IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 9164/09

In the matter between:

STEPHEN DE VRIES AND OTHERS Applicants

and

EDEN DISTRICT MUNICIPALITY AND OTHERS Respondents

JUDGMENT

OWEN ROGERS AJ

[1] In this case there is an application and a counter-application. I shall refer to all the parties as they are in the main application. I use the surnames of individual litigants, not intending any disrespect thereby. The 15 applicants are members of a political coalition in the Eden District Municipality ("the EDM") led by the African National Congress ("the ANC coalition"), while the 3rd to 17th respondents (15 persons in all) constitute a coalition in the EDM led by the Democratic Alliance ("the DA coalition"). The EDM, which is a district municipality as defined in

the Local Government: Municipal Structures Act 117 of 1998 ("the Structures Act"), is the first respondent and its council has been cited as the second respondent.

[2] One of the local municipalities (as defined in the Structures Act) within the EDM's area is the Kannaland Municipality ("the KM"). The EDM and two members of the KM's council are the counter-applicants. They cite as respondents in the counter-application all the councillors of the EDM and all the remaining councillors of the KM, as well as the Independent Electoral Commission ("the IEC").

[3] Pursuant to s20 of the Structures Act, the number of councillors of the EDM's council has been determined as 30. The current proceedings have their source in the fact that this number is equally divided between the ANC coalition and the DA coalition. On 12 March 2009 the executive mayor of the council (one Laws) ceased to hold office upon resigning from the DA and joining the ANC. At a meeting of the council on 31 March 2009 two candidates for mayor were proposed. The votes were equally divided and no decision was reached. A further proposed meeting on 7 April 2009 had to be abandoned because the members of the ANC coalition did not enter the meeting, thus frustrating the quorum requirement. Thereafter, and on 11 April 2009, a councillor Andrew Baartman was expelled from his party (a minority member of the ANC coalition), leading to a vacancy in the EDM's council. Baartman had been a representative of the KM on the EDM's council (as contemplated in s23(2)(b) of the Structures Act), and his replacement thus needed to be filled by appointment by the KM in accordance with item 16 of Schedule 2 to the Structures Act.

[4] The vacancy appeared to signal a temporary shift in the balance of power, with the DA coalition now having 15 out of 29 incumbent councillors. On 24 April 2009 a council meeting was convened for 30 April 2009. There were many items of business on the agenda, one of which was the outstanding matter of the election of a new mayor. On 29 April 2009 the KM notified the EDM that pursuant to a meeting held on the previous day Anthony Ewarts (the 14th applicant) had been appointed in Baartman's stead as the KM's representative on the EDM's council. If this appointment was valid and effective, the 15/15 split on the EDM council was restored and a stalemate could again have been expected at the meeting on 30 April 2009. In the case of the election of the mayor, this would have resulted in the successful candidate being determined by lot (item 8(3) of Schedule 3 of the Structures Act).

[5] The speaker of the EDM's council (Johannes Bouwer, the 6th respondent) took the view that Ewarts only became a councillor entitled to take his seat on the EDM's council when the IEC confirmed to the EDM that Ewarts had been duly elected. The meeting of 30 April 2009 started at 09h00 and ran to 09h30. Ewarts arrived about 15 minutes early but the speaker held that Ewarts could not take up his seat in the absence of a declaration from the IEC. At the commencement of the meeting there were present the 15 members of the DA coalition and the 14 members of the ANC coalition. The ANC coalition's whip, Pieter van der Hoven (the 11th applicant), proposed that the meeting be adjourned until 11 May 2009, alternatively until such time as Ewarts' status could be ascertained from the IEC. The motion was defeated by 15 votes to 14. The 14 members of the ANC coalition then left. The meeting proceeded in their absence and among the items of business transacted was the election of Faried Stemmet (the 17th respondent) as executive mayor. Two other

items carried over from the earlier meeting and voted upon were motions by the ANC coalition for the removal of the deputy mayor and the speaker. Both motions were defeated (the ANC coalition members being absent).

