argue that despite an undertaking furnished by Brummer on 7 July 2011

that until 13 July 2011 he would conduct himself in accordance with the Rules of Order and execute his powers thereunder in a lawful

manner, during that period he declared a resolution to be unopposed and insisted on moving on to the next agenda item – despite the fact that Mvimbi had raised his hand to indicate opposition. In so doing, Brummer denied the ANC Councillors the right to debate the motion. They also say that Brummer's conduct in the Council Chamber was exceeded only by his ruthless campaign of vilification

conducted in the media between Council meetings. Whatever vestiges of impartiality which might have remained were negated by his press statements.

[31] It is against this background that the 1st to 6th respondents seek orders declaring that:

[31.1] Brummer's direction at the meeting of the Council on 29 June 2011 that Mvimbi did not have the right to address the meeting was ultra vires the provisions of rules 27, 30 and 31 of the Rules of Order as read with s 37(f) of the Local Government: Municipal Structures Act No 117 of 1998 ('the Structures Act') and was accordingly unlawful and of no effect;

[31.2] Brummer's direction at the Council meeting on 29 June 2011 that Mvimbi retire from the Council Chamber was ultra vires rule 24(2) of the Rules of Order as read with s 37(f) of the Structures Act and was accordingly unlawful and of no effect;

[31.3] Brummer's use of profanity when addressing the Councillors at the Council meeting on 29 June 2011 constituted conduct unbecoming of a member of the Council as contemplated in rules 24(1)(f) and (g) of the Rules of Order; as also a failure by Brummer to maintain order during meetings and to conduct Council meetings in accordance with the Rules of Order as provided for in ss 37(d) and (f) of the Structures Act; and

[31.4] Brummer's determination at the Council meeting on 8 July 2011 that the urgent motion was an unopposed matter and his refusal of Mvimbi's objection that the urgent motion was indeed opposed were ultra vires the provisions of rules 14 and 16 of the Rules of Order and s 37(f) of the Structures Act and accordingly unlawful and of no force and effect.

[32] On 13 July 2011 Brummer withdrew the relief sought against the 14th respondent. It was also agreed between Brummer and the 1st to 6th respondents that the relief granted by Yekiso J on 7 July 2011 would continue to operate as an interim interdict against the 1st to

12th respondents pending the return date, which was scheduled for 8 August 2011 for hearing together with the relief sought by Brummer against the 13th respondent. In the intervening period the 1st to 6th respondents launched their counter-application, resulting in the matter being further postponed to 7 September 2011.

- [33] In an affidavit deposed to by Brummer on the day before the hearing (in response to a notice served on behalf of the 1st to 6th respondents in terms of rule 35(12) of the rules of court) he annexed copies of his requests to the MEC, Local Government dated 15 July 2011 and 3 August 2011 to investigate the conduct of the Councillors, as also the MEC's response dated 5 September 2011 which confirmed that an investigation would be conducted. The requests were made by Brummer in terms of item 14(4) of the Code of Conduct for Councillors contained in Schedule 1 to the Local Government: Municipal Systems Act No 32 of 2000 ("the Systems Act") and was responded to by the MEC on that basis.
- [34] The MEC's letter refers to an investigation into the conduct of 'Councillors'. A 'Councillor' is defined in the Systems Act as a member of a municipal council. 'Speaker' is not defined, but s 54 of the Systems Act provides that the Code of Conduct contained in Schedule 1 thereto applies to every member of a municipal council. And 'Speaker' is defined in rule 1 of the Rules of Order as the member elected as chairperson of the Council or any other member acting as chairperson of the Council.
- [35] Although Brummer's requests to the MEC pertain only to the conduct of Council members other than himself it is unclear from the MEC's reply whether the investigation will be limited to these Councillors or whether it will also include Brummer.
- [36] Brummer however submitted in that affidavit that in light of this development (i.e. the investigation) it might be appropriate for this court to grant the relief sought against the 1st to 13th respondents 'at the very least until this investigation is completed'.
- [37] Brummer changed his stance on the second day of the hearing, during reply to argument presented on behalf of the 1st to 6th and 13th respondents. Although persisting with his claims for costs and the dismissal of the counter-application, Brummer sought amended relief in the following terms:

'1. Subject to the right to raise a point or points of order in terms of rule 41, including that the chairperson of a Council meeting departed from any rule, including rule 24(1)(a) to (g) of the Rules of Order.... First to Twelfth Respondents are directed to adhere to directions given by the Applicant in terms of Rule 24 [until the completion of the investigation instituted by the Western Cape Minister of Local Government, Environment Affairs & Development Planning in terms of Item 14 (4) of Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000].

