THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between: Case No: 3517/2014

THE DEMOCRATIC ALLIANCE	**FIRST APPLICANT**
CONGRESS OF THE PEOPLE	**SECOND APPLICANT**
JULIA LE ROUX	**THIRD APPLICANT**
PIERRE NEL	**FOURTH APPLICANT**
DIANE DE JAGER	**FIFTH APPLICANT**
RYK RAYMOND WILDSCHUT	**SIXTH APPLICANT**
DANIE JOHAN FOURIE	**SEVENTH APPPLICANT**
EWA FORTUIN	**EIGHTH APPLICANT**
CHRISTIAAN DANIEL MACPHERSON	**NINTH APPLICANT**
FELICITY MAGXAKA	**TENTH APPLICANT**
VERNATTI VAN DER WESTHUIZEN	**ELEVENTH APPLICANT**
BERNADUS VAN WYK	**TWELFTH APPLICANT**
JOHN MAXIM	**THIRTEENTH APPLICANT**

and

OUDTSHOORN MUNICIPALITY	**FIRST RESPONDENT**
VLANCIO MARDEOK DONSON N.O.	**SECOND RESPONDENT**
NONDUMISA GUNGULUZA N.O.	**THIRD RESPONDENT**
CHARLES WAGENAAR N.O.	**FOURTH RESPONDENT**
THE ACTING MUNICIPAL MANAGER,	**FIFTH RESPONDENT**

OUDTSHOORN MUNICIPALITY	
THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	**SIXTH RESPONDENT**
THE INDEPENDENT ELECTORAL COMMISSION	**EIGHTH RESPONDENT**
THE MINISTER FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	**NINTH RESPONDENT**

And in the matter between Case NO: 8813/2014

THE DEMOCRATIC ALLIANCE	**FIRST APPLICANT**
JURIE HARMSE	**SECOND APPLICANT**

and

OUDTSHOORN MUNICIPALITY	**FIRST RESPONDENT**
VLANCIO MARDEOK DONSON N.O.	**SECOND RESPONDENT**
NONDUMISA GUNGULUZA N.O.	**THIRD RESPONDENT**
CHARLES WAGENAAR N.O.	**FOURTH RESPONDENT**
THE ACTING MUNICIPAL MANAGER, OUDTSHOORN LOCAL MUNICIPALITY	**FIFTH RESPPONDENT**
THE SPEAKER OF THE COUNCIL OF THE OUDTSHOORN MUNICIPALITY	**SIXTH RESPONDENT**
THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	**SEVENTH RESPONDENT**
THE INDEPENDENT ELECTORAL COMMISSION	**EIGHTH RESPONDENT**
THE MINISTER FOR CO-OPERATIVE	**NINTH RESPONDENT**

GOVERNANCE AND TRADITIONAL AFFAIRS

Coram: ROGERS J

Heard: **4 & 5 AUGUST 2014**

Delivered: **27 AUGUST 2014**

JUDGMENT

ROGERS J:

Introduction

[1] These two applications, which were by agreement heard together, concern the removal of councillors of the Oudtshoorn Municipality for alleged absence from meetings on three successive occasions. The political context is a delicate balance of power between coalitions led by the African National Congress ('the ANC') and the Democratic Alliance ('the DA') respectively. The removed councillors are from the DA coalition. For the sake of brevity I shall on occasion refer to these coalitions simply as the ANC and the DA.

[2] In the first case the applicants are the DA, its coalition partner the Congress of the People ('COPE') and 11 'removed' DA coalition councillors. In the second case the applicants are the DA and a 12th 'removed' DA councillor. The first to sixth respondents in each case are the Oudtshoorn Municipality (the first respondent), three of its councillors, all being members of the ANC coalition, in their capacities as the members of the disciplinary committee to be mentioned hereunder (the second

to fourth respondents), the Acting Municipal Manager (the fifth respondent) and the council's speaker, also an ANC coalition councillor (the sixth respondent). For convenience I shall refer to them collectively as 'the respondents'. The seventh respondent in each case is the Minister for Local Government, Environmental Affairs and Development Planning, Western Cape ('the MEC'). The eighth respondent in each case is the Independent Electoral Commission ('the IEC') and the ninth respondent the national Minister for Co-operative Governance and Traditional Affairs ('the Minister').

[3] It is convenient at the outset to make reference to certain provisions of the Local Government: Municipal Structures Act 117 of 1998 ('the Structures Act'), the Local Government: Municipal Systems Act 32 of 1998 ('the Systems Act') and certain instruments adopted by the Municipality.

[4] Section 27 of the Structures Act provides that a councillor vacates office during a term of office if he or she *inter alia* contravenes a provision of the Code of Conduct for Councillors set out in Schedule 1 of the Systems Act and is removed from office in terms of the Code.

[5] Section 54 of the Systems Act states that the Code of Conduct for Councillors contained in Schedule 1 applies to every member of a municipal council. One of the issues in this case is the inter-relationship between items 4 and 14 of the Code.

[6] Item 3 of the Code deals with attendance at meetings. It provides that a councillor must attend each meeting of the council and of a committee of which he or she is a member except when 'leave of absence has been granted in terms of an applicable law or as determined by the rules and orders of the council' or when the councillor is required in terms of the Code to withdraw from the meeting.

[7] Item 4 of the Code, which is headed 'Sanctions for non-attendance at meetings', reads thus:

'(1) A municipal council may impose a fine as determined by the standing rules and orders of the municipal council on a councillor for:

(a) not attending a meeting which that councillor is required to attend in terms of item 3; or

(b) failing to remain in attendance at such meeting.

(2) A councillor who is absent from three or more consecutive meetings of a municipal council, or from three or more consecutive meetings of a committee, which that councillor is required to attend in terms of item 3, must be removed from office as a councillor.

(3) Proceedings for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure which each municipal council must adopt for the purposes of this item. The uniform standing procedure must comply with the rules of natural justice.'

[8] Items 13(1) and (3) provide as follows:

'(1) If the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of this Code has been breached, the chairperson must –

(a) authorise an investigation of the facts and circumstances of the alleged breach;

(b) give the councillor a reasonable opportunity to reply in writing regarding the alleged breach; and

(c) report the matter to a meeting of the municipal council after paragraphs (a) and (b) have been complied with.

(2) ….

(3) The chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.

(4) …'

[9] Item 14 of the Code, which is headed 'Breaches of Code', should be quoted in full given its importance in this matter:

'(1) A municipal council may –

(a) investigate and make a finding on any alleged breach of a provision of this Code; or

(b) establish a special committee –

(i) to investigate and make a finding on any alleged breach of this Code; and

(ii) to make appropriate recommendations to the council.

(2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may –

(a) issue a formal warning to the councillor;

(b) reprimand the councillor;

(c) request the MEC for local government in the province to suspend the councillor for a period;

(d) fine the councillor; and

(e) request the MEC to remove the councillor from office.

(3)(a) Any councillor who has been warned, reprimanded or fined in terms of paragraph (a), (b) or (d) of subitem (2) may within 14 days of having been notified of the decision of the council appeal to the MEC for local government in writing setting out the reasons on which the appeal is based.

(b) A copy of the appeal must be provided to the council.

(c) The council may within 14 days of receipt of the appeal referred to in paragraph (b) make any representation pertaining to the appeal to the MEC for local government in writing.

(d) The MEC for local government may, after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.

(4) The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation as to the appropriate sanction in terms of subitem (2) if a municipal council does not conduct an investigation contemplated in subitem (1) and the MEC for local government considers it necessary.

(5) The Commissions Act, 1947 (Act No. 8 of 1947), or, where appropriate, applicable provincial legislation, may be applied to an investigation in terms of subitem (4).