[6] There is a factual dispute as to when the EDM received the IEC's declaration of Ewarts' appointment. The IEC's notification was faxed to the KM's municipal manager at 09h05 on 30 April 2009. The same letter was faxed to the EDM and it seems that the letter arrived while the council meeting was in progress, though the precise time of receipt is unclear. (Due to a malfunctioning of the EDM's fax machine, the date and time recorded on the incoming fax are plainly erroneous.) The EDM's municipal manager was in attendance at the meeting. Applying the well-known rules applicable to factual disputes in motion proceedings, I must accept the respondents' version that the municipal manager only saw the faxed letter in his in-tray after returning to his office immediately at the end of the meeting, and that neither he nor the speaker was aware during the course of the meeting that a fax from the IEC had arrived. The applicants' version is that the fax arrived sometime between 09h10 and 09h20. The respondents assert that the election of the mayor was disposed of well before 09h20 and again I cannot reject that assertion on the papers.

[7] After some interaction between the parties' attorneys, the main application was launched as one of urgency on 7 May 2009. The applicants ask the court to declare unlawful and invalid (a) the rejection of the motion to adjourn the meeting (b) the election of Stemmet as mayor (c) the rejection of the motions to remove the executive deputy mayor and the speaker.

[8] The EDM and its council oppose the main application (though the applicants complain that the real opponents are the members of the DA coalition). In the counter-application the EDM and two councillors of the KM ask the court (a) to declare unlawful the election of Ewarts by the KM's council on 28 April 2009 as the KM's representative on the EDM's council (b) to set aside the IEC's decision to declare Ewarts duly elected.

[9] The applicants in the main case do not oppose the counter-application. They state that the counter-application is from their perspective irrelevant since Ewarts was a member of the EDM's council *as at 30 April 2009*. They contend that even if Ewarts' appointment should now be declared to have been invalid, the court's order should not be made retrospective.

[10] The applicants put their case on three broad grounds. Firstly, the refusal of the majority at the meeting of 30 April 2009 to reject the requested adjournment was undemocratic and unlawful. Secondly, and even if the refusal was not unlawful, there were only 15 councillors present when the business of the meeting was transacted. Since Ewarts had been validly appointed by the time the meeting started, the required quorum for the meeting in terms of s30(1) of the Structures Act was 16 (being a majority of the 30 incumbent councillors). The 15 members in the meeting could thus not lawfully take decisions. Thirdly, and even if Ewarts had not been validly appointed, the quorum required by s30(1) was nevertheless 16, since (so it is contended) the majority referred to in s30(1) must be assessed with reference to the total number of councillors which the council is required to have (here, 30), not the number of incumbent councillors (here, 29).

[11] On the day before the hearing of this case on 12 June 2009 the applicants filed a late affidavit in which they sought leave to raise a fourth ground, namely that the 10th respondent, Jennifer Hartnick (a member of the DA coalition), had ceased to be a councillor on 28 April 2009 when, pursuant to item 16(4) of Schedule 1A to the Electoral Act 73 of 1998, the Electoral Commission published her name as a representative of the provincial legislature of the Western Cape. This was said to lead to her automatic disqualification as a councillor in terms of s158(1)(d) of the Constitution. If this contention were sound, the incumbent councillors numbered 28 on 30 April 2009 (assuming neither Ewarts nor Hartnick were councillors) and only 14 councillors were present when the impugned decisions were taken. On any reckoning there was thus not a quorum when the said decisions were taken.

[12] Mr Irish SC, who together with Ms K Pillay appeared for the respondents, opposed the late introduction of this ground and said that he was not in a position responsibly to address it. He made some preliminary observations concerning the issues which would call for decision, particularly the question as to the precise point in time at which a person could be said to become a "*member*" of a provincial legislature (as contemplated in s158(1)(d) of the Constitution) pursuant to a general election. I think it would indeed be unfair to decide the issue on such short notice. Since Mr De Waal, who appeared for the applicants, did not tender a postponement at his clients' cost to enable the respondents' counsel to prepare themselves on this new ground (and possibly file a further affidavit adducing any additional facts which might be relevant), I have decided to uphold the objection to the late raising of the new ground.

[13] If I am with the applicants on the third of their original contentions, the other two diminish in importance. I thus address this contention first. Section 30(1) states: *"A majority of the councillors must be present at a meeting of the council before a vote may be taken on any matter."* This is in accordance with s160(3)(a) of the Constitution which provides: *"A majority of the members of a Municipal Council must be present before a vote may be taken on any matter."* It is common cause between the parties that this quorum must exist when the relevant vote is taken – the existence of a quorum at the beginning of the meeting does not suffice.