2. Subject to sections 199(6) and (7) of the Constitution, Thirteenth Respondent is directed to assist the applicant or any other elected Chairperson of the Council to enforce rule 24(2) of the Rules of Order by removing any member of the Council of the Municipality of Bitou from a meeting if requested to do so by the applicant or such Chairperson.'

(emphasis supplied)

[38] Although the amendments themselves were not opposed by the 1st to 6th and 13th respondents, the amended relief itself was indeed opposed by them, and they were thus given an opportunity to address me thereon. The arguments of the parties are considered below.

The relief sought by Brummer against the 1st – 12th respondents

[39] Section 37 of the Structures Act sets out the functions of a Speaker of a municipal council. The Speaker *inter alia* presides at meetings of the Council and is obligated to ensure that order is maintained during meetings. This obligation includes ensuring that there is compliance with the Code of Conduct set out in Schedule 1 to the Systems Act and that council meetings are conducted in accordance with the Council's Rules of Order.

[40] Rule 24 of the Rules of Order provides that:

‘24. Conduct of members

If a member –

misbehaves, or

behaves in an unseemly manner, or

obstructs the business of a meeting, or

challenges the ruling of the chairperson on any point of order or ruling in terms of section 3(1),
or

declines to withdraw any expression when required to do so by the chairperson, or

indulges in tedious repetition or unbecoming language, or

commits any breach of these rules,

the chairperson shall direct such member to conduct himself or herself properly and, if speaking, to discontinue his or her speech.

In the event of a persistent disregard of the directions of the chairperson, the chairperson shall direct such member to retire from the place of meeting for the remainder of the meeting and may, if necessary, cause him to be removed therefrom.’

[41] Rule 41 of the Rules of Order provides that:

‘41. Points of order

A member may raise a point of order to call attention to a departure from these rules by stating the particular rule such member relies on, whereupon such member shall immediately be heard.’

- [42] Rule 24 thus confers far-reaching powers upon the chairperson of Council meetings (i.e. the Speaker) to control the conduct of Councillors at meetings and to have them removed from meetings if they disregard his directions. The 1st to 6th respondents do not challenge the constitutional validity of rule 24. The Rules of Order were in fact proposed by Mvimbi on 31 July 2009 and the Council thereafter approved them as being constitutionally compliant.
- [43] However the 1st to 6th respondents contend that Brummer misconceives his powers as Speaker and insists that he is entitled to conduct meetings in an authoritarian and overly mechanical manner. They believe that this approach is driven by his lack of impartiality towards them.
- [44] Whilst Brummer concedes that the Rules of Order must be interpreted in light of the Constitution of South Africa, he submits that ‘...chairpersons or persons placed in positions where they have to maintain the order in an assembly do have autocratic rights and must perforce act accordingly to maintain order, especially in circumstances such as arose between 29 June 2011, 1 July, 4 July and 8 July 2011 in our council... I submit that in the same vein, being peremptory and expecting prompt and unquestioning obedience to directions is acceptable behaviour for a person chairing a formal meeting and even more so when faced with unruliness and disorderliness.’
- [45] The 1st to 6th respondents argue that this attitude reflects a fundamental misunderstanding of the role of Speaker. In the prevailing constitutional order which entrenches the right of free political expression, elected representatives in Council are entitled to engage in vigorous legislative debate. The inevitable consequence will often be a robust ‘cut and thrust’ style which is starkly contrasted by the mechanistic and authoritarian style championed by Brummer. He himself concedes that the Rules of Order are in various respects open-ended and ambiguous and call for a purposive interpretation, although he interprets this to mean that his directions under the Rules of Order must therefore be accepted without argument, since he is the Speaker. The 1st to 6th respondents say that this approach has resulted in Brummer behaving in the manner complained of, employing vulgar language and summarily cutting deliberations short. And whilst the Speaker may exercise his function qua presiding officer with a firm hand, his legal, moral and political authority to do so is premised upon him remaining scrupulously impartial and non-partisan, which Brummer simply has not been.
- [46] It is trite that a final interdict is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs. For the grant of such an order there are three requirements, all of which must be present:
- [46.1] A clear right, which the applicant has to prove on a balance of probabilities;
- [46.2] An injury actually committed or reasonably apprehended; and
- [46.3] That there is no other satisfactory remedy available to the applicant.