(6) If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may

(a) suspend the councillor for a period and on conditions determined by the MEC; or

(b) remove the councillor from office.

(7) Any investigation in terms of this item must be in accordance with the rules of natural justice.'

[10] The Oudtshoorn Municipality has adopted 'Rules of Order Regulating the Conduct of Meetings of the Council' ('the Rules'). Rule 9 deals with attendance at meetings. Rule 9(1) states that every member attending a meeting of the council must sign his or her name in the register for such purpose. Rule 9(2) requires a member to attend each meeting except when leave of absence has been granted in terms of Rule 10 or the member is required to withdraw in terms of law. Rule 10 states:

'A member who wishes to absent himself or herself from meetings must before so absenting himself or herself, obtain leave of absence from the Council, provided that the speaker, on good cause, may grant leave of absence to a member who has been prevented by special circumstances from obtaining leave of absence from the Council.'

[11] Rule 11 sets out sanctions for non-attendance. In terms of Rules 11(1) to (4) a member who is absent without leave may, after investigation by a committee elected by the council, be fined 10% of his or her gross monthly remuneration. In terms of Rule 11(3) the elected committee must conduct its business in accordance with 'the uniform standing procedures determined by the Council'. In respect of multiple non-attendance, Rules 11(5) and (6) provide as follows (the references therein to 'sections' are to the Rules):

'(5) A member who is absent from three or more consecutive meetings which he or she is required to attend in terms of section 9, must be removed from office.

(6) Proceedings for the removal of a member in terms of subsection (5) or for the imposition of a fine in terms of subsection (4), must be conducted in accordance with the uniform standing procedure determined by the Council in terms of subsection (3).'

[12] Section 30 of the Structures Act deals with quorums and decisions of a council. Section 30(1) states that a 'majority of the councillors' must be present at a meeting of the council before a vote may be taken on any matter. In terms of s 30(2) read with s 160(3) of the Constitution, certain matters can be adopted only with a supporting vote of the majority of the council's members. Among these special matters is the approval of budgets. The expression 'majority of the councillors' in these provisions means a majority of the full number of councillors, not merely a majority of those present (see *De Vries v Eden District Municipality & Others* [2009]

ZAWCHC 94). The full number of councillors in the case of the Oudtshoorn Municipality is 25, from which it follows that a quorum requires 13 councillors and that the special matters specified in s 160(2) of the Constitution require a supporting vote of at least 13 councillors.

[13] The quorum issue is also dealt with in Rule 13. Rule 13(3) states that whenever there is no quorum the start of the meeting must be delayed for no longer than 30 minutes. If at the end of that period there is no quorum, 'the speaker must adjourn the meeting to another time, date and venue at his or her discretion and record the names of those members present'. In terms of Rule 13(5) the same applies when an initially quorate meeting becomes inquorate. Rule 13(7) provides that the speaker must report the names of the absentee members to the committee established in terms of rule 11 'for the purposes of an investigation of a breach of these rules'.

[14] Section 59 of the Systems Act requires a municipal council to develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances. In terms of s 79 of the Structures Act a municipal council may establish one or more committees and may delegate duties and powers to such a committee. The Oudtshoorn Municipality's council has adopted a system of delegation ('the Delegations'). Part 4 of the Delegations deals with delegations 'to political structures of council'.[1] One of these is a Disciplinary Committee ('DC'), described as having been 'established in terms of the Code'. Para 30 of the Delegations creates the DC with the following terms of reference:

'(A) To investigate and make a finding on any alleged breach of the Code and to make appropriate recommendations to Council.

(B) To investigate and make a finding of non-attendance at meetings and to impose a fine as determined by the Standing Rules and Orders of Council.'

[15] These terms of reference are followed by a statement that the council delegates to the DC the following powers, functions and duties:

[1] Only certain pages of the Delegations were annexed to the papers. During argument, and by agreement, the whole of Part 4 of the Delegations (pp 66-86 of that document) was handed up.

‘(1) To co-opt advisory members who are not members of Council provided that such members may not vote on any matter.

(2) To instruct any councillor(s) and request official(s) or other affected parties to appear before the Committee to give evidence.

(3) To appoint a legal adviser to assist the Committee including the obtaining of internal or external legal opinions.

(4) To make written representations to the MEC for local government pertaining to an appeal to the MEC by a councillor who has been warned, reprimanded or fined in terms of item 14(2)(a), (b) or (d) of the Code of Conduct for Councillors.

(5) In appropriate circumstances to impose a fine in respect of contraventions of item 4 of the Code.’

[16] Item 4(3) of the Code, which I have quoted, refers to the conduct of proceedings ‘in accordance with a uniform standing procedure which each municipal council must adopt for the purposes of this item’. The Oudtshoorn Municipality has not specifically adopted a ‘uniform standing procedure’ for purposes of item 4(3) though the respondents contend that the provisions of the Rules and Delegations to which I have referred constitute such a procedure.

The facts

[17] The Oudtshoorn Municipality’s council, as mentioned, comprises 25 members. Pursuant to the local government elections conducted in May 2011, the balance of power was 13/12 in favour of the ANC coalition. One of the ANC councillors was Mr Jurie Harmse (‘Harmse’). The ANC coalition, by virtue of its majority, was able to appoint the speaker and form the Municipality’s executive committee.

[18] Harmse says that during May 2013 he and four other ANC councillors became disillusioned with the ANC executive. At a council meeting held on 31 May 2013 it became apparent that they would support a vote of no-confidence. The speaker, Mr Johannes Stoffels (‘Stoffels’), adjourned the meeting and the ANC coalition members (apart from the five defectors) left. The remaining councillors (the members of the DA coalition together with the five defectors) purported to continue

with the meeting and voted to remove the municipal's executive. After the meeting Harmse and the other four defectors resigned from the ANC. (The respondents describe this as the 'DA *putsch*'.)

[19] The speaker, who (together with the remaining ANC coalition councillors) said that the floor-crossing by the five defectors had been unlawful, instituted legal proceedings under Case 8616/2013 for the setting aside of the resolutions passed on 31 May 2013. On 10 September 2013 Le Grange J upheld this challenge and ordered the DA and its coalition councillors to pay the costs.

[20] Two of the five ANC defectors were party-list representatives (or proportional representation councillors) so that, upon their resignation, they were replaced by other ANC-list members. In respect of Harmse and the remaining two defectors, their resignations from the ANC required by-elections to be held. These took place during August 2013. Harmse, now a member of the DA, defended his ward but the other two ANC defectors, now also members of the DA, were defeated and new ANC councillors were elected. The upshot was that the balance of power shifted 13/12 in favour of the DA coalition.

[21] By virtue of the order granted by Le Grange J on 10 September 2013, the ANC-appointed speaker and executive remained in place but, following the defections and results of the by-elections in August 2013, they were vulnerable to a vote of no-confidence by the DA coalition. This is the course which the DA coalition took. In terms of s 29(1) of the Structures Act the speaker of a council is obliged to convene a meeting upon written request by a majority of the councillors.

[22] As a result of what the DA coalition alleged to be prevarication, their initial attempts to have the matter brought to a vote did not succeed. This led, on 23 August 2013, to the launch by the DA coalition of an urgent application under Case 13789/13, proceedings in which the MEC intervened. The initial complaints were resolved by an order I made by agreement on 28 August 2013. Further complaints arising from new developments were again resolved by an agreed order granted by Henney J.

