

RECONSIDERING THE PRIVILEGES AND IMMUNITIES OF MUNICIPAL COUNCILS

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SUMMARY

Privileges and immunities of elected assemblies protect freedom of speech and promote vigorous debates in these assemblies. South Africa is ahead of the United Kingdom (UK) and Canada regarding the law on privileges of municipal councils, in that municipal councils in South Africa enjoy absolute privilege, whereas in the UK and Canada they enjoy qualified privileges. Yet, the absolute privilege notwithstanding, the law regarding privileges of municipal councils is not precise or clearly stated. The Constitution entrusts Parliament with the power to provide for a framework, and – to give content to this – provincial legislatures with the power to provide for privileges and immunities in municipal councils. However, it does not provide minutiae and details on the nature and extent of such privileges and immunities. The provision of municipal privileges by fragmented provincial legislation may result in disparity in municipal councils. Freedom of speech may require uniform legislation that applies across the nation. Thus, the Constitution should be amended to entrust Parliament to provide for uniform legislation on the privileges of municipal councils.

1 INTRODUCTION

Government in the Republic consists of three spheres of government, namely: national, provincial and local spheres.¹ In turn, the local sphere of government constitutes municipalities which are established throughout the Republic.² Political elections, in terms of which the electorate sends individuals to represent them in Parliament, provincial legislatures and municipal councils,³ ultimately give rise to all spheres of government. These

¹ See s 40(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”).

² S 157(2) of the Constitution provides that local spheres of government are constituted by municipalities.

³ The Electoral Act 73 of 1998 provides for elections in respect of the national and provincial spheres and Local Government; Municipal Electoral Act 27 of 2000 provides for elections in the local sphere of government.

elected representatives are given the mandate by voters to speak on their behalf. In most democracies the mandate of the voters is protected by guaranteeing their representatives freedom of expression through the provision of privileges and immunities to members of these assemblies. Accordingly, in South Africa the Constitution makes provision for privileges and immunities of the National Assembly, National Council of Provinces (NCOP), provincial legislatures and municipal councils.⁴ While the Constitution and national legislation provide certainty on the privileges and immunities of the National Assembly, NCOP and provincial legislatures, there is still uncertainty about the scope and extent of the privileges of municipal councils. The Constitution makes provision for national legislation to prescribe a framework and the provincial legislatures to provide for the privileges and immunities of municipal councils.⁵

Parliament adopted the Municipal Structures Act to prescribe a framework for the privileges and immunities of municipal councils.⁶ Apart from exempting members of municipal councils from criminal and civil liability, the Municipal Structures Act does not provide for the nature and scope of the privileges of municipal councils.⁷ It remains an academic question whether the provision of privileges to municipal councils by fragmented provincial legislation would bring adequate protection to freedom of speech in municipal councils. Accordingly, this paper explains the nature and scope of privileges and immunities in municipal councils and the possibility of exploring uniform privileges for municipal councils in the Republic. In setting the pace, the paper explains privileges and immunities of the National Assembly, NCOP and provincial legislatures. Furthermore, the privileges of municipal councils in other international jurisdictions are explained. The Constitution, the relevant legislation and case law are also discussed. Finally, a conclusion is drawn and proposals made regarding the adequate protection of freedom of speech in municipal councils.

2 PRIVILEGES AND IMMUNITIES OF MEMBERS OF THE NATIONAL ASSEMBLY, NCOP AND PROVINCIAL LEGISLATURES

The concept of parliamentary privilege originated in the UK when royal protection was bestowed on the King's advisors to ensure his access to them was not impeded by arrests or other obstructions.⁸ According to

⁴ S 58 of the Constitution makes provision for privileges and immunities in the National Assembly; s 71 provides for privileges and immunities of National Council of Provinces; s 117 provides for privileges and immunities of provincial legislatures; and s 161 provides for privileges and immunities of municipal councils.

⁵ See s 161 of the Constitution.

⁶ See the Local Government: Municipal Structures 117 of 1998.

⁷ See s 28 of the Municipal Structures.

⁸ Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM dissertation, Toronto University, 2009) 7. The judgment of *Poovalingam v Rajbansi* 1992 (1) All SA 230 (A) 231 reinforces the facts about the origin of parliamentary privilege, where it was stated that parliamentary privilege and especially the absolute privilege or immunity in law which it

Corlette Langlois, the privilege was later used by Parliament to prevent the Crown from interfering in Parliament.⁹ Parliamentary privilege was reinforced in the UK when Parliament adopted the Bill of Rights in 1688, which declared freedom of speech and debates in Parliament and protected such freedom from being impeached or questioned in any court or place outside Parliament.¹⁰ In South Africa, parliamentary privilege was first declared in 1854 in the then Cape Colony in an ordinance which secured freedom of speech and debates in Parliament, and protected such freedom from impeachment or questioned in any court of law.¹¹ Subsequently, the Powers and Privileges of Parliament Act was adopted to provide for freedom of speech and debates in Parliament of the Union of South Africa.¹² After the Union of South Africa became the Republic of South Africa in 1961, the privileges of Parliament were extended to the Republic.¹³ In the new constitutional dispensation the privileges do not only apply to Parliament, but are extended to the NCOP and provincial legislatures. In protecting freedom of speech in the National Assembly the Constitution provides that:¹⁴

- “(1) Cabinet members, Deputy Ministers and members of the National Assembly –
- (a) have freedom of speech in the Assembly and its committees, subject to its rules and orders; and
 - (b) 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 assembly or any of its committees; or
 - (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or its committees.
- (2) Other privileges and immunities of the National Assembly, Cabinet members and members of the National Assembly may be prescribed by national legislation.”