See: *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[47] An act of interference implies an injury actually committed or reasonably apprehended. A reasonable apprehension of injury is one which a reasonable person might entertain on being faced with certain facts. An applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow; he only has to show that it is reasonable to apprehend that injury will result. The test for apprehension is an objective one. This means that on the facts presented to the court it must decide whether there is any basis for the entertainment of a reasonable

apprehension by the applicant: see *Minister of Law and Order v Nordien* 1987 (2) SA 894 (AD) and 896F-H.

[48] In my view Brummer has failed to meet the test of establishing a clear right. He has fundamentally misconceived his role as Speaker in two important respects. The first is that he is constitutionally bound to allow the members of the Council to participate in its proceedings in a manner that not only allows parties and interests reflected within the Council to be fairly represented, but is one which is consistent with democracy: see s 160(8) of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'). The second is that core aspects of the Speaker's functioning are regulated by the common law which demands that the Speaker be completely impartial and non-partisan, both inside and outside the Council Chamber.

[49] Brummer's first misconception is self-evident. He has said in terms that he believes that as Speaker he has autocratic rights and that it is acceptable behaviour for him to be peremptory and to expect prompt and unquestioning obedience to his directions. This attitude is fundamentally at odds with the constitutional entitlement of members of a Council meeting set out in s 160 (8) of the Constitution. Simply put, Brummer's 'clear right' cannot be founded on autocracy but must be based on democracy and constitutionality. This also clearly implies that any directions given by him must be lawful. To require that any direction given by the Speaker must be slavishly adhered to by the member concerned

addresses neither the democratic constitutional entitlement of such member nor the underlying principles of lawfulness and natural

justice. And the amended relief belatedly sought by Brummer is belied by his interpretation of what he considers to be his 'clear right' as set out in the papers.

[50] As to the second misconception the following is apposite. The institution of Speaker in South Africa finds its origin at the Parliament of Westminster, as to which the leading authority is Erskine May: *Parliamentary Practice* (2004). At page 6 May outlines the very broad powers of the Speaker in the House of Commons, but emphasises that these powers carry with them distinctive and onerous responsibilities. He stresses that a Speaker is required to be an impartial moderator and that 'Confidence in the impartiality of the

Speaker is an indispensable condition of the successful working of procedure...’ .

[51] A recently retired Speaker of the House of Commons echoes May when she writes:

‘For the past two centuries the House has expected the Speaker to abandon all party loyalties and to be outside the battle in the Chamber. If he is to bring complete impartiality and fairness to his work, this requirement is an absolute necessity ... Our democracy owes more than words can say to the clash of ideas and the rough and tumble of party political debate, but it also owes an enormous amount to the fact that the Speaker is completely impartial in the political controversies.’

(Boothroyd, *The Role of the Speaker in the 20th Century Speech 1, The Role of Government: a Liberal Approach* - The Menzies Research Centre 1995 national lecture series, 6 June 1995.)

[52] In a similar vein another authority writes:

‘The essential element of chairing any meeting is that the person in the role of chair must ensure that the rules governing the conduct of the meeting are applied fairly to all participants. If a Presiding Officer fails to do this, he or she cannot be regarded as impartial – even if his or her other dealings with members are exemplary. Presiding Officers must apply the standing orders fairly and equally at all times.’

(Harris ‘Question time; impartial Speakers and dissent from rulings - some comments on the House of Representatives’ experience’, *Democratic Audit of Australia* (2006).)

[53] In *Gauteng Provincial Legislature v Kilian and Others* 2001 (2) SA 68 (SCA) at 79D the Supreme Court of Appeal has held that the Speaker ‘... is required by the duties of his office to exercise, and display, the impartiality of a Judge’. And the requirement that the Speaker conduct himself fairly also flows from the rights of political expression entrenched in the Constitution.

[54] Brummer’s conduct during the various meetings of the Council as outlined above raises serious concern about his impartiality in the role of Speaker. And this concern is deepened by a series of press statements released by Brummer to regional and national media outlets, setting out what he considered to be the chronology of events. Without going into detail, certain material allegations made by Brummer therein conflict with the recorded transcriptions of the Council meetings which were subsequently filed of record.

[55] Notably, one of Brummer’s press statements contained the allegation that when he directed Mvimbi to be seated at the meeting on 29 June 2011 the latter ‘proceeded to shout [him] down, became abusive and threatened a member of the community’. Further, according to one press statement, Brummer was bound to direct Mvimbi’s expulsion from the meeting in light of his apparently persistent ‘bad behaviour’. Brummer then went even further and characterised Mvimbi’s alleged conduct as ‘an attack on the Constitution’. In my view Mvimbi’s reaction to Brummer’s instruction for him to be seated can hardly be regarded as behaviour which constituted ‘a persistent disregard of the directions of the chairperson’ as

referred to in rule 24(2) of the Rules of Order.