[14] In *Oelofse and Others v Sutherland and Others* 2001 (4) SA 748 (T) Bertelsmann J was required to decide the meaning of the phrase *"a majority of the councillors"* in s29(1) of the Structures Act. Section 29(1) states that the speaker of a council decides when and where the council meets but that the speaker must convene a meeting if *"a majority of the councillors"* in writing requests him to do so. The learned judge held that the majority was to be determined with reference to incumbents rather than the total number of councillors allocated to the council. Unsurprisingly the respondents rely heavily on this decision.

[15] It is unnecessary for me to determine whether the meaning given to s29(1) in *Oelofse* was correct, since I am concerned with the interpretation of s30(1). Admittedly there is a presumption that the same phrase in a statute bears the same meaning wherever it appears, but the presumption is no more than an application of common sense and must yield to the context. The many provisions cited to me from the Constitution and the Structures Act lead me to the conclusion that the terms *"members"* and *"councillors"* sometimes refer to incumbents and sometimes to the office of councillor. As was said by Mr Irish, no clear pattern of usage emerges

from the legislation. The definition of *"councillor"* in s1 of the Structures Act does not take the matter much further.

[16] Section 157 of the Constitution leaves the detail of the composition of municipal councils to national legislation. The Structures Act is that legislation. Although the Constitution is supreme, one should not be astute to find irreconcilable conflicts between the Constitution and the Structures Act where their terms can be reconciled in a manner consistent with constitutional values.

[17] Section 20(1) of the Structures Act states that *"[t]he number of councillors of a municipal council"* must be determined in accordance with the formula contemplated by that section. In the case of local and district councils, the number of councillors of a council may not be fewer than three or more than 90. The number of councillors determined for the EDM's council (a district council) is, as noted, 30 councillors. So if one were asked what is the *"number of councillors"* of the EDM's council as contemplated in s20(1), the answer would be 30. And if one was then asked what figure constituted a *"majority"* of that number, the answer would be 16.

[18] Section 30(1) states that the quorum for taking a vote is a majority *"of the councillors"*. The section does not refer to a majority *"of the number of the councillors"* (the phrase used in s20(1)), but the actual wording could quite sensibly be read as a less cumbersome rendering of the same concept. Mr De Waal drew my attention to the fact that in kindred provisions in the interim Constitution and in the Constitution of the Republic of South Africa Acts 110 of 1985 and 32 of 1961 the expression *"total number of members"* was used, and in my view the change of

formulation is more plausibly to be taken as a simplification of language than a change of meaning.

[19] However, it could fairly be contended that the phrase *"the number of councillors"* is itself capable of more than one meaning. It could refer (as it does in s20(1)) to the total number of councillors determined for that council or it could refer to the total number of actual incumbents. There are, though, two very strong pointers in favour of a conclusion that in s30(1) the *"majority of the councillors"* is a majority of the number of councillors allocated pursuant to s20(1), and this is the view of Steytler & De Visser *Local Government Law of South Africa* para 3.3.3.

[20] The first pointer is s35(1) of the Structures Act, which reads (my emphasis):

> *"If a municipal council is dissolved in terms of section 34(4) or does not have enough members to form a quorum for a meeting, the MEC for local government in the province must appoint one or more administrators to ensure the continued functioning of the municipality until a new municipal council is elected or until the council has sufficient members for a quorum."*

[21] The words I have emphasised would only be needed and would only serve a purpose if the requirement for a quorum were based on the number of allocated councillors pursuant to s20(1). If the quorum requirement in s30(1) referred to incumbents, a council would never not have enough members to form a quorum – if, for example, the allocated number of councillors were 30 but there were only 10 incumbents, six councillors would (on that view) be a quorum.

[22] The second pointer is of a similar kind. Item 10 of Schedule 2 of the Structures Act deals with the case where a party list contains fewer candidates than seats to which the party is entitled. The first three sub-items set out how this problem is in the first instance to be addressed, concluding with item 10(3)(b), which reads thus (again my emphasis):

> *"Where seats are unfilled in terms of paragraph (a), and the vacancies render a quorum for the municipal council impossible, the party concerned forfeits the unfilled seats, and the seats must be filled within fourteen days in accordance with sub-items (4) to (8)."*

[23] The quorum contemplated in item 10(3)(b) can only mean the quorum referred to in s30(1) of the Act. And a vacancy could only render a quorum impossible if vacancies were counted in determining the *"majority of the councillors"* referred to in s30(1).