[23] Then, at a council meeting on 20 September 2013, the speaker, Stoffels, purported to suspend the voting rights of two of the DA councillors, Messrs Pierre Nel ('Nel') and Bernadus Van Wyk ('Van Wyk'), something he had done before but withdrawn. The ANC coalition says it regarded the suspension as justified because there was *prima facie* evidence that Nel and Van Wyk had defrauded the Municipality and that Van Wyk had caused the Municipality, in terms of a settlement agreement, to abandon a costs order it had against Nel. (The costs order had been made in an unsuccessful application by Nel in Case 18083/2010 to set aside the reinstatement of a Rev Petersen as the Municipal Manager.[2]) The Municipality had obtained a report from two forensic advocates regarding the conduct of Nel, Van Wyk and their attorney. Be that as it may, the effect of the purported suspension was that the DA coalition was no longer recognised by the ANC-appointed speaker as commanding a majority. At the same meeting the motions of no-confidence were (on the basis of the exclusion of the votes of Nel and Van Wyk) rejected.

[24] As a result, the relief claimed by the MEC in Case 13789/13 was amended to incorporate *inter alia* a prayer for the setting aside of the suspension of Nel and Van Wyk's voting rights. Schippers J handed down judgment on 12 November 2013.[3] Although he dismissed claims for certain other relief (on the basis that the MEC lacked *locus standi* to claim that particular relief), he granted an order declaring the suspension of Nel and Van Wyk's voting rights invalid. This was on the basis that neither the speaker nor the council had the right to suspend a councillor or to suspend his voting rights; in terms of Item 14 of the Code, only the MEC could do so. He dismissed a counter-application by the ANC coalition. He ordered Stoffels *de bonis propriis* to pay the costs relating to the proceedings which gave rise to the orders on 28 August 2013 and 13 September 2013 because of what he found to be the *mala fide* 'stratagems' Stoffels had employed to prevent the motions of no-confidence being put to the vote. He made no order in respect of the proceedings giving rise to his judgment of 12 November 2013 because the MEC had only succeeded in part.

---

[2] *Nel v Oudtshoorn Municipality* Case 18083/2010 WCHC (judgment delivered 7 June 2011); appeal dismissed in [2013] ZASCA 37.
[3] [2013] ZAWCHC 174; [2014] 1 All SA 221 (WCC).

[25] An application by Stoffels and the Municipality for leave to appeal was refused by Schippers J. A petition to the Supreme Court of Appeal ('SCA') was dismissed by that court on 10 February 2014 and an application for leave to appeal to the Constitutional Court was rejected on 16 May 2014. In the meanwhile, however, the application for leave to appeal and the petition to the SCA were said by the ANC coalition to suspend Schippers J's order, so that the suspension of Nel and Van Wyk's voting rights supposedly remained in force. The effect was that, at least until 10 February 2014, the incumbent ANC coalition did not recognise the DA coalition as having a majority on the council.

[26] This was the position in which Stoffels persisted at the council meeting which he chaired as speaker on 31 January 2014. The 13 members of the DA coalition, who signed the attendance register and were present at the beginning of the meeting, announced that they could not in good conscience remain at the meeting in the light of Stoffels' ruling. They departed after registering their protest. This left the council inquorate. The minutes reflect that the meeting started at 10h00, that the DA coalition councillors left at 10h05 and that the speaker closed the meeting after waiting half an hour. (This is the first of three successive meetings at which 11 of the 13 DA councillors were alleged to have been absent in violation of the Code.)

[27] Although in terms of Rule 13(3) the inquorate meeting of 31 January 2014 could (and perhaps should), at the close thereof, have been adjourned to a new time and date, the speaker did not follow this course, either on this occasion or in respect of the further meetings mentioned below. Instead, Stoffels later convened a fresh special council meeting for 4 February 2014. The 13 DA coalition councillors, who signed the attendance register and were present at the beginning of the meeting, departed after Stoffels ruled that Nel and Wyk could not vote. Again the meeting was left inquorate. The minutes reflect that the meeting started at 14h05, that the DA coalition councillors left at 14h10 and that the speaker closed the meeting after waiting half an hour. The DA coalition's chief whip, Mr J Maxim, delivered a notice to the speaker saying that the coalition was not willing, following the result of the elections in August 2013, to attend meetings simply for the purpose of lending a quorum to the 'minority'. (This is the second of three successive meetings at which

11 of the 13 DA councillors were alleged to have been absent in violation of the Code.)

[28] Stoffels convened a further special council meeting for 14h00 on 6 February 2014. Harmse applied in writing to be excused and his excuse was accepted.

[29] It appears from an affidavit to which Roberts deposed as part of the respondents' answering papers in the first case that, although he is a DA councillor, he has crossed swords with the DA coalition caucus and with senior members of the DA leadership over various matters, including the Nel settlement. He says he abided by the caucus' decisions to walk out of the meetings of 31 January 2014 and 4 February 2014, decisions taken, according to him, to prevent a quorum. He alleges, further, that during the morning of 6 February 2014 the DA coalition caucus held a telephonic conference with the DA's attorney, Ms Jonker, and the DA's Federal Council Chairperson, Mr Selfe, regarding the meeting scheduled for that afternoon. He says that Jonker and Selfe advised them to attend the meeting or risk removal as councillors in terms of item 4 of the Code. Roberts regarded this advice as correct.

[30] In reply Jonker confirms having advised the caucus members to attend the meeting but denies that she expressed the view that non-attendance would violate item 4. She says her advice was expressed out of caution, because in view of the acrimonious history she thought it likely that the incumbent executive would 'use any opening' to exclude DA councillors.

[31] At any rate, there were influential voices within the caucus against the advice to attend and, after further telephonic communication with the MEC himself (who was also the DA's Provincial Chairperson), the caucus decided not to attend the meeting. Roberts, who considered Selfe's view to be the official one, told the caucus that he would be attending the meeting, upon which he was suspended as a member of the caucus.

[32] The DA coalition's whip notified the speaker that the DA coalition councillors would not attend in the light of the ruling that Nel and Van Wyk would not be

permitted to vote. (Stoffels says that this notification was only received after the meeting.) However, with Roberts' attendance the council was quorate. According to the minutes the meeting lasted about half an hour.

[33] This was the third of three successive meetings at which the 11 DA coalition councillors (ie those apart from Harmse and Roberts) were alleged to have been absent in violation of the Code. The council, being quorate, proceeded to resolve *inter alia* that a Disciplinary Committee ('DC') be appointed comprising Mr V Donson ('Donson' - the Deputy Mayor and a member of ICOSA, which belonged to the ANC coalition), Mr C Wagenaar and Ms N Gunguluza (both ANC councillors). The minutes do not state that this was an *ad hoc* committee constituted specifically to consider the successive absences of the 11 councillors. The minutes record no terms of reference and are more consistent with a decision to constitute (or reconstitute) the council's standing DC established in terms of para 30 of the Delegations, though in that case the alleged successive absences of the 11 councillors would have been very much in mind as the new DC's first order of business. I observe, in this regard, that the question of leave of absence was the second item on the agenda. Thereafter five unrelated agenda items were discussed. The seventh agenda item appointed the council's Disciplinary Committee without reference to the second agenda item.

[34] The respondents state, however, that the DC was in fact appointed as an *ad hoc* committee, its terms of reference being the alleged non-attendances. Because Harmse had been excused, he had not missed three successive meetings and his earlier absences were not the subject of the DC's initial investigations arising from this meeting.

[35] At the meeting the council also approved the Municipality's 2013/2014 budget. Roberts initially proposed, without support, that the recommendation to adopt the budget not be accepted. The minutes record that in the event the budget was adopted unanimously. Without Roberts' support, the budget could not lawfully have been adopted, having regard to s 160(3) of the Constitution read with s 30(2) of the Structures Act.