- [56] Brummer's response is simply to take issue with Mvimbi's allegations as to when exactly and why the press statements were released. He also claims that one statement given to the media was merely 'a narrative which I prepared, which I had made available to a journalist who wanted more detailed information'.
- [57] What Brummer pertinently fails to address is whether his conduct was consistent with his common law obligations as Speaker. It is difficult to conclude from the media statements that Brummer was behaving in a manner consistent with that of an impartial moderator, that the object of his media statements was to convey his impartiality and that such impartiality would be recognised by the readers of those statements as such.
- [58] Whilst he attempts to excuse his behaviour during the Council meetings by placing the blame on Mvimbi and his fellow ANC councillors, Brummer himself fails to take any responsibility for that behaviour, asserting rather that he was entitled to act in the autocratic manner in which he did. It is of concern that in a Council wracked historically by dissent Brummer as the Speaker seems to lack insight for the necessity to tread particularly carefully in discharging his powers and functions, irrespective of whether he considers that he was treated poorly by the ANC councillors prior to the elections of May 2011. And whilst Brummer believes that his use of profanity during a Council meeting is excusable because it was used in an in-committee meeting where the public was not present and apparently cannot be regarded as unbecoming language in this day and age, the fact of the matter is that he did not conduct himself in a manner befitting that of a member, let alone the Speaker. His profanity was clearly directed at Mvimbi and his fellow ANC Councillors. It does not constitute conduct which lends itself to the conclusion that Brummer was behaving in an impartial manner.
- [59] It is for these reasons that I find that Brummer has failed to overcome the hurdle of establishing a clear right. And since this is my finding it must follow that it is not necessary to consider the remaining two prerequisites, since all three must be present for final relief to be granted.

The relief sought by Brummer against the 13th respondent

- [60] Initially Brummer sought a blanket order against the 13th respondent, directing it to assist him in enforcing rule 24(2) of the Rules of Order by removing any member of the Council from a meeting if requested to do so by him. The amended relief belatedly sought by Brummer against the 13th respondent now includes the proviso that the latter shall only be obliged to adhere to such direction(s) if they do not offend against ss 199(6) and (7) of the Constitution.

- [61] Section 199(6) provides that no member of any security service may obey a manifestly illegal order. Section 199(7) provides that neither the security services nor any of their members in the performance of their functions shall: (a) prejudice a political party interest that is legitimate in terms of the Constitution; or (b) further any interest of a political party in a partisan manner.
- [62] Save for the security services established in terms of s 199(1) of the Constitution such services may only be established in terms of national legislation and must be structured and regulated in terms thereof. The 13th respondent has been established under 64A of the South African Police Service Act 68 of 1995 ('the Police Act'). In *South African Municipal Workers Union v City of Cape Town and Others* 2004 (1) SA 548 (SCA) at 556E-F the Supreme Court of Appeal found that 'There is in law only one way in which a municipal police service can be established ...: that is by following the procedure set out in s 64A of the Police Act.' The 13th respondent is thus a security service for purposes of ss 199(6) and (7) of the Constitution.
- [63] Brummer argues that he has a 'clear right' to insist that the 13th respondent comes to his aid when he instructs it to remove a member of the Council from the Chamber. Although conceding that rule 24(2) of the Rules of Order is silent on how a Speaker may cause a member to be removed from the Chamber, he contends that by virtue of the employment relationship which apparently exists between the municipality and its law enforcement unit, the 13th respondent has no discretion to decide whether a direction from the Speaker is lawful or not.
- [64] It is the Council which appoints the executive head of the law enforcement unit. The executive head is responsible to that Council for the functioning of the unit: see ss 64B, 64C(1) and 64D of the Police Act. Section 64C(2)(a) provides that the executive head shall be responsible for maintaining an impartial, accountable, transparent and efficient municipal police service. Section 64F(1) specifically provides that 'Subject to the Constitution of the Republic of South Africa...and with due regard to the fundamental rights of every person, a member of a municipal police service may exercise such powers and shall perform such duties as are by law conferred upon or assigned to a member of a municipal police service'.
- [65] Brummer has not alleged that the 13th respondent violated any legislative requirement in failing to come to his assistance in removing Mvimbi from the Council Chamber. He appears to be of the view however that it is he who shall decide whether any instruction issued by him to the 13th respondent for this purpose is lawful. This approach not only conflicts with ss 64C(2)(a) and 64F(1) of the Police Act but also with ss 199(6) and (7) of the Constitution.