[24] In *Oelofse* the court was referred to s35(1) but not to item 10(3)(b). Bertelsmann J quoted a passage from *Loughlin v Guinness* (1904) 23 NZLR 748, where a distinction was drawn between two possible objects in fixing a quorum, the one *"enabling"* the other *"restrictive"*. The relevant part of the quoted passage reads:

> *"What is the object of fixing a quorum? Is it enabling, by allowing a statutory body which could otherwise act only by an actual majority to carry out its powers and duties by a majority of a lesser number than its whole members; or is it restrictive, by constituting a fixed minimum of its members as necessary to constitute a valid meeting? If enabling, then it would, in the absence of a fixed quorum, require at least a majority of the whole members to give validity to any action; if restrictive, then, until a quorum was fixed, the business of such statutory body could be done by any two or more members attending a properly convened meeting."*

[25] After quoting this passage, Bertelsmann J continued:

"It follows that a municipal council must have at least one half plus one of the number of potential council seats, allocated to the particular council by the MEC for local government, to be filled by incumbents before the council can function. Had the intention been to determine a specific number or minimum number, the Act would have provided the number or formula according to which the number had to be calculated. It is clear that the quorum required by section 35 is an enabling quorum. Loughlin's case is therefore directly in point."

[26] I have some difficulty in understanding the import of the passage quoted from the New Zealand case. The premise of the New Zealand case seems to have been that but for an *"enabling"* quorum a statutory body could act by an actual majority of all of its members and that an *"enabling quorum"* allows the body to act on a majority of a fewer number than its whole membership. The premise is unsound, in South African law at any rate, where the rule is that if functions are entrusted to a statutory body, the said body can only act if all its members are (a) present and (b) unanimous (see, eg, *Schierhout v Union Government* 1919 AD 30 at 44; *R v Price* 1955 (1) SA 219 (A) at 223E-G and 224C-E; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander* 1983 (4) SA 689 (C) at 707F-711B). A quorum provision typically ameliorates the impracticality of the first requirement (the presence of all members) but does not touch the second at all (unanimity). A quorum may, for example, be a simple majority (or less) of all members but a meeting so constituted might, depending on the legislation, be required to act by a simple majority or by a special majority or even conceivably unanimously. It seems to me, with great respect, that the passage from the New Zealand case confuses these two discrete aspects.

[27] In the present case, the quorum provision (presence at the meeting) is s30(1): in order for a vote to be taken there must be present a majority of

the councillors. The voting aspect is covered by ss 30(2), (3) and (4): certain matters require a special majority (s30(2)), while other matters require only a simple majority of those present (s30(3)).

[28] For the rest, the New Zealand case does not bear on the essential problem which arises in a case such as the present, namely whether the formulation of the quorum requirement is a reference to the full number of allocated councillors or the number of incumbent councillors.

[29] I also have difficulty in following Bertelsmann J's reasoning on s35(1). He seems to have accepted that in s35(1) the *"quorum"* is a majority of the full number of allocated councillors (here, such majority would be 16) but to have held that s35(1) means only that in order to *"function"* a council must have at least such a majority as incumbents. I cannot, with respect, subscribe to that view. The relevant phrase in s35(1) is *"quorum for a meeting"*. A council functions through meetings, and the quorum for meetings is as stated in s30(1). No other provision in the Structures Act sets out requirements for forming *"a quorum for a meeting"* of the council. Accordingly, if (on the facts of the present case) 16 was a *"quorum for a meeting"* as contemplated in s35(1), it was also the quorum required by s30(1). It would be correct to say that if the full number of allocated councillors were 30 and there were fewer than 16 incumbents, the council would not have enough members to form a quorum and would thus be liable to have administrators appointed to ensure the continued functioning of the municipality. But the reason this is so is that a council which (in this example) has fewer than 16 members cannot satisfy the quorum requirement of s30(1) and thus cannot take any decisions.