The Constitution further provides for privileges and immunities of delegates to the NCOP, Cabinet members, Deputy Ministers attending the NCOP and local-government representatives attending the NCOP.¹⁵ In the provincial legislatures, members of provincial legislatures and the province's permanent delegates to the NCOP are afforded privileges and immunities similar to the privileges and immunities of the National Assembly and

gives, in certain circumstances, to statements made by *inter alia* members of Parliament is essentially of English origin.

⁹ See Langlois *Parliamentary Privilege: A Relational Approach* 7.

¹⁰ See Langlois *Parliamentary Privilege: A Relational Approach* 7; and *Poovalingam v Rajbansi supra* 231.

¹¹ See *Poovalingam v Rajbansi supra* 235.

¹² The privileges were provided in s 36 of the Powers and Privileges of Parliament Act 19 of 1911.

¹³ S 36 of the Powers and Privileges of Parliament Act 91 of 1963 made provision for the privileges of Parliament in the Republic.

¹⁴ See s 58 of the Constitution.

¹⁵ See s 71 of the Constitution. It should be noted that the provision of the Constitution extends the privilege and immunity to people who are referred to in s 66 and s 67 of the Constitution. S 66 refers to Cabinet members and Deputy Ministers and s 67 refers to the representatives of local government, who are attending meetings of the NCOP.

NCOP.¹⁶ Other privileges and immunities of the members of provincial legislatures may be prescribed by national legislation.¹⁷

The Constitution provides for absolute privileges in respect of Parliament, NCOP and provincial legislatures. An absolute privilege as opposed to qualified privilege was explained in the *Poovalingam* case. It bestows to a member “complete right of speech in Parliament without fear and his motives or intentions or reasoning will not be questioned or held against him thereafter.”¹⁸ The privilege does not only protect members from criminal and civil liability in respect of what was said or done in Parliament, but also prohibits what was said or done in Parliament in the course of the proceedings from being examined outside Parliament for purposes of supporting a course of action.¹⁹ In addition, qualified privilege applies if what was done or said was fair and honest and not actuated by malice.²⁰ The Supreme Court of Appeal in the case of *NEHAWU v Tsatsi*²¹ also explains the defence of qualified privilege, where it was held that to establish the defence of qualified privilege one must show that the author and recipient of the information had “a reciprocal right and duty to make and receive the report, and the defamatory statements were relevant or germane and reasonably appropriate to the occasion”.²² The immunity is forfeited if it is established that the maker of the statement acted with improper motive.²³ The Constitutional Court in *Dikoko v Mokhatla*,²⁴ specified three categories of occasions that enjoy qualified privilege in South African law, namely: “(a) statements published in the discharge of a duty or the exercise of a right; (b) statements published in the course of judicial or quasi-judicial proceedings and (c) reports of proceedings of courts, Parliament or public bodies.”²⁵

Accordingly, the defence of absolute privilege protects the institutions and its members, whereas the defence of qualified privilege covers the circumstances under which something was done or said. This view is supported by the Canadian Supreme Court judgment in the *Prud’homme v Prud’homme*,²⁶ where it was held that the defence of qualified privilege is not about an individual but the privilege attaches more often to particular circumstances.²⁷

Parliament adopted the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act²⁸ to prescribe for other immunities and privileges of the National Assembly, NCOP and provincial legislatures. The

¹⁶ See s 117 of the Constitution.

¹⁷ See s 117(2) of the Constitution.

¹⁸ See *Poovalingam v Rajbansi supra* 232.

¹⁹ *Ibid.*

²⁰ See *Poovalingam v Rajbansi supra* 235.

²¹ 2006 (1) All SA 583 (SCA).

²² See *NEHAWU v Tsatsi supra* par 10.

²³ *Ibid.*

²⁴ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

²⁵ See *Dikoko v Mokhatla supra* par 48.

²⁶ *Prud’homme v Prud’homme* [2002] 4 S.C.R. 663.

²⁷ See *Prud’homme v Prud’homme supra* par 53.

²⁸ Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

Act affords privileges and immunities to the President and members in a joint sitting of the National Assembly and NCOP.²⁹ Freedom of speech is further protected by prohibiting any person from improperly interfering with or impeding the exercise or performance by Parliament or a House or Committee of its authority or functions, improperly interfering with a member in the performance of his or her functions, threatening or obstructing a member in the performance of business of Parliament, or a House or Committee; assaulting or threatening, or depriving a member of any benefit for reason of the member's conduct in Parliament, or a House or Committee; or creating or partaking in any disturbance while Parliament, or a House or Committee is meeting.³⁰ Members are protected further from improper influence in the performance of their functions, inducement to be absent from Parliament or a House or Committee, or influence members regarding any decision on anything pending before or proposed in Parliament or House or Committee.³¹ The speaker or chairperson is afforded the power to order arrest and removal from Parliament, or a House or Committee, any person who creates or takes part in any disturbance while Parliament or a House or Committee is meeting.³²

3 PRIVILEGES OF MUNICIPAL COUNCILS

Though Parliament had always enjoyed absolute privilege, the same could not be said for the municipal councils. This view is reinforced by the Constitutional Court judgment of *Swartbooi v Brink*,³³ where it was held that before the 1996 Constitution took effect the absolute privilege applied only to legislatures and only in respect of their legislative functions.³⁴ Given the fact that the absolute privilege applicable to Parliament was not applicable to municipalities, the analysis of parliamentary privilege might provide insight but is not decisive on the law regarding privileges of the municipal councils. Therefore, the Constitution, the legislation of South Africa and the application of the law in other international jurisdictions should be helpful. Accordingly, privileges of municipal councils in the UK are relevant for South Africa, because the law on privileges of elected assemblies originated from the UK. Furthermore, the position in Canada could also be of assistance because Canada, like South Africa, is a three-tiered system of government and the issue of municipal privileges in municipal councils is well traversed in Canadian case law.