[66] The 13th respondent contends that it would simply have been illegal for it to have removed on Brummer's instruction a member who was legally entitled to participate in a meeting of Council. If the 13th respondent were ordered by this court to act merely on the instruction of the Speaker it would reduce the former to a personal

law enforcement unit. This in turn would not only frustrate the very purpose of ss 199(6) and (7) of the Constitution, but would also curtail legitimate democratic debate within Council.

[67] The 13th respondent also argues that the relief sought by Brummer would essentially violate its legal duty to conduct law enforcement without fear, favour or prejudice to any person or political party. It would render the 13th respondent a tool at Brummer's disposal to utilise in regulating meetings. Accordingly the relief, if granted, would essentially replace the statutory basis upon which the 13th respondent carries out its duties. It would result in this court conferring upon Brummer, in his sole discretion, the right to invoke

the most invasive manner of enforcing a perceived transgression by a Council member. And if this is not Brummer's intention then there is no need for this court to order the 13th respondent to comply with its legal obligations in circumstances in which it cannot validly be accused of having acted unlawfully in the past.

[68] In my view, the 13th respondent is both legally obliged and duty bound to properly exercise its discretion before simply carrying out any instruction

given by the Speaker. This discretion involves the consideration of whether the instruction so issued is manifestly illegal, may

prejudice a political party interest that is legitimate in terms of the Constitution, might further any interest of a political party in a partisan manner, or might result in a failure by it to maintain an impartial, accountable, transparent and efficient law enforcement unit. And set against a backdrop where Brummer already believes that not only is he entitled to act in an autocratic manner and require prompt and unquestioning obedience from Council members, but that it is he who is entitled to decide whether an instruction so issued is lawful, to arm him with an order in the terms sought would simply have the effect of undermining the very Constitutional imperatives to which the 13th respondent is obliged to adhere. Brummer simply does not have such a right.

[69] I thus similarly find that Brummer has not established a 'clear right' for purposes of final relief against the 13th respondent. Again therefore it is thus not necessary to consider the other two prerequisites for the grant of a final interdict.

The declaratory relief sought by the 1st to 6th respondents

[70] The relief sought by the 1st to 6th respondents is to have this court declare that Brummer's conduct in four specific instances fell foul of the relevant legislative provisions and/or the Rules of Order. The four instances of conduct complained of are: (a) Brummer's determination at the Council meeting on 29 June 2011 that Mvimbi did not have the right to

address the meeting; (b) Brummer's direction thereafter (but during the same meeting) that Mvimbi be expelled from the Council Chamber; (c) Brummer's use of profanity when addressing the councillors at the Council meeting on 29 June 2011; and (d) Brummer's determination at the Council meeting on 8 July 2011 that an urgent motion was unopposed coupled with his refusal of Mvimbi's objection that it was indeed opposed.

[71] It is trite that a court has a discretion in applications for declaratory relief. In *J T Publishing (Pty) Ltd v Minister of Safety and Security and Others*

[1996] ZACC 23; 1997 (3) SA 514 (CC) at 525A-B the Constitutional Court dealt with this discretion as follows:

'...A declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.'

[72] Brummer submits that this court should exercise its discretion against the granting of the orders sought because (in the words of the Constitutional Court in the *J T Publishing* case at 526E-F): 'There can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one...'. Certain directions made by Brummer are attacked but no consequential relief is sought. More particularly, no resolutions or decisions of the Council taken at any meeting are challenged. The setting aside of the directions and determinations complained of can have no practical effect.

[73] Brummer contends that two of the directions were given at a meeting (on 29 June 2011) which was disrupted and had to be adjourned. One was given at a meeting (on 8 July 2011) where decisions were taken by the Council but none of these decisions are challenged. Put differently, it is not contended that Brummer's determinations and directions 'poisoned' any of the decisions taken. The invalidation of the directions and determinations would be a 'thunderless bolt' or 'brutem fulmen'.

[74] Brummer submits that one cannot attack a ruling which forms part of a decision making process without contending that it had a bearing on the result and without challenging the decision taken. In any event Brummer has explained that he has no intention of enforcing the past directions complained of. Those directions were given in a particular set of circumstances and cannot be 'repeated' at another meeting.