[30] Mr Irish, in his endeavour to support Bertelsmann J's explanation of s35(1), submitted that despite the use of the phrase "*quorum for a meeting*" in s35(1), I should disregard the words "*for a meeting*" and instead understand the phrase to say "*quorum for a council*", which is substantially the phraseology of item 10(3)(b) of Schedule 2. He argued that the legislature had two distinct quorums in mind, namely the quorum for meetings in s30(1), and the quorum for a municipality to "*function*" in s35(1). I pressed him as to what he meant by "*function*" (if functioning connoted something other than the taking of decisions by the council at meetings), but did not receive a satisfactory answer. He disavowed (correctly) any suggestion that what s35(1) meant was that a municipality ceased to exist in law if its incumbent councillors dropped in number below a majority of the full number of councillors allocated to the municipality.

[31] There are other difficulties in the way of his argument. In the first place, I see no warrant for disregarding the words "*for a meeting*" in s35(1). Such a course would violate elementary principles of statutory construction. Secondly, the argument disregards the ordinary meaning of the word "*quorum*" itself. A quorum is the number of persons who need to be present in order for a meeting to be validly constituted (see Cordes *et al Shackleton on the Law and Practice of Meetings* 10th Ed para 6-02; Lewin *The Law, Procedure and Conduct of Meetings in South Africa* 5th Ed p29). It does not refer to the number of incumbents which a body must have on its governing council in order to "*exist*" or to "*function*" in some vague sense outside of meetings. Thirdly, on Mr Irish's argument the statute does not tell us what the s35(1) quorum is (if it is something different from the s30(1) quorum). Mr Irish was driven to contend that the quorum in s35(1) is, as a matter of necessary implication, a majority of the number

of councillors allocated to the municipality. He argued that this was in fact the residual common law rule as to quorums. But since s30 is headed "*Quorum and decisions*" and since s30(1) *does* define the quorum ("*a majority of the councillors*"), I cannot conceive why, if s35(1) meant a differently calculated quorum, the legislature would have left such an important matter to implication. And support for the existence of any common law rule on the subject is meagre indeed[1].

[32] Bertelsmann J did not say that s35(1) could be disregarded as nugatory. He thought it could be explained in a way which did not conflict with his conclusion on the meaning of s29(1), but I do not think that s35(1) can be so explained. The same is true of item 10(3)(b) of Schedule 2. There is a powerful presumption against a construction which renders a provision in a statute nugatory or results in superfluity (see *LAWSA* Vol 25 Part 1 First Re-issue paras 330 and 341 and cases there cited).

[33] Mr De Waal referred me to the judgment of Streicher J (as he then was) in *Onshelf Trading Nine (Pty) Ltd v De Klerk NO and Others* 1997 (3) SA 102 (W). The *Onshelf* case was also mentioned in the *Oelofse* judgment, but Bertelsmann J considered that the wording of the legislation dealt with in *Onshelf* was too different to support the argument that s29(1) of the Structures Act referred to a majority of the full number of allocated councillors. Plainly there are differences of wording, but unlike Bertelsmann J I do find Streicher J's reasoning of assistance.

[1] Mr Irish referred me to *LAWSA* 2nd Ed Volume 17(2) para 191. I have examined the authorities there cited, and South African judicial authority on the issue is almost wholly lacking. Voet 3.4.7 (which is cited in the work by Bamford mentioned in footnote 3 of the *LAWSA* reference) refers to a rule requiring the presence of two-thirds of all voters.

[34] The *Onshelf* case raised the question whether the council of the Independent Broadcasting Authority had been quorate when a certain decision was taken. The council's composition and functioning was regulated by the Independent Broadcasting Authority Act 153 of 1993. In terms of s4 the council comprised one or two chairpersons and six other councillors. Provision was made in s9(2) for the filling of vacancies. Section 10(4) stated: *"The quorum for any meeting of the Council shall be a majority of the total number of councillors"*. Section 12 provided that (subject to s11) a decision taken by the council would not be invalid merely by reason of any irregularity in the appointment of a councillor or a vacancy in the council or the fact that any person not entitled to sit as a councillor sat as such at the time such decision was taken, *"provided such decision was taken by a majority of the councillors present at the time and entitled to sit, and the said councillors at the time constituted a quorum"*.