[36] The council also adopted a report of the speaker on an investigation he had conducted in terms of item 13 of the Code. I was told from the bar that this involved the alleged misconduct of the same 11 councillors in relation to the Nel settlement though the report is not part of the record.

[37] After the meeting the speaker notified the 11 councillors of their alleged successive absences and invited them to give reasons why they should not be removed as councillors in terms of Item 4(2) of the Code read with Rule 11(5). They were required to respond by the following day. They were informed that the DC would, after considering the matter, make recommendations to the council.

[38] The speaker also wrote to the MEC stating that the council, having considered his investigation report (ie regarding the Nel settlement), had resolved at its meeting on 6 February 2014 to request the MEC to remove the 11 councillors in terms of item 14(2)(e) of the Code. He requested, in order to bring about stability, that the MEC make his decision by 13 February 2014 failing which he would be compelled to launch High Court proceedings. (The 11 councillors were thus subject to two separate proceedings for their removal, one relating to successive absences, the other to the Nel settlement.)

[39] I pause here to mention that, although the applicants in the first case contended that their words and conduct at the meetings of 31 January and 4 February 2014 and their whip's notification in respect of the meeting of 6 February 2014 amounted to requests for leave of absence from those meetings which the speaker unjustifiably refused, I do not think the contention is sustainable.

[40] On 7 February 2014 attorneys acting for the DA Alliance, Minde Schapiro and Smith ('MSS'), wrote to the speaker denying that the 11 councillors had absented themselves from the meetings of 31 January and 4 February 2014 and in any event challenging the procedure which the speaker was following. Legal proceedings were threatened.

[41] As noted, on 10 February 2014 the Supreme Court of Appeal dismissed the ANC coalition's petition for leave to appeal against the order of Schippers J. This

meant that the suspension of Nel and Van Wyk's voting rights fell away and the DA coalition would again be able to exercise a slender majority. The DA coalition immediately took steps to requisition a meeting for the consideration of motions of no-confidence. In order to requisition the meeting, the DA coalition required the cooperation of Roberts, whom they had suspended from their caucus. After approaches from high places, Roberts was eventually prevailed upon to co-sign the requisition.

[42] Before the DA coalition's motions of no-confidence could be considered, the DC on 17 February 2014 found that the 11 councillors had violated item 4(2) of the Code. Before the DC was a report dated 11 February 2014 (with corroborating attachments) by the speaker, Stoffels, stating that the 11 councillors had indeed breached the Code and should therefore be removed, and a lengthy response from MSS dated 17 February 2014. The DC's minutes record a resolution that the 11 councillors 'be removed' as councillors of the Municipality. The minutes concluded with a statement by Donson that the matter would be 'reported' to the council.

[43] The meeting at which the DA coalition's motions were to be considered was initially scheduled for 18 February 2014. However, the speaker postponed the meeting first to 19 February 2014 and then to 24 February 2014. The agenda for 24 February 2014 included the motions of no-confidence but made no reference to the decision of the DC. In the meanwhile the speaker on 20 February 2014 met with the Municipality's attorneys. Late on Friday 21 February 2014 Adv F Human ('Human'), the Director: Corporate Services who was temporarily acting as the Municipal Manager, sent a letter to the 11 councillors notifying them of the outcome of the DC's deliberations. Presumably acting on legal advice, Human said that as a result of the peremptory wording of item 4(2) the 11 councillors had to be removed:

'The removal from office is a direct consequence subsequent to the finding that you failed to attend three consecutive Council Meetings and neither the disciplinary committee, the Council, nor the MEC has any power to impose any sanction.

You are therefore herewith advised that, following the finding of the disciplinary committee, that you absented yourself from three consecutive Council Meetings, that by due operation of law following the provisions of item 4(2) of Schedule 1, the Code of Conduct for Councillors, your membership of this Counsel has terminated *ex lege*.'

[44] The position set out in this letter was thus that a councillor's office terminated by operation of law once a factual finding had been made that the councillor had absented himself or herself from three consecutive meetings and that the factual finding had permissibly been made by the DC. This was the position adopted in argument by the respondents. The applicants, by contrast, argued that the removal of a councillor for non-attendance required a decision by the MEC in terms of item 14 of the Code, and this position was supported by the MEC.

[45] Of the 11 removed councillors, five were ward councillors whose positions, if they were validly removed, had to be filled pursuant to by-elections. The other six were party-list councillors whose positions could be filled by appointment from the DA list.

[46] To return to the chronology, the DA coalition's motions were due to be considered at a meeting on Monday 24 February 2014. But, with the purported removal of the 11 councillors, the motions would inevitably be defeated. It is common cause that the 13 members of the DA coalition arrived for the meeting. It is also common cause that the 11 removed councillors were prevented by security from entering the council chamber. The applicants allege that Harmse and Roberts were also prevented from entering. The respondents dispute this, saying that Harmse and Roberts chose to leave in solidarity with their 11 colleagues. (This is the first of three successive meetings at which Harmse was alleged to have been absent in violation of the Code.)

[47] The applicants' counsel submitted that the respondents' version, that Harmse and Roberts were not barred from entering the council chamber, is based on hearsay. In particular, he submitted that the person on whose supposed direct evidence the respondents relied, Ms Jantjies, employed by the Municipality in its Traffic and Law Enforcement Department, did not on careful analysis claim to have been present. I disagree. She states in her affidavit that she has personal knowledge of the matters contained therein. On a fair reading of her substantive allegations, she was present in the foyer when the security contingent prevented the 11 councillors from entering. In accordance with the *Plascon-Evans* rule, I must thus

decide the case on the basis that Harmse and Roberts were not prevented from entering the chamber.

[48] Although there was no quorum for the meeting of 24 February 2014, the ANC coalition says that the motions of no-confidence lapsed on this date because the mover and seconder of the motions were not present.

[49] The speaker, Stoffels, gave notice of a further council meeting to be held the following day, Tuesday 25 February 2014. The agenda no longer included the motions of no-confidence but did include the removal of the 11 councillors. It is common cause that notice of the meeting was not given to the 11 'removed' councillors, given the speaker's view that they no longer held office. There is a factual dispute as to whether due notice of the meeting was given to Harmse and Roberts. Be that as it may, they learnt of the meeting (whether through due notice or otherwise), and on the morning of 25 February 2014 Harmse and Roberts together with their 11 removed colleagues presented themselves at the municipal offices. The 11 councillors were again barred from entering the council chamber. Harmse and Roberts were allowed inside. They signed the attendance register and then departed in protest. Roberts does not say why he cooperated with the DA coalition caucus at this meeting. Be that as it may, the meeting was again left inquorate. (This is the second of three successive meetings at which Harmse was alleged to have been absent in violation of the Code.)

[50] The speaker proceeded to give notice of another meeting for Friday 28 February 2014. Again, the agenda included the removal of the 11 councillors and did not include motions of no-confidence. The 11 removed councillors were not on the notification distribution list. All 13 members of the DA coalition arrived at the meeting. The 11 removed councillors were again barred. Harmse and Roberts entered and signed the attendance register. On this occasion, however, only Harmse departed after registering his protest. Roberts remained. The result was that there was a quorum for the meeting, which comprised 12 members of the ANC coalition plus Roberts. The minutes in regard to the removal of the 11 councillors record the following under the heading 'Resolved': 'The councillors present

unanimously indicated that they noted the report on the removal of the municipal councillors for non-attendance of three (3) consecutive council meetings.'

[51] At the same meeting the council approved a draft IDP/Budget/Performance Management Process Plan for the 2014/2015 financial year. The Municipality says that this was something that had to be done by the end of February 2014 and that for this reason the meeting was urgent.