²⁹ See s 6 of the Act.

³⁰ S 7(a)–(e) of the Act.

³¹ See s 8(1) of the Act.

³² See s 11 of the Act.

³³ 2006 (1) SA 203 (CC).

³⁴ See *Swartbooi v Brink supra* par 16.

4 COMPARATIVE OVERVIEW OF PRIVILEGES AND IMMUNITIES OF MUNICIPAL COUNCILS

4.1 Position in the UK

In the UK case of *Horrocks v Lowe*,³⁵ the issue of immunities and privileges of municipal councils arose from a meeting of Bolton Borough Council, where alderman Lowe, the respondent, made a speech criticising the conduct of councillor Horrocks, the appellant, both as a member of the finance management committee of the council and as chairman of a land-development and building company. The respondent brought an action for defamation against the appellant, based on words used by the appellant at a council meeting that were defamatory of the respondent. The appellant raised the defence of qualified privilege in that what was said in the council was protected by privilege. The court held that freedom of speech, protected by the law of qualified privilege, may be available to anyone who has acted in good faith in compliance with a legal or moral duty or in protection of legitimate interest.³⁶ With regard to privileges in municipal councils Lord Diplock said that:³⁷

“My Lords, what is said by members of local council at meetings of the council or any of its committees is spoken on a privileged occasion. The reason for the privilege is that those who represent the local government electors should be able to speak freely and frankly, boldly and bluntly, on any matter which they believe affects the interests or welfare of the inhabitants. They may be swayed by strong political prejudice, they may be obstinate and pig-headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern and as long as they do so honestly they run no risk of liability for defamation of those who are subjects of their criticism.”

The importance of freedom of speech in municipal councils was emphasised further in the case of *Derbyshire County Council Appellant v Times Newspapers Ltd.*³⁸ Derbyshire County Council (the plaintiff) brought an action for damages for defamation against the *Times Newspapers* (the defendant) in respect of two newspaper articles which had criticised the plaintiff for investments made for its superannuation fund. Although the main question in this case was whether a municipal council can bring an action for defamation to protect its reputation, the court explained the importance of freedom of speech in municipal councils.³⁹ In determining whether a municipal council can bring an action for defamation, the question arose whether a municipal council can raise a defence of privilege to protect its reputation. In finding that the local municipality cannot raise the defence of privilege to protect its reputation, the court held that it is of public importance that a democratically-elected governmental body should be open to uninhibited public criticism, and the threat of a civil action for defamation

³⁵ [1974] 1 All ER 662.

³⁶ See *Horrocks v Lowe supra* 669.

³⁷ See *Horrocks v Lowe supra* 671.

³⁸ [1993] 2 W.L.R 449.

³⁹ See *Derbyshire County Council Appellant v Times Newspapers Ltd supra* 451.

must inevitably have an inhibiting effect on freedom of speech.⁴⁰ This case demonstrates the importance of freedom of speech in municipal councils in promoting democracy in the local sphere of government

4 2 Position in Canada

In Canada, the privileges of municipal councils were described in the Ontario Appeal Court case of *Ward v McBride*,⁴¹ where the court held that councillors were legislators as important as members of Parliament and state legislators; that the law of qualified privilege protects their rights and duty to speak their minds fully and clearly without evasion or equivocation; and they should not be mealy-mouthed but they should call a spade a spade.⁴² Privileges in municipal councils were explained further in the Supreme Court judgment of *Prud'homme*.⁴³ The issues arose from remarks made by the respondent, a councillor at a meeting of a municipal council, which the ratepayers (the applicants) perceived to be defamatory of them. The municipal council in Quebec passed a by-law that the applicants are due to finance the building of an infrastructure proposed by the council. The applicant brought a court action for an order setting aside the by-law. The Superior Court found that the by-law was invalid and set it aside. The respondent criticised and questioned the correctness of the judgment of the Superior Court which invalidated the by-law. The appellants approached the court for damages for defamation against the respondent. The Supreme Court of Canada alluded to the fact that "despite the early emergence of municipal institutions in Quebec, the rights and duties of elected municipal officials were still not stated in precise, well-organised statutory provisions".⁴⁴ The court held that elected municipal officials do not enjoy the parliamentary privilege enjoyed by members of the National Assembly of Quebec or of the federal Parliament; however, words spoken at a meeting of a municipal council are protected by qualified privilege.⁴⁵ Accordingly, the court found that:⁴⁶

"Things done by municipal councillors acting in the course of their office fall into those privileged occasions where important public interest considerations call for them to be granted partial protection against the legal consequences that flow from words that would otherwise be regarded as defamatory."

The court found that a respondent did not commit any fault by questioning the judgment of the Superior Court and held that "if the respondent were to be found to have committed any fault under the circumstances, the right of free discussion within the municipal political precincts would be dangerously

⁴⁰ See *Derbyshire County Council Appellant v Times Newspapers Ltd supra* 456.

⁴¹ (1911), 24 O.L.R 555.

⁴² See *Ward v McBride supra* 568.

⁴³ *Prud'homme v Prud'homme supra* 663.

⁴⁴ See *Prud'homme v Prud'homme supra* par 18.