[35] The arguments advanced in *Onshelf* mirrored those in the present case. The applicant contended that the required quorum was five (a majority in relation to eight) while the fourth respondent argued that the required quorum was four (since there were, at the time of the relevant decision, only seven incumbents). Streicher J upheld the applicant's argument. The following passage from his judgment has particular relevance to the present case (at 109D-110B):

> *"Section 4(1) read with s4(3) provides that the membership of the council shall consist of at least a chairperson and six additional councillors. It follows that in the event of the appointment of a co-chairperson in terms of s4(3) the council shall consist of eight councillors. Having provided that the council 'shall' consist of seven or eight councillors, depending on whether or not a co-chairperson is appointed, it is highly unlikely that the Legislature could, in s10(4), have had anything but that number in mind when referring to 'the total number of councillors'.*

...

If the respondent's construction of s 10(4) were correct, there would have been no need for the Legislature to have provided, as it did in s12, that a vacancy in the council would not affect the validity of the decision of the council provided such decision was taken by a majority of the councillors present at the time and entitled so to sit, and the said councillors at the time constituted a quorum. On the fourth respondent's construction of those sections, all of that would already have been provided for in s10(4) and (5). Contrary to the fourth respondent's argument, the provisions in s12 relating to a vacancy were necessary if the applicant's construction of s 10 were correct and if the Legislature did not want a vacancy to affect a decision of the council which was otherwise in order.

Section 4(2)(a) and (c) places great emphasis on the attributes of the councillors when viewed collectively. When viewed collectively they, inter alia, have to represent a broad cross-section of the population of the Republic. In these circumstances it is likely that the Legislature had a minimum number in mind as a quorum and not a number that would be determined by the number of vacancies in the council and that could have gone down to as few as two councillors.

[36] It seems to me that this line of reasoning supports the approach I have taken, but I would add that in the present matter the indicators to be found in s35(1) and item 10(3)(b) of Schedule 2 to the Structures Act are even stronger than the provisions of s12 of the Independent Broadcasting Authority Act. Although each legislative provision must turn on its own particular wording, I may also mention an old English case, *Newhaven Local Board v Newhaven School Board* (1885) 30 Ch D 350, where a board's governing statute laid down a quorum of "*at least one third of the full number of members*". The statute provided that the board was to consist of nine members, though it could function despite vacancies. The Court of Appeal held that the quorum was one-third of the prescribed number who were to constitute the board (nine), not one-third of those actually in office (see particularly at 361 *per* Cotton LJ).

[37] I said earlier that s160(3)(a) of the Constitution must enjoy primacy. If that section has a different meaning to the one indicated by s30(1) of the Structures Act, the Constitution would obviously prevail and one would then have to resign oneself to the conclusion that s35(1) and item 10(3)(b) are nugatory. But I do not think one is driven to that conclusion. The language of s160(3)(a) is ambiguous and capable of either meaning. When the section refers to *"a majority of the members"* it could quite plausibly have in mind the number of members to be elected in terms of s157, which in turn takes one to the number of councillors determined for each council in accordance with the Structures Act. I accept, as Bertelsmann J did in *Oelofse*, that the *"members"* in s160(4)(a) and s160(8) are incumbent members since in the nature of things only incumbent members can be given notice of and participate in meetings. The same inherent limitation is absent where one is dealing with a quorum formulated with reference to a *"majority of the members"*.

[38] Democracy and universal suffrage are foundational values of our country (s1 of the Constitution). The objects of a municipality include the provision of democratic and accountable government to local communities (s152(1)(a); see also s41(1)(c) and s195). It seems to me that these values are better served by a quorum requirement that has regard to the majority of the full number of allocated councillors than one which is limited to incumbent councillors[2]. On the respondents' argument, important decisions of the council to which (say) 30 seats had been allocated could be taken at a meeting attended by only 30% of the number of councillors intended for that council and with the support of only 16% of the said

[2] Cf *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) paras 21-23 on the duty of courts to read legislation, where possible, in ways which give effect to the Constitution's fundamental values.

intended number[3]. And if one accepts the respondents' construction of s30(1) while rejecting the attempt to explain s35(1), one would have an ever-reducing quorum where two out of three incumbent councillors could constitute a valid meeting. In this way the democratic voice of the community might, even if only temporarily, be stifled through a quirk of circumstance.