[52] The meeting of 28 February 2014 was the third of three successive meetings at which Harmse was alleged to have been absent in violation of the Code.

[53] On 3 March 2014 DA, COPE and the 11 removed councillors launched the first of the applications that served before me (Case 3517/14). The notice of motion stated that the application would be moved on 6 March 2014. Various orders were sought, all aimed effectively at setting aside the purported removal of the 11 councillors. In the alternative, and if it were found that item 4(2) had the effect of automatically disqualifying the 11 councillors, an order was sought declaring that item to be unconstitutional. It was in respect of this alternative relief that the Minister was joined.

[54] On 6 March 2014 the application was by agreement postponed for hearing on the semi-urgent roll on 21 May 2014 with a timetable. In the meanwhile, the respondents and IEC were not to take any action to prevent the 11 councillors from performing their functions as such, were to ensure that the 11 councillors were paid their salaries and were not to take any action to fill the purported vacancies through appointment or by-elections as the case might be.

[55] Subject to Roberts' allegiance, the interim agreement reflected in this order restored the 13/12 balance of power in favour of the DA coalition. But in the absence of further action, the speaker and executive committee remained ANC-coalition appointees.

[56] On 18 March 2014 the respondents filed their answering papers in the first case. Attached to the main answering affidavit was the application by Stoffels and

the Municipality to the Constitutional Court for leave to appeal against Schippers J's judgment. The respondents stated that there was no finality regarding the suspension of Nel and Van Wyk's voting right pending the decision of the Constitutional Court. (In the event, the Constitutional Court dismissed the application on 16 May 2014.)

[57] Also filed as part of the respondents' answering papers was Roberts' affidavit which I have previously mentioned. It appears from this affidavit that on 13 March 2014 Mr Bredell, who apart from being the MEC was the DA's Provincial Chairperson, notified Roberts that he was being suspended pending an investigation into his alleged gross misconduct in acting in a manner which impacted negatively on the DA, bringing its name into disrepute, disregarding caucus decisions, breaching confidentiality and the like.

[58] On 20 March 2014 the Acting Municipal Manager, Mr RP Lottering ('Lottering'), wrote to the speaker (Stoffels) attaching the documents relating to the meetings of 24, 25 and 28 February 2014. He noted that Harmse 'did not attend three consecutive meetings'. Lottering said that Stoffels' 'further instruction to the Disciplinary Committee is awaited'.

[59] On 27 March 2014 Donson on behalf of the DC addressed a letter to Harmse, informing him that his successive absences could lead to his removal and requesting him to respond 'in recognition of the severity of the charges'. When Harmse did not give a response, Donson sent a further request on 8 April 2014. Harmse still did not respond.

[60] The DC met on 11 April 2014 and concluded that Harmse had violated item 4(2) of the Code. The minutes record, under the heading 'Recommended': 'That Alderman Harmse be removed as a councillor of the Oudtshoorn Municipality.'

[61] In a letter dated 17 April 2014, Human (now as Director Corporate Services) reported the DC's decision to the Acting Municipal Manager. The opening paragraph of the letter stated that its purpose was to inform the Acting Municipal Manager 'of the finding and recommendation' of the DC. He concluded his letter by stating the

legal position in the same way as in his letter of 21 February 2014, namely that Harmse's removal had taken place by operation of law.

[62] On the same day Lottering notified Harmse of his removal, expressing the legal position as contained in Human's letter.

[63] The DA and Harmse say that the latter's removal was contrived so as to deprive the DA coalition of their narrow majority pursuant to the order granted in the first case on 6 March 2014. In the absence of any similar temporary arrangement in respect of Harmse, there would be a 12/12 split between the ANC coalition and the DA coalition, meaning that the *status quo* would remain.

[64] On 20 May 2014, by which date the parties in the first application were agreed that the first case was not ripe for hearing on the following day, the DA and Harmse launched the second application that served before me (Case 8813/14). The institution of the application was preceded by correspondence in which the applicants' attorneys unsuccessfully sought agreement that Harmse's proposed application be joined with that of the 11 councillors and that a similar temporary agreement be reached regarding his position. The notice of motion in the second application stated that the application would be moved on 3 June 2014. On that date the applicants would seek interim interdictory relief together with an order that the two cases be consolidated for hearing.

[65] On 26 May 2014 Traverso DJP made an order by agreement in the first application, postponing it for hearing on 4 August 2014 with a revised timetable. The order repeated the *status quo* arrangement which was to prevail pending the finalisation of the proceedings.

[66] In the second application, the respondents maintained that it should not be consolidated with the first application and they refused to agree to a similar *status quo* arrangement. This was the state of play when the matter came before me on 3 June 2014 in the urgent court. It became apparent that due to other urgent matters the case would not be able to be heard that week. Eventually, and on 5 June 2014, an order was granted by agreement that the second case would be consolidated

with the first and that Harmse would benefit from the same *status quo* arrangement. There was added a further stipulation that the DA coalition would not take any action to prevent the other members of the council from performing their functions and would not bring any motions of no-confidence or initiate disciplinary proceedings against any employee. The order in the first case was similarly amplified.

[67] The applicants were represented at the hearing by Mr SP Rosenberg SC leading Mr D Borgström. The MEC, represented by Mr I Jamie SC leading Ms M Adhikari, made submissions regarding the interpretation of the Code broadly in line with the applicants' contentions (though the MEC abided the court's decision on the relief claimed). The respondents (ie the Municipality and the cited members of the ANC coalition) were represented in the two cases by Mr WJ Vermeulen SC and Mr H van der Linde SC respectively, in each case leading Mr Snijders. The Minister, represented by Mr AT Ncongwane SC leading Mr K Ramaimela, opposed only the alternative constitutional relief. The IEC has given notice to abide.

[68] At the commencement of argument on 4 August 2014 Mr Ncongwane for the Minister said that, although heads of argument had been filed on behalf of the Minister, the latter had not filed an affidavit and wished to do so. Since a postponement of the case would have caused considerable wasted costs and since the constitutional issue might not be reached, I ordered that the alternative relief for an order that item 4(2) of the Code be declared unconstitutional stand over for later determination. This approach was supported by counsel for the applicants and the MEC and by Mr Vermeulen for the respondents in Case 3517/14 though curiously enough not by Mr van der Linde who appeared for the same respondents in Case 8813/14. The Minister's counsel initially indicated that they would remain present on a watching brief but excused themselves after the tea adjournment on the first day.

[69] Immediately after the consolidation order, an attorney, Mr Antonio McKenzie, arose and said that he had instructions on behalf of the third and fourth respondents, namely Gunguluza and Wagenaar in their capacities as co-members of the DC. He requested a postponement of the case so that he could consult more fully. In response to a question from the court, he indicated that they might wish to file affidavits distancing themselves from the respondents' opposition to the

applications. Counsel for the other parties (including Messrs Vermeulen and Van der Linde, who had hitherto understood themselves to be acting for, among others, the two councillors now represented by Mr McKenzie) opposed a postponement. Since there was no substantive application for a postponement, I refused to delay the commencement of argument.

The relief claimed

[70] After conclusion of argument the applicants' counsel submitted draft orders setting out the relief claimed (somewhat simplified in comparison to the notices of motion). In the first case the applicants seek orders (a) reviewing and setting aside the decision of the DC on 17 February 2014 that the 11 councillors be removed; (b) declaring the 11 councillors to have remained at all times members of the council; (c) setting aside all resolutions taken at the council meeting of 28 February 2014; (d) interdicting the Acting Municipal Manager or any other person employed by the Municipality or the IEC from taking any action to hold by-elections as a result of the purported removal of those of the 11 councillors who are ward councillors; (e) interdicting the IEC from taking action to fill the seats of those of the 11 councillors who are party-list councillors; (f) directing the respondents to pay the costs of the application.

