

CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 27/02

GABRIEL NTLELI SWARTBOOI
AND SEVENTEEN OTHERS

Applicants

versus

LILIAN RAY BRINK

First Respondent

GERRIT NIEWOUDT

Second Respondent

Heard on : 12 November 2002

Decided on : 21 November 2002

JUDGMENT

YACOOB J:

[1] This application for leave to appeal relates to the affairs of the Nala local municipal council. The proposed appeal is directed at a special order of the Free State High Court in a successful review application against the council directing the applicants, members of the council, to pay the costs personally and on the scale as between attorney and own client. The applicants in the review proceedings, the current respondents, are also members of the council. They had asked for attorney and own client costs against the council but the judges hearing the matter took the

view that the conduct of the applicants warranted their and not the council having to pay costs on the punitive scale out of their own pockets.

[2] The council applied to the High Court for leave to appeal against the whole judgment and the costs order. When that was refused, the applicants joined with the council in an application to the Supreme Court of Appeal for leave to appeal. When that application, too, was refused, an application for leave to appeal to this Court was launched. Unlike the two previous applications for leave to appeal, it was brought in the name of the 18 individual members of the council struck by the special costs order and cited only the original two applicants as respondents.

[3] Directions issued by the Chief Justice required the parties to submit written argument on: -

- a) Whether the determination of the circumstances (if any) in which it is appropriate for members of a municipal council to be ordered to pay, *de bonis propriis*, the costs of court proceedings concerning the validity of decisions of a municipal council is a matter within the jurisdiction of the Constitutional Court; and if it is,
- b)
 - i) The circumstances in which it is appropriate for members of a municipal council to be ordered to make payment of such costs; and
 - ii) Whether, in the circumstances of this case, the applicants ought to have been ordered by the High Court to pay the costs of the proceedings before it *de bonis propriis*.”

[4] The application was heard on 14 November 2002. During argument this Court raised the important procedural consideration that the council, which had been the respondent in the High Court, was no longer a party to the proceedings. It has a

material interest in the appeal, for any finding that the High Court was wrong in ordering the applicants to pay the costs would almost inevitably result in that liability being placed on the council. The council ought therefore to be joined as a party to the proceedings.

[5] Quite apart from the procedural question, important issues were raised concerning the separation of powers and the scope of the privileges and immunities conferred upon members of a municipal council by section 28 of the Local Government: Municipal Structures Act 117 of 1998. These are issues that affect all municipal councils and could have a significant bearing on the way in which they function. It is desirable that these issues be determined by this Court. For this reason alone leave to appeal should be granted.¹ It is also desirable that notice of these proceedings be given to the South African Local Government Association, the members of provincial executive committees responsible for local government in each of the provinces as well as the national minister responsible for local government, and that they be given an opportunity to address argument to this Court if they choose to do so. It would be helpful to the Court for the views of those involved in local government to be made available to it.

Order

[6] The following order is made:

- (a) The applicants are granted leave to appeal.

¹ We will give reasons for this decision more fully when we give judgment on the appeal.

- (b) The municipal council of the Nala local municipality is joined as a party in the appeal and is required to lodge its written argument, if any, on or before 13 December 2002.
- (c) The South African Local Government Association, all members of provincial executive councils responsible for local government and the national minister responsible for local government may, if they wish to do so, lodge written argument on the issues referred to in paragraphs 3 and 5 of the judgment on or before 13 December 2002. Those who wish to submit written argument must lodge notice of their intention to do so with the registrar of this Court on or before 2 December 2002.
- (d) The applicants and the respondents are given leave to respond to the argument filed pursuant to paragraphs (b) and (c) of this order on or before 10 January 2003.
- (e) The registrar is requested:
 - (i) to notify the municipal council of the Nala Local Municipality that it has been joined in these proceedings, to serve a copy of this judgment upon it and to ensure that the attention of the council is drawn to the terms of paragraphs (b) of this order.
 - (ii) to notify each of the organs of state mentioned in paragraph (c) of this order of the terms of that paragraph and to ensure that a copy of this judgment is brought to their attention.
- (f) The costs of this application will be costs in the cause of the appeal.

Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J
and Sachs J concur in the judgment of Yacoob J.

For the applicants:

D. Marais instructed by Ramsurjoo & Du
Plessis Inc, Johannesburg.

For the respondents:

S.J. Reinders instructed by G.P. Niewoudt &
Partners, Bothaville.