[39] It was argued on behalf of the respondents that the interpretation urged by the applicants would allow the functioning of councils to be frustrated by deliberate absenteeism (as, they would say, happened here). I do not agree. Such a possibility exists on any interpretation of s30(1). In a municipality where the seats are evenly split between two factions, one faction could (on the respondents' argument) frustrate a quorum by absenting itself from the meeting, provided the split of incumbents was equal between the two factions (whether the incumbents represented the full number of allocated seats or some lesser number). Where factions are evenly matched, my interpretation would give increased scope for frustrating a quorum where the number of incumbents was (due to a temporary vacancy) an odd number, but one should not assume that the framers of the Constitution or the Structures Act proceeded on the supposition that vacancies would remain unfulfilled for lengthy periods of time, and if in the meanwhile one faction were precluded from stealing a march on its opponents by pushing through contentious business during a temporary vacancy in opposition ranks, I am far from persuaded that this would be a bad thing.

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[3] On the respondents' argument (and the *Oelofse* judgment) a council with 30 allocated councillors could only "*function*" in terms of s35(1) if it had 16 incumbent members. A valid meeting, though, could take place in terms of s30(1) if a majority out of the 16 councillors were present, ie nine (30% of 30), and at such a meeting the number of votes needed to adopt a motion would be five (about 16% of 30).

[40] It is of interest to note that in s51(6) of the Municipal Ordinance 20 of 1974 (Cape) the quorum of a council meeting was "*one-half of the total number of councillors assigned to the municipality*". This does at least show that the meaning I have given to s30(1) of the Structures Act has, in past times, been thought by lawmakers to be a suitable and practicable quorum provision for municipalities.

[41] Mr Irish argued that it is improbable that the phrase "*majority of the councillors*" was intended to have different meanings in s29(1) and s30(1). In the first place, he submitted, it would not make sense to allow a certain number of councillors to insist on the convening of a meeting but then to impose a greater number as a quorum for the meeting itself. This is a *non sequitur*. Secondly, he relied on the well-known presumption that the same word or phrase in a statute has the same meaning wherever it appears. This argument is superficially more attractive than the first, though its force is somewhat diminished by the acknowledgement on both sides that there is no clear pattern in the legislature's use of the words "*members*" and "*councillors*". More importantly, though, the argument presupposes that the interpretation in *Oelofse* of s29(1) is correct. I do not need to decide whether it is, but I am satisfied that s30(1) has the meaning I have proposed in this judgment. If the same phrase in the two sections must have the same meaning, it is s29(1) which would yield to the interpretation of s30(1). I say this because there is specific textual support for the interpretation I have given to s30(1) and there are no specific contrary textual considerations in respect of s29(1).

[42] For these reasons it is my conclusion that when the members of the ANC coalition left the council meeting on 30 April 2009 there ceased to be a quorum as required by s30(1). That would ordinarily mean that all the

business transacted thereafter was invalid, but the applicants only seek to impeach certain decisions. The "*non-contentious*" decisions of the meeting they are prepared to leave in place. I think it is open to them to adopt that stance. Review is a remedy aimed at a particular decision or decisions. The non-contentious decisions in the present case might be substantively invalid for the same reasons as the contentious decisions, but if nobody asks the court to set them aside those decisions stand (see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)). For the avoidance of doubt, I mention that the order I intend to make setting aside the rejection of the ANC coalition's motions to remove the deputy mayor and the speaker obviously will not have the effect of converting them into successful motions. The proposed motions will simply stand as agenda items on which no valid decision has yet been taken. (This is of importance because the EDM's rules preclude defeated motions from being renewed until the lapse of a prescribed period.)

[43] In the light of my conclusion, the other contentions raised by the applicants become academic. The setting aside of the refusal of the postponement is merely another way of attempting to impeach what followed at the meeting. As relief in its own right, it has no effect – the meeting has come and gone. And if the quorum in s30(1) must be assessed with reference to the full number of councillors allocated to the EDM, it matters not whether Ewarts was a councillor at the time of the meeting.