⁴⁵ See *Prud'homme v Prud'homme supra* par 49.

⁴⁶ See *Prud'homme v Prud'homme supra* par 53.

undermined, and the vitality of democracy at the local level would be weakened".⁴⁷

In the case of *Bauman v Turner*,⁴⁸ the issue of the privileges arose from the conduct of the mayor of the District of Squamish who wrote a letter to the Minister concerning the involvement of the appellant to the district plan in connection with domestic water supply, and caused the copies of such letter to be distributed to members of the council. The letter was subsequently published by the media. The appellant perceived the letter to be defamatory of him and he approached the court for damages. The respondent denied that the letter was defamatory of the appellant and raised the defence of qualified privilege. The court held that the respondent's publication of the letter to members of the council was upon an occasion of privilege because of his duty and their duty.⁴⁹ It was further held that it should be borne in mind that the proceedings of meetings of municipal councils are not, unlike proceedings in Parliament or the legislature, absolutely privileged. The occasion is one of qualified privilege only.⁵⁰ The court found that the defence of privileged qualification cannot be extended to the publication in the media.⁵¹ Furthermore, in the Superior Court of Ontario case of *Whitehead v Sarachmen*,⁵² the issues arose from an exchange of e-mails between councillors of Hamilton (the respondent) and a rate payer (the applicant), about the rate of tax imposed on the residents of the municipality. The applicant perceived the contents of the respondent's e-mail to be defamatory of him and approached the court for claim of defamation. It was held that the impugned e-mail was part of an on-going discussion in Hamilton over municipal-taxation issues.⁵³ Therefore, the issue falls squarely within the ambit of qualified privilege for an elected city councillor.⁵⁴

The comparative overview shows that, in both Canada and the UK, the defence of privilege applies to municipal councils, albeit that such privilege is qualified. Thus, councillors are not afforded absolute privilege like members of Parliament. The *Horrocks* case shows that the privilege does not only apply to meetings of a full council, but also to its committees in the UK. The case law shows further that freedom of speech in municipal councils is so important in the UK in that municipal councils are denied the right to sue for defamation to protect their reputation. It seems that the law in other states of Canada is not precise on the privileges of municipal council as it was pointed out in the *Prud'homme* case: the rights of municipal councils are not categorically stated in the statutory provisions of Quebec.⁵⁵ It is evident from the *Whitehead* judgment that the privilege extends beyond council and its committees, further to include the exchange of e-mails which relate to the business of the council.

⁴⁷ See *Prud'homme v Prud'homme supra* par 84.

⁴⁸ (1993) 105 D.L.R. 437 B.C.A.

⁴⁹ See *Bauman v Turner supra* 50.

⁵⁰ *Ibid.*

⁵¹ See *Bauman v Turner supra* 51.

⁵² 2012 ONSC 6641.

⁵³ See *Whitehead v Sarachmen supra* par 31.

⁵⁴ See *Whitehead v Sarachmen supra* par 32.

⁵⁵ See *Prud'homme v Prud'homme supra* par 18.

5 PRIVILEGES AND IMMUNITIES IN MUNICIPAL COUNCILS IN SOUTH AFRICA

The law regarding privileges of municipal councils prior to the new constitutional dispensation was not clearly articulated; hence the Constitution paves a way for privileges and immunities of the municipal councils, where it provides that: "Provincial legislation within the framework of national legislation may provide for privileges and immunities of municipal councils and their members."⁵⁶ Unlike the National Assembly, NCOP and provincial legislatures, privileges and immunities of municipal councils are not entrenched in the Constitution, but they are permitted. A conclusion can be drawn from the use of the tentative word "may" that the Constitution bestows Parliament only with the discretion to adopt legislation to prescribe a framework and the provincial legislatures with the power to provide for the privileges and immunities of municipal councils. This view is reinforced by Bekink who points out that provinces are not obliged to enact legislation in terms of section 161 of the Constitution, and that some provincial legislatures may opt not to enact such legislation.⁵⁷

The nature and scope of privileges that may be afforded to municipal councils is not clearly articulated in the Constitution. The issue of privileges and immunities of municipal councillors in a municipal council was indirectly prompted in the case of *Waters v Khayalami Metropolitan Council*.⁵⁸ The case was decided after the provision of the Constitution on the privileges of municipalities came into effect, but before the Municipal Structures Act which provides for the framework of the privileges for municipal councils was adopted. In this case the applicant was a councillor representing the Democratic Party (DP) in the Khayalami Metropolitan Council. He was suspended from council without pay by resolution of an African National Congress (ANC) dominated municipal council for tabling a motion which alleged that the chief executive officer of the municipality gave false information about a debt of one of the councillors to the municipality. Noting this misdemeanour, the applicant requested the establishment of an enquiry into why the regulations which provide for exclusion of a candidate who is owing the municipality from the list of prospective councillors, were not properly applied.⁵⁹ The chairperson of council requested the applicant to withdraw the allegations against the council official, which the chairperson believed to be unfounded. After he refused both to withdraw the allegation made to the councillor and apologise to the chief executive officer on instructions of the council, the council took a resolution to suspend the applicant from council for wilfully disregarding the authority of the chairperson of council. The applicant approached the High Court for an order setting aside the resolution of the council suspending him from council on the basis, among others, that the resolution has the effect of stifling disclosure of and debate on issues of public importance and suppressing

⁵⁶ See s 161 of the Constitution.

⁵⁷ See Bekink *Principles of South African Local Government Law* (2006) 270.

⁵⁸ 1997 (3) SA 476 (WLD).

