

**Media Summary**

*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The appellants, elected councillors of the Council of the Nala Local Municipality, challenged a decision of the High Court in Bloemfontein. They were ordered to pay out of their own pockets the costs of a court case in which two other members of the council succeeded in having two council decisions set aside. In coming to its conclusion the High Court had relied mainly on what it considered to be the incompetent, malicious and to a degree racist conduct of the members of the council in supporting the decisions that had been set aside and on the impropriety of the decisions themselves.

On Thursday, 3 April 2003, Justice Yacoob handed down a judgment on behalf of a unanimous Court. It was held that the liability of members of a local council for costs should not be determined according to common law rules that provide for personal liability for costs of people acting in a representative capacity if their actions are motivated by malice or amount to improper conduct. Instead, section 28(1)(b) of the Local Government: Municipal Structures Act 117 of 1998 applied to the case. This law exempts municipal councillors from, amongst other things, being liable to civil proceedings for anything that they have said in, produced before or submitted to the council.

The Constitutional Court further held that the costs order against the appellants made them liable to civil proceedings within the meaning of section 28(1)(b). In making its costs order the High Court had relied on a report by the speaker of the council, the statements made by various members in support of the resolutions and their votes in favour of them. All of this conduct was held to be integral to deliberations at a council meeting and to the legitimate business of the council. It did not matter whether the decisions taken after the deliberations were administrative, executive or legislative or even whether they were unlawful. The purpose of section 28(1)(b), the Court held, is to encourage vigorous and open debate in the process of decision making. This is fundamental to democracy. Any curtailment of that debate would compromise democracy. Justice Yacoob remarked that there may be conduct that is so at odds with the values of the Constitution that neither the Constitution nor the legislature could conceivably have contemplated its protection but held that it was unnecessary to decide this issue in the case before the Court.

The High Court was also motivated by the perception that the costs order against the appellants might serve to ensure that members of the council would consider their decisions more carefully in the future. The Constitutional Court held that this reasoning evinces an intention to teach municipal councillors a lesson and trenches upon the separation of powers. Courts have the power to set aside legislative and executive decisions that are inconsistent with the Constitution. They cannot attempt by their orders to punish municipal councillors and in so doing, influence what members of these bodies might or might not do.

The Constitutional Court concluded that had section 28 been applied by the High Court the correct conclusion would have been that the appellants' conduct, however serious it may have been, did not deprive the appellants of the benefits of their section 28(1)(b) immunity.

The Constitutional Court ordered that the High Court costs order made against the appellants should be set aside and that the Nala Municipal Council should be ordered to pay the costs of the case in the High Court on the attorney and client scale.