[71] In the second case the applicants seek orders (a) reviewing and setting aside the decision of the DC on 11 April 2014 that Harmse had absented himself from the council meetings held on 24, 25 and 28 February 2014 in contravention of item 4(2) of the Code; (b) declaring that Harmse has at all times remained a member of the council; (c) declaring that the meetings of the council on 24, 25 and 28 February 2014 (i) were invalidly called and convened in the absence of a notice to all the members of the council and (ii) were a nullity, and reviewing and setting aside all decisions and resolutions taken at those meetings; (d) interdicting the Acting Municipal Manager or any other person employed by the Municipality or the IEC from taking any further action to hold by-elections in respect of Harmse's seat; (e) directing the respondents to pay the costs of the application.

[72] The first question is whether item 14 applies to the removal of a councillor for successive absences. If so, the power of removal vests in the MEC. Since the matter has not been referred to the MEC for decision, the affected councillors have not as yet been lawfully removed and remain in their seats.

[73] The second set of questions concerns the lawfulness of the establishment and proceedings of the DC.

[74] The third set of questions have to do with whether, on the facts and on the proper interpretation of the Code, the decisions of the DC (that the 11 DA coalition councillors and later Harmse were guilty of three successive absences) were correct.

[75] If the first question were answered in favour of the applicants, any purported decision by the DC (or the council) to remove the affected councillors would on that account alone be invalid. It might nevertheless be necessary to determine one or more of the further attacks on the decisions of the DC, since a valid decision by the DC might be a prerequisite for a removal recommendation to the MEC.

The first question: Who has the removal power?

[76] The applicants submitted that item 14 of the Code applies to all breaches of the Code and that a councillor can thus only be suspended or removed by the MEC. The respondents submitted that item 4 was self-contained and that the power of removal thus vested in the council or an authorised committee.

[77] As to the general approach to the interpretation of statutes, I was referred to and have endeavoured to follow the approach summarised by the Supreme Court of Appeal in *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17-26.

[78] There was certain common ground. All counsel were agreed that removal did not occur *ex lege* once, objectively speaking, a councillor had been absent from three consecutive meetings. The body or person with statutory authority must first

determine whether there have been three or more successive absences. The debate was whether the statutory authority lay with the council (or a committee thereof) or with the MEC. I agree with counsel's view on this point. Apart from other indications in the language of the Code, it would not make sense to talk of absence from 'three or more consecutive meetings' if removal were an automatic consequence after three successive absences.

[79] The fact that removal only occurs on due decision of a breach distinguishes removal for a breach of item 4(2) of the Code from the type of automatic or deemed termination considered in cases such as *Frans v Groot Brakrivierse Munisipaliteit & Andere* 1998 (2) SA 770 (C) at 778I-779D and *Phenithi v Minister of Education & Others* 2008 (1) SA 422 (SCA) paras 9-10. In the latter class of case there is no administrative action at which a review can be directed. In the case of removal for a breach of item 4(2), by contrast, there is a decision which can be the subject of a review (cf *Armbruster & Another v Minister of Finance & Others* 2007 (6) SA 550 (CC) paras 38-46, where the court rejected an argument that forfeiture of foreign currency in terms of regulation 3(5) of the Exchange Control Regulations occurred *ex lege* on seizure). Although the respondents' counsel referred to *Phenithi* and similar cases and appeared to place reliance thereon in written argument, it became apparent during oral presentation that their contention was a narrower one, namely that removal followed *ex lege* once the duly authorised functionary had determined that the councillor had been guilty of three or more successive absences. The respondents' counsel did not say that the removal thereupon became retrospectively effective from the date of the third absence. They accepted that there had to be a decision by a duly authorised functionary on the breach and the decision had to be communicated to the delinquent councillor.

[80] Counsel for the applicants and the respondents were also agreed that, once the statutorily authorised decision-maker concluded that the councillor had been absent from three or more successive meetings, removal was a mandatory sanction, though doubt was expressed by the applicants' counsel regarding the wisdom of a mandatory sanction. Mr Jamie for the MEC contended that mandatory removal was a blunt instrument which the lawmaker could not have intended, though the route by which he ameliorated what he regarded as the harshness of the mandatory sanction

was to circumscribe the absences which would give rise to removal. He submitted that removal is only prescribed where the successive absences were 'not justifiable on the objective facts'.

[81] Since item 4(2) states that a councillor who is absent from three or more consecutive meetings 'must' be removed from office as a councillor, there is no escaping the conclusion, in my view, that removal is mandatory. (Whether such a provision is constitutional is the subject of alternative relief which will be determined in later proceedings, if necessary.) However, the fact that removal is mandatory may have a bearing on the interpretation of the breach contemplated in item 4(2). Two aspects of the defined breach received attention in argument, namely the word 'absent' and the phrase 'required to attend'. Once the proper interpretation of these parts of item 4(2) has been determined and applied to the particular facts of the case, I do not think there is scope for an unstated qualification that removal follows only if the absence was 'not justifiable on the objective facts'.

[82] Although removal is mandatory in the prescribed circumstances, I nevertheless consider that the duly empowered functionary is required to make a removal decision and not merely a finding that item 4(2) has been breached. However, if the functionary makes a proper finding that there have been three successive absences and thereupon communicates (or causes to be communicated) to the affected councillor that his or her removal has followed as a matter of law upon such finding, it would be unduly technical to complain that there was no actual decision to remove the councillor. The decision-maker in the posited case would have made the necessary factual finding and communicated what he or she regarded as the peremptory statutory outcome.

[83] I also did not understand it to be in dispute that, in cases of recommended suspension or removal properly falling under item 14, the MEC is not bound by the factual and legal findings of the council or the council's committee in regard to the breach. It is for the MEC to determine what further investigation if any he or she should undertake in order to form the opinion that the Code has been breached (see *Van Wyk v Uys NO* 2002 (5) SA 92 (C) at 99G-H; *Lili v Independent Electoral Commission: Chief Electoral Officer & Others* [2013] ZAWCHC 196 paras 35-40;

Kannaland Municipality v MEC for Local Government, Environmental Affairs and Development Planning & Another [2014] ZAWCHC paras 22-39).[4] This might be affected by the attitude of the councillor in respect of whom suspension or removal is recommended.

[84] In support of their clients' respective positions on the interpretation of items 4 and 14 of the Code, the applicants' counsel referred to the support and monitoring role of provincial government in relation to municipalities while the respondents' counsel referred to the principle of municipal autonomy. While both sides were able to cite provisions of the Constitution and other national legislation in support of these broad notions, I do not think they shed light on the present problem. We are concerned here with the removal of councillors. That is not a functional area of provincial or municipal competence in terms of Schedule 4 or 5 of the Constitution so there is no 'default position' (as Mr Vermeulen put it) in favour of removal being in the hands of the council rather than in the hands of the MEC. Nor does it seem to me a natural consequence of provincial government's support and monitoring role that the MEC rather than the council should have the power to suspend or remove a councillor.

[85] What is beyond doubt, however, is that Parliament, by way of a national law (the Systems Act), has decreed that, at least for all breaches of the Code apart from item 4(2), a council or a special committee has the power to make findings of a breach and to issue a formal warning, reprimand or fine whereas suspension and removal are the exclusive domain of the MEC. Parliament has also clearly laid down that, even where a council or special committee has issued a warning, reprimand or fine, the aggrieved councillor may appeal to the MEC. This indicates that the imposition of the more serious sanctions of suspension and removal should be in the hands of a higher level of government (see the cases cited in para 83 *supra*). Whether in general or in any particular case that is likely to give rise to a 'better' decision is not for me to judge.