⁵⁹ See *Waters v Khayalami Metropolitan Council supra* 483.

freedom of speech in the council.⁶⁰ In setting aside the resolution of the Khayalami Metropolitan Council, Navsa J stated that:⁶¹

“In my view, to censure the applicant in the fashion complained of, for labelling information supplied by the CEO as ‘incorrect’, is to stifle freedom of expression and to restrict debate in council meetings. This militates against the fundamentals of democracy.”

In emphasising the importance of freedom of speech in municipal councils, the court held that vigorous and open debate was important to an open democratic system of government.⁶² The court supported its decision by referring to the objects of local government in terms of section 152 of the Constitution to “provide democratic and accountable government for local communities”.⁶³ The case was decided without reference to section 161 of the Constitution on privileges and immunities of municipal councils.

Pursuant to section 161 of the Constitution, Parliament passed the Municipal Structures Act,⁶⁴ which prescribes for the framework of privileges and immunities of municipal councils in the following terms:⁶⁵

- “(1) Provincial legislation in terms of section 161 of the Constitution must provide at least:
- (a) that councillors have freedom of speech in a municipal council and its committees, subject to the
 - (b) relevant council’s rules and orders as envisaged in section 160 (6) of the Constitution; and
 - (c) 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
 - (ii) anything revealed as a result of anything that they have said in, produced before or submitted to council or any of its committees.
- (2) Until provincial legislation contemplated in subsection (1) has been enacted the privileges referred to in paragraph (a) and (b) of subsection (1) will apply to all municipal councils in the province concerned.”

The provisions of the Municipal Structures Act on the privileges of municipal councils provide for a minimum protection to freedom of speech in all municipal councils. This is done by exempting councillors from criminal and civil liability in all that they do or say in the council. The provisions of the Act are binding to all municipalities in those provinces which have not yet adopted their legislation on the privileges and immunities of municipal councils. In adopting their legislation provinces should provide for the bare minimum of protection provided for in the national legislation. If the provisions of any provincial legislation conflict with that of the national legislation on the core protection of the freedom of speech in municipal

⁶⁰ See *Waters v Khayalami Metropolitan Council* supra 485.

⁶¹ See *Waters v Khayalami Metropolitan Council* supra 491.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ See the Local Government: Municipal Structures 117 of 1998.

⁶⁵ See s 28 of the Municipal Structures Act.

councils, the provincial legislation would be invalid to that extent.⁶⁶ This would be the case because the Municipal Structures Act deals with a matter that requires uniformity across the nation and provides for the framework for privileges of municipal councils.⁶⁷ The weakness in the Municipal Structures Act is its failure to prescribe a time frame within which provincial legislatures should adopt their legislation. Consequently, to date, 16 years after the national legislation was adopted, some provinces have not yet adopted their legislation. Thus far, the Northern Cape, North-West, Gauteng, Free State and Western Cape provinces have adopted their legislation on privileges and immunities of municipal councils.⁶⁸ The Eastern Cape, Limpopo, Mpumalanga and KwaZulu-Natal provinces have not yet adopted their legislation.⁶⁹

6 THE NATURE AND SCOPE OF THE PRIVILEGES AND IMMUNITIES OF MUNICIPAL COUNCILS

The nature and scope of the privileges and immunities under the Municipal Structures Act have been the subject of litigation. In the case of *Swartboo* the issues revolved around the resolutions adopted by the Council of Nala Local Municipality which affected the rights of the respondents. The resolutions concern the role of the respondents who were councillors in a previous local council that merged to form the Nala Local Municipality, in an alleged financial irregularity in the old municipality. The resolutions of the council provided that the respondents ought to recuse themselves from all council meetings pending an investigation by the South African Police Services and the Auditor-General into the alleged criminal conduct by the respondents. Subsequently, the respondents were suspended without pay for alleged breach of the councillor's code of conduct. The respondents approached the court for an order setting aside the resolutions of the council. The High Court set aside the resolutions and ordered all the councillors who voted in favour of the resolutions, the appellants, to be personally liable for costs of litigation for voting in favour of the wrong resolution against the respondent. The appellants approached the Constitutional Court for an order setting aside the order for costs against them, based on section 161 of the Constitution and section 28 of the Municipal Structures Act on the privileges and immunities of municipal councils. After examining the nature of the case brought by the respondent

⁶⁶ S 146(2)(b)(ii) of the Constitution provides that, when the national legislation conflicts with provincial legislation, the national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation by establishing a framework.

⁶⁷ See s 161 of the Constitution.

⁶⁸ See the Northern Cape Determination of Types of Municipalities and Regulation of Privileges and Immunities of Council Members Act 7 of 2000; North-West Municipal Structures Act 3 of 2000; Gauteng: Privileges and Immunities of Councillors Act 1 of 2002; Free State Privileges and Immunities of Councilors Act 2 of 2002 and Western Cape Privileges and Immunities of Councillors Act 7 of 2011.