[44] As regards the counter-application, the applicants do not oppose it, and the KM and IEC have filed notices to abide. It is clear from the counter-applicants' uncontested allegations that the election of Ewarts on 28 April 2009 was not "*managed*" by the "*chief electoral officer*" (as defined in

item 1 of Schedule 2 of the Structures Act), as was required by item 16(1) of Schedule 2. Ewarts' election was thus unlawful and invalid. The IEC purported to confirm the unlawful election in its letter of 30 April 2009. The IEC's letter professes to be a notification in terms of item 23 of Schedule 2, but the parties are agreed that item 23 is inapplicable. There seems to be no express provision requiring the IEC to declare an appointment made in terms of item 16(2), though Mr Irish argued that the declaration of the result by the IEC is necessarily implicit in its function of "*managing*" the election. Be that as it may, the counter-applicants are entitled to have the purported declaration by the IEC set aside.

[45] The relief claimed in the notice of counter-application is a declaration of unlawfulness in respect of Ewarts' election and a setting aside of the IEC's declaration. A point was made by Mr De Waal in passing that a setting aside of Ewarts' election is not claimed as such. However, the clear purpose of the counter-application was to nullify the election (with a view to neutralising one of the applicants' three grounds of attack on the proceedings of 30 April 2009) and no parties would be prejudiced if I were expressly to set aside Ewarts' election. Indeed, I see that the applicants themselves in their notice of motion claim only declarations of invalidity. In their case, too, I propose to make orders setting aside the unlawful decisions.

[46] Mr De Waal submitted that the order on the counter-application would be one in terms of s172(1) of the Constitution and that I could and should limit the retrospective effect of my declaration that Ewarts' election was unlawful. The purpose of this submission was to keep alive the applicants' argument that if the quorum requirement was to be assessed with reference to incumbents rather than allocated seats, Ewarts was

already an incumbent by the time of the meeting and that the quorum was for this reason 16, not 15. Given my conclusion on the interpretation of s30(1), it is not necessary to find that Ewarts was an incumbent in order for the applicants to succeed.

[47] In any event, and assuming that my declaration would be one under s172(1) of the Constitution, there is no good reason to limit the retrospectivity of the declaration. This is not a case where Ewarts on 30 April 2009 was mistakenly but in good faith assumed by all to be a member and permitted to participate in the meeting. The speaker considered that Ewarts was *not* a member of the council and excluded him from participation. The speaker's reason for doing so may or may not have been erroneous (I do not intend to go into that question), but since in substantive law Ewarts' election was in truth invalid I cannot see why justice requires Ewarts' invalid membership nevertheless to be recognised as *de facto* valid for a temporary period of time simply so that the respondents can then be said to have acted unlawfully by excluding him from the meeting of 30 April 2009. It was also not shown that Ewarts' participation in meetings subsequent to 30 April 2009 was decisive on any decision of the council and that the retrospective setting aside of his appointment would thus cause inconvenience.

[48] As regards costs, Mr De Waal was at first inclined to argue that the costs of the main application should be borne not by the EDM and its council but by the individual respondents (the members of the DA coalition). He agreed, though, that since the notice of motion only sought costs against those who opposed and since the individual respondents did not (at least as a matter of form) oppose, I could not order costs against them. Such a course would only be permissible, I think, if it were clearly established

that the individual respondents were truly the parties opposing the application and that they were merely using the EDM and its council as a front. On the information before me, I cannot find that all the individual respondents as a body caused the EDM to oppose and that all of them were in substance the opponents. I also do not think that the costs order should be against the council but only against the EDM.

[49] Concerning the costs of the counter-application, costs were sought only in the event of opposition. Since there was no opposition there can be no order for costs in the counter-application.

[50] I thus make the following orders (references hereunder being to the parties as cited in the main application and counter-application respectively):

Main application

(a) The following decisions taken at the second respondent's meeting held on 30 April 2009 are declared unlawful and invalid and are set aside, namely:

(i) the election of the seventeenth respondent as the executive mayor of the first respondent;
(ii) the rejection of the motion to remove the executive deputy mayor in terms of item DC28/03/09;
(iii) the rejection of the motion to remove the speaker in terms of item DC29/03/09.

(b) The first respondent is ordered to pay the applicants' costs of suit.

Counter-application

(a) The election on 28 April 2009 of the fourteenth respondent by the municipal council of the thirty-second respondent as its representative on the municipal council of the first applicant is declared unlawful and set aside.

(b) The decision of the thirty-first respondent, taken on or about 30 April 2009, to declare the fourteenth respondent as the duly elected representative of the thirty-second respondent on the municipal council of the first applicant is set aside.

(c) No order as to costs is made in respect of the counter-application.

OWEN ROGERS AJ