[4] The first of these cases was decided prior to the amendment of item 14(4) of the Code. The other two cases were decided subsequent to the amendment.

[86] It would thus accord with the scheme of the Code that only the MEC should be empowered to remove a councillor for three successive absences. This conclusion would also not offend the overarching constitutional vision for the three spheres of government in South Africa, part of which is that, while local authorities have legislative and executive authority in respect of certain matters, national and provincial legislatures have competence in respect of the structuring of local government and for overseeing its functioning (see, eg, *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 51). I do not say that, based on the notion of municipal autonomy (which is necessarily a relative concept), the national lawmaker might not rationally have adopted a different model and entrusted the suspension and removal of councillors to a proper decision of the council itself. What I do say, though, is that the model of entrusting the final decision on the suspension and removal of councillors to a higher level of government cannot be regarded as inconsistent with broader constitutional principles of the inter-relationship between local and provincial government.

[87] Item 14(1) empowers a council or a duly established special committee to investigate and make a finding 'on any alleged breach of a provision of this Code'. On the face of it, the 'Code' means the whole Code, a view enforced by the all-embracing phrase 'any alleged breach'.

[88] The respondents submitted that there were nevertheless indications that item 4 was self-contained and that item 14 had no part to play in the breaches contemplated therein. The consequences of this argument, as Mr Vermeulen acknowledged, are not confined to the proposition that the council rather than the MEC is vested with the power of removal for three or more successive absences. A further consequence is that, where the council has fined a member for absence in terms of item 4(1), there is no right of appeal to the MEC in terms of item 14(3). And, of course, there would be no right to appeal to the MEC against removal.

[89] Mr Vermeulen countered these considerations by pointing to the more general remedies of an aggrieved person in terms of s 59(3)(a) and s 62 of the Systems Act. The first of these provisions empowers a municipal council in certain circumstances to review a decision taken under delegated authority while the

second gives a right to appeal against an exercise of delegated power, such appeal lying to the council or to a special committee thereof, depending on the size of the council. However, and assuming that these remedies would notionally be available to a removed councillor, they are not a substitute for a decision by or appeal to the MEC. Indeed, it is clear that in the circumstances of the present case both remedies mentioned by Mr Vermeulen would have been hollow and futile.

[90] The main textual considerations which might be thought to support the respondents' interpretation are the following. Firstly, item 4 (which must be read with item 3 dealing with attendance at meetings) is the only breach item in the Code which mentions sanctions and thus does not have to depend on item 14. Second, item 4(3) envisages the adoption by a council of a particular procedure by which to deal with absences, a procedure which would (or at least might) be different from the general disciplinary procedure in item 14(1). And third, item 4(2) makes removal mandatory in the case of three or more successive absences, which reduces the scope for decision by the MEC and removes the discretion envisaged by item 14(6).

[91] While these considerations have some force, I do not think they are sufficient to remove breaches in the form of non-attendance of meetings from the scope of item 14. The fact that item 4 contains its own sanctions is not inconsistent with the operation of item 14. Indeed, since the only sanctions mentioned in item 4 are fines and removal, an acceptance of the respondents' argument would require one to conclude that a council is not permitted, in the case of non-attendance of or failure to remain in attendance at a single meeting, to issue a warning or reprimand; it would be a case of a fine or nothing. One would also have to conclude that, despite serial non-attendance by a councillor (but not three successive absences), the council would be limited to imposing a fine; it could not recommend to the MEC in terms of item 14(2)(c) or (e) that the delinquent councillor be suspended or removed.

[92] A more sensible construction is that item 4(1)'s purpose is specifically to authorise a council to adopt standing rules and orders making provision for fines, as a means of encouraging diligent involvement by all councillors in the affairs of the municipality. The fact that standing rules and orders might provide for a fine is not

inconsistent with a discretion to issue formal warnings or reprimands (ie in terms of item 14(2)) in cases where a fine is considered not to be justified. Standing rules making provision for fines for non-attendance would simply indicate the penalty which delinquent councillors should generally expect to be imposed in relation to a particular type of breach (non-attendance), ie advance guidelines for the exercise of the fining power conferred more generally by item 14(2)(e). In the absence of item 4(1), there might have been a complaint that standing rules laying down fines for non-attendance were an undue fetter on the council's power to impose sanctions.

[93] It is also not inconsistent with item 14 that item 4(2) should prescribe, in relation to three or more successive absences, a peremptory sanction of removal. The general power of removal is contained in item 14. Item 4(2) merely provides that, in the particular circumstances there mentioned, removal is mandatory and not discretionary. As I have said, there may be serial non-attendance without three successive absences and in such circumstances one would expect the sanctions of suspension and removal in item 14 to remain of potential application, except not on a mandatory basis.

[94] It is so that item 4(2) reduces the scope of the MEC's decision-making in cases of successive absence but the same would be true if the power were vested in the council. It is common ground that there needs to be a proper decision as to whether the councillor was absent for three or more successive meetings. In cases of alleged breaches other than item 4(2), the MEC (where suspension or removal is under consideration) must consider two matters: (a) what breach, if any, was committed; and (b) the appropriate sanction for the established breach. Depending on the particular circumstances, the one or other leg might assume greater importance. In the case of item 4(2), by contrast, the question for the MEC's decision is confined to the first leg, namely whether in his opinion the councillor was absent from three or more successive meetings. Sometimes the conclusion of three successive absences will be self-evident but that will also sometimes be so for other types of breaches. There will be cases where the conclusion is more controversial. The conclusion may depend not only on the particular facts of the case but on a proper interpretation of the words 'absent' and 'required to attend', which is a question of law. Nonetheless, even on the respondents' argument there may be

questions of degree. For example, Mr Vermeulen conceded that on the *de minimis* principle a councillor who was present for most but not the whole of a meeting might be said not to have been absent from it. Whether a councillor was 'required' to attend a particular meeting might require an investigation as to whether the councillor received due and adequate notice of the meeting.

[95] The respondents point out that item 14(6) is framed on the supposition that the MEC has a discretion (or exercises a value judgment) in regard to sanction. That generally will be the case. However, the Code must be read as a whole. If that is done, I see no difficulty in reading item 14(6) as being subject to peremptory removal where the case falls within item 4(2). Having regard to scope and objects of the Code, the word 'may' in item 14(6) confers a power together with a duty to exercise it where, in the opinion of the MEC, suspension or removal is warranted (see, eg, *Noble & Barbour v South African Railways and Harbours* 1922 AD 527 at 440; *SAR&H v New Silverton Estate Ltd* 1946 AD 830 at 842-843; *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 472E-475D; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 937B-F; *Dlisani v Minister of Correctional Services & Another, Mathwetha v Minister of Safety and Security & Another* 1999 (1) SA 1020 (TkHC) at 1024F-1026D; Baxter *Administrative Law* 1984 at 412-414). Where the MEC concludes that item 4(2) has been breached, he could not properly reach a conclusion other than that removal is 'warranted' and that he is bound to exercise his sanction-imposing power accordingly.

[96] As to the provision in item 4(3) for a 'uniform standing procedure' ('USP') which the council must adopt for the purposes of item 4, the Code must, once again, be read as a whole. Item 14(1) empowers a council in general to investigate and make findings on any alleged breach or to establish a special committee to make such investigations and findings with a view to making recommendations to the council. Item 4(3) merely regulates this power by requiring that its exercise should, where one is dealing with non-attendance at meetings, be conducted in accordance with a USP adopted for that purpose. Where one is dealing with alleged non-attendance but not for three or more successive absences, the USP would cover the determination of the facts and the imposition of the fine. Where one is dealing with three or more alleged successive absences, the USP would cover the investigation

and determination of the facts with a view to making a request to the MEC in terms of item 14(2)(e). In both cases, the proceedings followed at council level could aptly be described, within the meaning of item 4(3), as 'proceedings for the imposition of a fine or the removal of a councillor'.