⁶⁹ It appears from the list of provincial legislation that these provinces have not yet adopted their legislation on the privileges and immunities of municipal councils.

against the appellants, it was held that the order made against the appellants to pay the costs of civil proceedings “rendered the appellants liable to civil proceedings within the meaning of section 28(1)(b)”.⁷⁰

In the *Dikoko* case the issue arose from a defamatory statement made before the North-West Public Account Standing Committee (SCOPA) by the appellant, the mayor, against the respondent, the chief-executive officer of the Southern District Municipality. The appellant was summoned by SCOPA to account on the debt that accrued in respect of the use of a cellphone, which had exceeded the amount prescribed in terms of the council policy. The appellant blamed the respondent for deliberately changing procedures of the council, thereby causing his indebtedness to the council to accumulate. The statement was perceived by the respondent to be defamatory of him and he approached the court for claim of damages based on defamation. The appellant argued that section 161 of the Constitution, read with section 28 of the Municipal Structures Act and section 3 of the North West Municipal Structures Act,⁷¹ on privileges and immunities protected him from civil liability arising from the statement he made before the SCOPA. When deliberating on the importance of the privilege to municipal councils the court held that, when a councillor participated in the genuine and legitimate functions or business of the council, the privilege afforded under section 28 ought to extend to her or him.⁷² It was held that on the given facts Mr Dikoko’s cellphone incident and his indebtedness to the council did not constitute council business.⁷³ It was further held that section 117 of the Constitution and the provisions of North-West Privileges Act⁷⁴ confine the privileges to members and officers of the provincial legislature, and not to councillors who are attending the meeting of SCOPA.⁷⁵ The court found that the statement made by the appellant against the respondent was defamatory and it was not related to the business of the council and, therefore, it was not protected under section 28 of the Municipal Structures Act read in tandem with section 3 of the North-West Municipal Structures Act.⁷⁶

6.1 Scope of liability of councillors

In protecting freedom of speech in municipal councils, the Municipal Structures Act refers to speech made in the municipal council and its committees.⁷⁷ This raises the question of whether the protection is limited to any speech or the speech that is linked to the business of council or its committees only. Analyses of case law show that the privilege applies to

⁷⁰ See *Swartbooi v Brink supra* par 10.

⁷¹ See the North-West Municipal Structures Act 4 of 2000.

⁷² See *Dikoko v Mokhatla supra* par 39.

⁷³ See *Dikoko v Mokhatla supra* par 40.

⁷⁴ North-West Provincial Legislature’s Powers, Privileges and Immunities Act 5 of 1994.

⁷⁵ See *Dikoko v Mokhatla supra* par 44.

⁷⁶ The provisions of s 3 of the North-West Municipal Structures Act are similar to the provisions of s 28(1) of the Municipal Structures Act on the privileges and immunities in municipal councils.

⁷⁷ See s 28(1)(b) of the Municipal Structures Act.

conduct relating to a business of the council and not to personal matters between members of the council. This view is reinforced by the decision of the *Poovalingam* case which deals with parliamentary privileges, where the court confined the privilege in respect of Parliament to the business of Parliament and its committees, to the exclusion of personal matters between members of Parliament.⁷⁸ The scope of the privilege of municipal council was considered in the *Dikoko* case, where the court held that privileges of municipal councils do not apply to an issue relating to the debt of councillors to the municipality because that was not council business, but it was a personal matter.⁷⁹ In defining the scope of exemption of councillors it was held that councillors are exempted from liability to civil or criminal proceedings, arrest, imprisonment or damages. They are not protected from liability that falls into any other categories.⁸⁰ The judgment shows that members of the municipal councils may be liable on other categories that might be prescribed by provincial legislation or rules of the councils. This view is based on the provisions of the Municipal Structures Act which empowers the municipal councils to regulate further their privileges and immunities through their internal rules of the councils.⁸¹

The question whether the protection of freedom of speech in the municipal councils extends beyond the deliberation of the full council has not yet been decided in the case law. In the *Swartbooi* case it was held that the protection is limited to anything that councillors said, produced, or submitted in the council.⁸² The conduct must be linked to the business of the council, statements must be made to the council, matters must be produced before the council and submission must be made to the council.⁸³ It was further held that the words "said in", "produced before" and "submitted to" the council are wide enough to cover all conduct in the council that is integral to the deliberations at a council meeting and to the legitimate business of that meeting.⁸⁴ The court observed that, in exempting from liability in relation to the council and its committees, section 28 of the Municipal Structures Act may in this respect be of wider scope than section 161 of the Constitution, which does not refer to the committees of the council. However, the court avoided making a finding on whether the committees of the council are exempted from liability in terms of section 28 of the Municipal Structures Act, but found that: "section 28 protection covers the conduct of members of a municipal council that constitutes participation in deliberations of the full council in the course of the legitimate business of that council".⁸⁵ The issue also arose in the *Dikoko* case, where the court left the question open and

⁷⁸ See *Poovalingam v Rajbansi supra* 241.

⁷⁹ See *Dikoko v Mokhatla supra* par 40.

⁸⁰ See *Swartbooi v Brink supra* par 9.

⁸¹ In this regard s 28(1)(a) of the Municipal Structures Act allows the councils to regulate the provision of freedom of speech through their rules, and s 160(6) of the Constitution empowers the municipal councils to make by-laws which prescribe rules and orders for its internal arrangements; its business and proceedings; and the establishment, composition, procedures, powers and functions of its committees.

⁸² See *Swartbooi v Brink supra* par 10.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ See *Swartbooi v Brink supra* par 18.

held that the facts of the case did not require the court to make a finding of whether the privilege under section 28 of the Municipal Structures Act and section 3 of the North-West Municipal Structures Act should be interpreted to extend to the business of council outside of the full council or its sub-committee.⁸⁶ The question should be answered with reference to the rules regarding the interpretation of statutes. The literal approach to the interpretation of statutes requires that the clear and unambiguous text of the legislation must be heeded, and the court may only depart from literal meaning of the words if the words seem ambiguous and inconsistent.⁸⁷ In the Constitutional Court judgment of *Kubyana v Standard Bank of South Africa*,⁸⁸ it was held that it is well established that statutes must be interpreted with regard to their purpose and within their context; but where the ordinary meaning and language of the statute is clear, that should not be discarded.⁸⁹ The rules of interpretation of statutes support the conclusion that the privileges and immunities of municipal councils apply to the committees of the municipal council. Section 28 protects anything said or done in the council or its committee. Therefore, the grammatical meaning of the text is clear and unambiguous that council committees are included within the ambit of the privileges.