[75] The first complaint is that Brummer did not allow Mvimbi to speak on the COPE letter on 29 June

2011. Brummer contends that this is a 'ridiculous attack' given that Mvimbi was later (on 4 July 2011) given the opportunity to speak on the issue. Further, the agenda did not allow an ordinary councillor to make a 'statement'. Only the Speaker, the Executive Mayor and the

Municipal Manager could make statements and the agenda item concerned did not permit debate. It merely provided room for the officials concerned to communicate matters of interest to the councillors. Brummer points out that it was almost a month prior to the launching of the counter-application that he retracted his direction and allowed Mvimbi to speak. Brummer advances the same argument on the second act complained of, namely his direction expelling Mvimbi from the Council Chamber.

[76] In answer the 1st to 6th respondents contend that it is self-serving of Brummer to artificially characterise the introduction of the COPE letter by the Municipal Manager as a 'statement' in order to justify his preclusion of debate in that regard. The COPE letter raised a contentious matter, viz. whether the purported COPE councillor was entitled to take up a seat in Council. The matter raised by the COPE letter cannot be classified as raising a purely procedural issue or being of a purely informal nature.

[77] Rule 5 of the Rules of Order deals with the Order of Business of meetings of the Council and sets out the agenda to be followed. The 1st to 6th respondents point out that this rule does not allow for 'statements and communications' by the Municipal Manager, but only by the Executive Mayor, his Deputy and the Speaker. They contend that under 'statements and communications' one may include the welcome by the Speaker to any person invited to address the meeting, the making of brief preparatory remarks, expressions of congratulations or condolence, the conveying of other matters of personal or general interest not forming part of the regular business of the meeting, and the communication of purely formal matters: see Lewin *The Law, Procedure and Conduct of Meetings in South Africa*

(1966) at pages 36-37 and Kilpin *Parliamentary Procedure in South Africa* (2nd Ed) at page 107.

[78] These respondents argue that this interpretation of 'statements and communications' is underscored by rule 5(1)(i) which makes express provision for the submission of 'urgent matters' by the Municipal Manager. Given the latter's status as head of municipal administration it is understandable that the Rules of Order would allow him/her to submit to Council matters requiring its immediate attention. They contend that Brummer not only failed to ascertain the sense of the meeting on the matter presented in the COPE letter, but unilaterally resolved how the issue concerning the COPE councillor's election should be dealt with. The COPE letter raised a matter of substance, not a matter of procedure, and Brummer should have dealt with it in accordance with rules 27 and 30-31 of the Rules of Order. In my view the provisions of rule 30(1) are of special application and are as follows:

'30. Right to Speak

A member may only speak once---

to the matter before the council;

to any amendments to the matter before council;

to a matter or an amendment proposed or to be proposed by himself or herself;

to a point of order or a question of privilege;

unless authorised by the Speaker or as provided for in terms of these rules.’

[79] It is the duty of a Speaker to take care that proceedings are conducted in a proper manner and that the sense of the meeting is properly ascertained regarding any issue properly before the meeting: see Lewin (*supra*) at page 52. The Speaker must exercise special caution in the case of new and unexpected subjects, viz. matters that were not included in the agenda, since members would not have received advance notice thereof. According to Lewin at page 48:

‘If the new issue is relevant and of obvious interest, it would be unwise of [the Speaker] to prohibit discussion unless he has a very special reason for doing so, and he should explain his reasons... If the presiding officer is in any doubt about the propriety or advisability of allowing debate of a subject that has been unexpectedly introduced, he should ask if any members are opposed to the discussion proceeding, not whether the meeting as a whole approves. On the response to his question, he must decide whether to allow, disallow or defer.’

[80] It is accordingly submitted by the 1st to 6th respondents that Brummer exceeded his powers as Speaker by unilaterally determining the issue placed before Council by the Municipal Manager. His determination as to how the Council should deal with the issues raised in the COPE letter went beyond the regulation and control of the proceedings of the meeting. Further, Brummer allowed petty party politics to cloud his judgment when he prematurely directed Mvimbi to take his seat which was compounded by his arbitrary decision to expel Mvimbi from the Chamber under rule 24(2) of the Rules of Order when Mvimbi had not, objectively, displayed a persistent disregard of his (i.e. Brummer’s) directions.

[81] As to the third act complained of, namely Brummer’s use of profanity in the meeting of 29 June 2011, the latter submits that when viewed in its proper context, the complaint is so trivial that it should be dismissed as *de minimis non curat lex*. Brummer also contends that rule 24 of the Rules of Order confers certain powers on the Speaker to make rulings. It does not allow a court to find that a member (or the Speaker) has contravened the rule.