6 2 Nature of protected conduct

The conduct that is protected by section 161 of the Constitution includes the place, occasion or proceedings at which the conduct must occur if it is to be protected.⁹⁰ The question that arises regarding the nature of the privilege is the type of the privilege that is afforded to the municipal councils. It is pointed out above that Parliament and provincial legislatures enjoy absolute privilege.⁹¹ Furthermore, the comparative overview on privileges and immunities of municipal councils shows that internationally, municipal councils are afforded qualified privileges as opposed to absolute privileges. In the *Swartboo* case it was held that, while it is true that, historically, absolute privilege applied only to the legislature, since the Constitution is now the supreme law, the nature of privilege applicable to the municipal councils must be determined by reference to the Constitution and section 28 of the Municipal Structures Act.⁹² In the *Swartboo* case it was further held that section 28 of the Municipal Structures Act afforded the municipal councils protection, without referring to the nature of the privilege.⁹³ However, the wording of section 28 should be capable of affording municipal councils absolute privilege in that it affords protection from civil and criminal liability from whatever that was said or done in the municipal council for business of the municipal council. This view is reinforced by the status

⁸⁶ See *Dikoko v Mokhatla* *supra* par 41.

⁸⁷ Botha *Statutory Interpretation: An Introduction for Students* 4ed (2005) 96.

⁸⁸ 2014 (3) SA 56 (CC).

⁸⁹ See *Kubyana v Standard Bank of South Africa* *supra* par 18.

⁹⁰ See *Swartboo v Brink* *supra* par 9.

⁹¹ See *Swartboo v Brink* *supra* par 16.

⁹² See *Swartboo v Brink* *supra* par 13.

⁹³ See *Swartboo v Brink* *supra* par 16.

afforded to local government under the Constitution in terms of which municipalities have original powers which they source directly from the Constitution.⁹⁴ By-laws adopted by municipal councils are no longer delegated legislation, but original legislation.⁹⁵

The autonomous status of local government is further reinforced by referring to local government together with the provincial and national governments as spheres of government. The word "sphere" implies that local government is a fully-fledged autonomous partner in government in the Republic. Meyer echoes this view when he says that the word "sphere" introduces a new constitutional status of local government "as government in the governmental team of the State: national, provincial and local".⁹⁶ In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan*,⁹⁷ the Constitutional Court reflects further on the status of local government, where it was held that under the new constitutional dispensation local government is no longer exercising delegated powers; its council is a deliberative legislative assembly with powers sourced directly from the Constitution.⁹⁸ Thus, the application of absolute privilege to municipal councils is congruent with the purpose of the privilege to protect freedom of speech in the autonomously elected assemblies in local government.

6 3 Nature of the function

It should be noted that the legislation does not specify the nature of the functions of municipal councils that are protected by the privilege. In the national and provincial spheres of government the privileges protect only the legislatures and do not extend to the executive. This resonates well with the doctrine of separation of powers in the two spheres of government, where Parliament and provincial legislatures are vested with legislative powers and the President, ministers, premiers and members of the executive councils are vested with executive powers.⁹⁹ However, in local government the municipal council is vested with both the legislative and executive powers of a municipality.¹⁰⁰ This raises the question whether the protection under section 161 of the Constitution is limited to the legislative function or covers both the legislative and executive functions of a municipal council. De Visser and Baatjies point out that the notion of a councillor's function is not

⁹⁴ Schedules 4 and 5 of the Constitution allocate the powers to municipalities.

⁹⁵ 1999 (1) SA 374 (CC) par 26, the Constitutional Court held that under the 1996 Constitution local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.

⁹⁶ Meyer *Local Government Law* (1997) 6.

⁹⁷ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan supra* par 26.

⁹⁸ *Ibid.*

⁹⁹ S 43 of the Constitution provides that the legislative power of the national sphere of government is vested in parliament; the legislative power of the provincial sphere of government is vested in the provincial legislatures and the legislative power of the local sphere of government is vested in the municipal councils.

¹⁰⁰ See s 151(2) of the Constitution.

important for the question of whether or not he or she is protected by immunity, since any activity of the council is covered under the scope of section 161 of the Constitution.¹⁰¹

The issue of whether the privilege extends to the executive function of a municipal council arose in the *Swartbooi* case, where it was held that, considering the vesting of both legislative and executive powers in the municipal council, the scope of the privileges under section 161 of the Constitution is not limited to the legislative function of the council only.¹⁰² The question further arose in the *Dikoko* case on whether privileges under section 28 of the Municipal Structures Act should be extended to the executive functions of a municipal council, where the court mentioned in passing that the privilege afforded under section 28 should extend not only to the legislative functions of councils but also to their executive functions.¹⁰³ This view is reinforced by the judgment of the *Democratic Alliance v Masondo*, where the court held that: "The local government system is a hybrid one in that both executive and legislative authority are vested in the municipal council".¹⁰⁴ Accordingly, in a hybrid system of government functions, it may not be practical to exclude the privilege from executive function of a municipal council. The deliberations of municipal councils should be protected by freedom of speech irrespective of whether it is executive or legislative. Given the purpose of the privilege to protect freedom of speech in the elected assemblies, the protection of executive function in municipal councils is equally important.

7 UNIFORM PRIVILEGES AND IMMUNITY OF MUNICIPAL COUNCILS

Given the fact that South Africa has breached the history of a divided past, at least in respect of the law, where all people ought to enjoy equal protection in all parts of the Republic, any disparity with regard to privileges and immunities of municipal councils should be prevented. By entrusting provincial government with the power to provide for privileges and immunities to municipal councils, the Constitution might be allowing disparities on the privileges and immunities of municipal councils on such an important matter dealing with freedom of speech in municipal councils. When the current institutional systems of municipalities were created some of the factors considered were disparities in municipalities due to, among others, the uneven distribution of municipal capacity, particularly between urban and rural municipalities; sharp social divisions within local communities; the need to intervene and tackle entrenched patterns of inequity; and to enable diverse community groups to have adequate voice and representation within the municipal system without perpetuating existing

¹⁰¹ See De Visser and Baatjies "Councillors Can have the Say: Immunity in Council" 2006 8(4) *Local Government Bulletin* 13.

¹⁰² See *Swartbooi v Brink supra* par 15.

¹⁰³ See *Dikoko v Mokhatla supra* par 38.

¹⁰⁴ *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC) par 21.

division.¹⁰⁵ In reflecting on the history of separation in local government in the past, and with the aim to create uniform though different categories of municipalities to meet South African needs, the *White Paper on Local Government* provides that: "Transformation requires an understanding of the historical role of local government in creating and perpetuating local separation and inequity, and the impact of apartheid on municipal institutions."¹⁰⁶ The need to prevent disparities of the past was further emphasised in the *Fedsure Life Assurance* case, where it was held that:¹⁰⁷

"We are all in agreement that it is a legitimate aim and function of local government to eliminate the disparities and disadvantages that are a consequence of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas so that equal services will be provided to the residents."

The judgment further supports the conclusion that there should be no space for disparities in the protection of freedom of speech in municipal councils throughout the Republic. Adequate provision of privileges and immunities to municipal councils would encourage vigorous debate in councils and that would, in turn, contribute to the realisation of access to services by residents. Accordingly, the uniform provision of privileges by national legislation instead of fragmented provincial legislation might provide equality to freedom of speech in all municipal councils.

The provision of the Constitution and national legislation on the protection of freedom of speech in municipal councils may not be adequate. The *lacuna* on the law regarding privileges of councillors was made manifest in the *Dikoko* case, where a councillor appeared before the SCOPA of the North-West provincial legislature. He could not be protected by the national legislation and North-West Privileges Act because he was not a member or official of the North-West legislature, nor was he a witness in the North West SCOPA. On the other hand, he could not be protected by section 28 of the Municipal Structures Act because he was not attending a meeting of council or its committee. In highlighting this *lacuna* in the law of privileges in the elected assemblies the court held that:¹⁰⁸

"Accordingly, a situation is created where others who participate in the same deliberations as witnesses, promoting the same role and functions of the legislature and advancing the same business of the legislature are not protected. That leaves them exposed to criminal and civil proceedings on the basis that they are not members of the legislature."

Apart from the fact that some provinces have not yet adopted their legislation on privileges and immunities in municipal councils, a scenario may arise where one province in its provincial legislation protects councillors who are appearing before a legislature's committee whilst another province does not. Given the oversight role of provinces over municipalities, it follows

¹⁰⁵ The *White Paper on Local Government* (GN 423 in GG 187 39 of 1998-03-15) s D 1.2.

¹⁰⁶ See s A of the *White Paper on Local Government*.

¹⁰⁷ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan* *supra* par 80.

¹⁰⁸ See *Dikoko v Mokhatla* *supra* par 47.

that councillors could be summoned from time to time to appear before the committees of legislatures to account on municipal council business.¹⁰⁹ In this instance councillors attending the provincial legislature would not be protected from criminal and civil liability, whereas members of the legislature attending the meeting will be protected. The potential discrimination of elected members attending the same meeting for the same purpose of advancing democracy should be addressed by national legislation which, by rights, should apply uniformly in the Republic.

8 CONCLUSION

There is no doubt that the 1996 Constitution broke new ground regarding the privileges of municipal councils – an issue which had not received the attention of Parliament in the previous constitutional dispensation. Though municipal councils in South Africa enjoy absolute privileges as opposed to the qualified privileges afforded to municipal councils in the UK and Canada, the failure of other provincial governments to adopt legislation on privileges of municipal councils leaves other municipal councils without adequate protection. Therefore, the advance of the Constitution on absolute privilege has not yet been fully realised in municipal councils. The article reveals that there is not much South Africa can learn from other international democracies on the privileges of municipal councils because the defence on the grounds of qualified privilege applicable to municipal councils in the UK and Canada does not apply to South African municipal councils. Given the impreciseness of the law and the potential disparity on the provision of privileges to municipalities by fragmented provincial legislation, a call for revisiting the law on the privileges of municipal councils is unavoidable.

Accordingly, it is recommended that section 161 of the Constitution should be amended to bestow on Parliament the power to provide for uniform privileges of municipal councils across the Republic. The recommendation seeks to prevent disparity on the privileges of municipal councils and ensure that, at least in terms of the law, all councillors are afforded adequate and equal protection of freedom of speech across the Republic. This in turn would contribute to the timeous delivery of services because councillors will debate issues fearlessly and vigorously, thereby making the governing party accountable for governance matters.

¹⁰⁹ S 155(6) and (7) and of the Constitution requires provincial and national governments to monitor and support local government.