[82] In my view Brummer overlooks the fact that, as indicated above, s 54 of the Systems Act provides that the Code of Conduct contained in Schedule 1 thereto applies to every member of a municipal council. And ‘Speaker’ is defined in rule 1 of the Rules of Order as the member elected as chairperson of the Council (or any other member acting as chairperson thereof). Item 2(b) of Schedule 1 imposes an obligation

on a Council member to act at all times in the best interests of the municipality ‘and in such a way that the credibility and integrity of the municipality are not compromised’. By parity of reasoning rule 24 of the Rules of Order, which is specifically directed at the conduct of members of a Council, must

surely apply to the Speaker as well. To contend otherwise would be to place the Speaker in a position in which he or she is not accountable at all for his/her conduct. And there can be little doubt that by using the term 'pissed off' Brummer used unbecoming language as envisaged in rule 24(1)(b) of the Rules of Order.

[83] As to the fourth complaint, namely Brummer's determination at the Council meeting on 8 July 2011 that an urgent motion was unopposed, Brummer's answer is that he did not see Mvimbi indicating his opposition. When it was brought to his attention he had already moved on to the next agenda item and there was nothing he could do about it. The matter can be corrected at the next Council meeting by amending the minutes to reflect that the motion in question was indeed opposed.

[84] But the 1st to 6th respondents argue that this is not good enough. They say that not only do Brummer's contentions exhibit an overly-mechanical

application of the Rules of Order, they also show that he fails to appreciate the real prejudice viz his prohibition of debate on the motion. In effect, he made it impossible for the minority to engage in debate with the coalition councillors and to express a different viewpoint and he should have acted in accordance with the provisions of rules 14 and 16 of the Rules of Order. Rule 14 provides that whenever Council is called upon to consider a matter before it and there is no opposition from any member, a unanimous vote shall be recorded in the minutes. Rule 16 sets out the manner of voting and includes that the Speaker must put every opposed motion to the vote by calling upon the members to indicate by a show of hands whether they are for such motion or against it, whereupon the Speaker must declare the result of the vote.

[85] Brummer characterises the relief sought in the counter-application as moot. However, the 1st to 6th respondents say that there is ample authority that declaratory 'forward looking' relief is appropriate where the conduct complained of gives rise to a reasonable apprehension of repetition. They contend that in any event the relief sought is not moot. The papers show that Brummer believes that he has licence to behave in an autocratic fashion and to ride roughshod over their right of political expression. By his own account he will continue to conduct himself in an imperious and partisan fashion.

[86] The 1st to 6th respondents say that more particularly, on Brummer's own version, he has allowed his decision making at Council meetings to be dictated by his misguided perceptions of mala fides on their part. In other words, because he believed that these respondents had 'deliberately sought to disrupt' previous Council meetings, he rejected subsequent objections and requests in a knee-jerk fashion, insisting also on a pedantic application of the Rules of Order. In the absence of the declaratory relief sought Brummer will continue to deny these respondents a fair and reasonable opportunity to participate in the business of Council. They also submit that even if this court finds that the declaratory relief sought is moot, it nonetheless has the discretion to grant such relief in the interests of justice.

- [87] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at 18H-I the court said that 'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.'
- [88] I am satisfied that the declaratory relief sought by the 1st to 6th respondents is predicated on an 'existing or live controversy'. As already noted Brummer maintains that he is entitled to apply the Rules of Order in a mechanical and autocratic manner. Moreover he has descended into the political fray. As Speaker he has issued a series of press statements that give a one-sided and partisan account of events. His animus against these respondents has clouded his judgment and has impaired his impartiality as Speaker. The probabilities are that he will continue to exercise his powers as Speaker in this manner, thereby infringing the constitutional right of the 1st to 6th respondents to participate in the business of the Council and to enjoy free political expression at its meetings.
- [89] The Constitutional Court has repeatedly affirmed that courts have no discretion when a finding is made that law or conduct is or has been inconsistent with the Constitution; they must declare it to be invalid in terms of s 172(1)(a) thereof, whereafter they may turn to considering what relief is 'just and equitable' in terms of s 172(1)(b).
- [90] The decision in *Parents Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA) underscores that a declarator unaccompanied by any other relief may serve a purpose that goes to the heart of a court's

role in a constitutional democracy, even though it is not susceptible to enforcement. This case concerned an application in which both a declarator and an order were sought directing the release of certain Namibian citizens being held as political prisoners at SWAPO detention camps in Angola. The court rejected the argument that no relief should be granted because it would be powerless to enforce its order for the release of the detainees. Although the court was not prepared to order the release of the detainees because such an order would be unenforceable, it held that it did have jurisdiction to issue 'A declaratory order to the effect that the five detainees are being unlawfully detained and are entitled to be released' (at 892G-I).

- [91] In *Mohammed and Another v President of the Republic of South Africa and Others* (Society for the Abolition of the Death Penalty in South Africa and Another intervening) [2001] ZACC 18; 2001 (3) SA 893 (CC) the fact that the declarator sought might in a literal sense be 'futile' did not stay the hand of the court from issuing the declarator it deemed necessary in order to vindicate the rights at issue. In that case the first applicant had been illegally removed from South Africa by the FBI with the collaboration of South African authorities to face trial in the United States. Rejecting assertions by the government that no relief was indicated because the first applicant was already in US custody, the Constitutional Court issued a declarator affirming that the conduct of the state in achieving his de facto deportation was contrary to the Constitution: 'Quite apart from the particular interest of the applicants in the case, there are important issues of legality and policy involved and it is necessary that we say

plainly what our conclusions as to those issues are' (at 922B).

[92] In *Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC) the Constitutional Court considered declaratory relief in the following terms:

'A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values... It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law on the one hand, but leave to the other arms of government, the executive and legislature, the decision as to how best the law, once stated, should be observed' (at 410F).

[93] Having found that the state had failed to fulfil its constitutional duty to protect individuals using a commuter train service, the court in that case preferred to issue a simple declaration of the state's obligations and declined to affirm the interdict granted by the court a quo.

[94] Having given careful consideration to the instances of conduct complained of, the conclusion which I have reached is that Brummer's directions in those instances were indeed ultra vires the Rules of Order and s 37(f) of the Structures Act and are accordingly unlawful and of no effect. I also find that Brummer's use of profanity at the meeting on 29 June 2011 constituted unbecoming language as contemplated in rule 24(1)(f) of the Rules of Order. I am thus obliged to declare that Brummer's conduct in these instances was inconsistent with the Constitution as provided in s 172(1)(a) thereof.

[95] However, it is my view that it would not be just and equitable to order that Brummer must bear the costs of the counter-application. Mvimbi has himself conceded that he has in certain instances conducted himself in a manner inconsistent with the Rules of Order. It is also apparent from the papers that Mvimbi has probably, at certain times, himself 'stoked the fire'. It is not possible from the papers to determine precisely which of the other ANC councillors have themselves played a role, but in my view it would be artificial in the particular circumstances of this matter to completely discount that possibility.

[96] It seems to me that the time has arrived for all of the Council members to move beyond the in-fighting which is so clearly prevalent and to rather focus on fulfilling in good faith the mandate conferred on them by their electorate, which is to serve their constituents in a manner befitting our constitutional democracy in a spirit of co-operative governance. To my mind, ordering Brummer to bear the costs of the counter-application may well only serve to perpetuate the current conflict.

Conclusion

[97] In the result I make the following orders:

- (a) The rule nisi issued on 13 July 2011 against the 1st to 13th respondents is discharged with costs, such costs to include the costs of the two counsel appointed by the 1st to 6th respondents and counsel appointed by the 13th respondent.
- (b) It is declared that the applicant's direction at the meeting of the Bitou Municipal Council ('the Council') on Wednesday, 29 June 2011 that the 1st respondent did not have the right to address the meeting, was ultra vires the provisions of rule 30(1) of the Council's Rules of Order regulating the conduct of meetings of the Council published in Western Cape Provincial Gazette no 6689 of 22 January 2010 ('the Rules of Order') and s 37(f) of the Local Government: Municipal Structures Act, 117 of 1998 ('the Structures Act') and accordingly unlawful and of no effect.
- (c) It is declared that the applicant's direction at the Council meeting on Wednesday, 29 June 2011 that the 1st respondent retire from the Council Chamber was ultra vires rule 24(2) of the Rules of Order and s 37(f) of the Structures Act and accordingly unlawful and of no effect.
- (d) It is declared that the applicant's use of profanity when addressing the Councillors at the Council meeting on 29 June 2011 constituted unbecoming language as contemplated in rule 24(1)(f) of the Rules of Order.
- (e) It is declared that the applicant's determination at the Council meeting on Friday, 8 July 2011 that the urgent motion regarding Resolution No C/1/04/06/11 (file ref 13/5/49) ('the urgent motion') was an unopposed matter coupled with his refusal of 1st respondent's objection that the urgent motion was indeed opposed were ultra vires the provisions of rules 14 and 16 of the Rules of Order and s 37(f) of the Structures Act and accordingly unlawful and of no effect.
- (f) In respect of the counter-application of the 1st to 6th respondents, there shall be no order as to costs.

J I CLOETE

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