[97] As against the textual matters raised by the respondents, there is the consideration that, whereas item 4(1) is framed in the active voice and empowers a 'council' to impose a fine, item 4(2) is framed in the passive voice, stating that a councillor guilty of three or more successive absences 'must be removed from office as a councillor'. If what was meant is that a council has the power to remove the councillor, one would have expected item 4(2) to follow the phraseology of item 4(1) and to say that a council must remove from office a councillor who has been absent from three or more consecutive meetings.

[98] I thus conclude that none of the 12 purportedly removed councillors has as yet been validly removed. It follows that in both cases the applicants are entitled to an order declaring that the councillors in question have at all times remained members of the Municipality's council (prayer (ii) summarised earlier).

The second set of questions

[99] I shall consider, under separate headings, the various points which I loosely group under the second set of questions (paras 100 to 119 below). These are concerned with the lawfulness of the establishment and proceedings of the DC as distinct from the correctness, on the merits, of its decisions that the 11 councillors and Harmse were guilty of three successive absences.

No uniform standing procedure?

[100] The first issue under the second set of questions is whether it was competent for the council or a committee thereof to investigate and make a recommendation regarding the removal of the DA coalition councillors, given the alleged absence of a USP as contemplated in item 4(3). This is one of the grounds on which the applicants seek to have the DC's decisions reviewed and set aside.

[101] Section 37(f) of the Structures Act envisages that a council will have 'rules and orders', one of the speaker's functions being to ensure that council meetings are conducted in accordance with such rules and orders. In the present case, the Rules I mentioned earlier are the council's said rules and orders. Rules 10 and 11 deal with absence and non-attendance. Item 4(1) of the Code authorises a council to impose a fine for non-attendance as determined by its standing rules and orders, and the Municipality here has done that by way of Rule 11(4).

[102] However, item 4(3) requires that 'proceedings for the imposition of a fine or the removal of a councillor' must be conducted in accordance with a USP which each council 'must adopt for the purposes of this item'. It is further stated that the USP must comply with the rules of natural justice. So whereas fines for non-attendance would be found in the Rules, the procedure for the imposition of a fine or removal should be contained in another instrument, namely the USP. In the present case, Rules 11(3) and 11(6) themselves recognise this, because they require proceedings for the imposition of a fine or for removal to be conducted in accordance with a USP adopted by the council. While notionally a USP could be incorporated into the same document as the one containing the standing rules and orders, that was not done in the present case. Apart from the fact that Rule 11 expressly contemplates a USP *dehors* the Rules, neither Rule 11 nor any other of the Rules as a fact contains a procedure for the committee contemplated by Rules 11(3) and (6).

[103] The respondents argued that the USP was to be found in para 30 of the Delegations. I do not think those provisions are sufficient to constitute a USP. The mere establishment of a DC with delegated authority to determine certain matters cannot by any stretch be regarded as a USP. What is contemplated in item 4(3) is a procedure (whether one to be followed by the council itself or by a committee). That procedure must be a uniform one adopted specifically for purposes of item 4 breaches. The statutory purpose is evidently that all councillors should be subject to the same even-handed processes in respect of alleged non-attendance. Although the Delegations authorise the DC to co-opt advisory members, to instruct councillors and officials to appear to give evidence and to appoint a legal adviser, these are permissive powers. Nothing is laid down as to the procedure which the DC must

follow in the case of non-attendance. Furthermore, the DC created by para 30 of the Delegations is a general disciplinary committee, not one set up exclusively to deal with non-attendance.

[104] Item 4(3) is expressed in peremptory terms. In the absence of a duly adopted USP, a council is not in the position lawfully to conduct proceedings for the imposition of a fine or for the removal of a councillor. In this regard, I respectfully disagree with the *obiter dictum* of Mamosebo AJ to the contrary in *The Nama Khoi Municipality & Others v MEC for Local Government: Northern Cape Provincial Government & Others* Case [2013] ZANCHC 28 para 24. On the evidence before me, the Municipality's council has not adopted a USP. That does not mean that, in respect of past absences, the council is precluded from taking action, but before it does so it will need to adopt a USP and deal with those absences in accordance with such USP.

[105] For this reason, the DC's decisions were unlawful and must be set aside.

Validity of appointing resolution?

[106] The DC was appointed by a resolution of the council on 6 February 2014. It might be said that this meeting as a whole was unlawful because the speaker had made it clear for some time, including at the immediately preceding meetings of 31 January and 4 February 2014, that he would not recognise the votes of Nel and Van Wyk. This ruling by the speaker was unlawful. In convening the meeting of 6 February 2014, the speaker did not communicate any change of heart and it is clear from the answering papers that as at 6 February 2014 there had been no change of heart. (The respondents were still contending, when they filed their initial answering papers in the first case, that the position as determined by Schippers J was suspended in view of the appeals to the Supreme Court of Appeal and the Constitutional Court. It was only after the filing of such papers that the Constitutional Court on 16 May 2014 dismissed the application for leave to appeal, signalling the end of the road.)

[107] Whether, despite the speaker's unlawful position, the DA coalition councillors were required to attend the meeting of 6 February 2014 is something more appropriately dealt with under the third set of questions. As will appear hereunder, the resolutions passed at this and other meetings would not necessarily fall to be set aside even if the meetings were unlawful. In regard to the resolution of 6 February 2014, it is obvious that the 11 councillors (including Nel and Van Wyk) would not have been entitled to vote on the appointment of the DC, even if they had been present and allowed to vote on other business. Harmse was granted leave of absence for reasons apparently unrelated to the speaker's unlawful ruling. Roberts was present on 6 February 2014 and apparently supported the appointment of the DC (the resolution having been unanimous).

[108] I thus do not intend to base my decision on the contention that the resolution appointing the DC was invalid because the meeting itself was unlawful.

Extent of DC's power under para 30 of Delegations?

[109] A further question arises as to whether the DC was entitled, in terms of para 30 of the Delegations, to decide, as it purported to do on 17 February 2014, that the 11 councillors be removed. In deciding that the 11 councillors be removed, the DC could not have been acting in terms of item B of its terms of reference (the power to fine for non-attendance).[5] In terms of item A of its terms of reference, the DC may investigate and make a finding on any alleged breach of the Code and make an appropriate recommendation to the council.

[110] The respondents' argument is that, since removal was peremptory, there was nothing on which to make a recommendation; removal followed as a matter of law upon a finding of three or more successive absences. I have already concluded that the final decision as to whether there has been a breach in the form of three or more successive absences, and thus whether removal must follow, is a decision for the MEC. What the council can do is make a recommendation to the MEC in terms of

[5] Whether, having regard to the language of item 14(2), it is permissible for a council to delegate to a disciplinary committee the power actually to impose a fine as distinct from making a recommendation in that regard to the council need not be decided.

item 14(2)(e) of the Code. In terms of item 14(1) a factual investigation and finding may be conducted and made either by the council or by a special committee, subject (in the case of breach in the form of three or more successive absences) to compliance with a duly adopted USP. However, item 14(2) of the Code provides that only the council itself may recommend to the MEC that the delinquent councillor be removed.

[111] Consistently with this scheme, item A of the DC's terms of reference in the Delegations needs to be interpreted as requiring the DC, where it has found that a councillor has been guilty of three or more successive absences, to recommend to the council that it recommend to the MEC that the councillor be removed. (That is certainly what the DC would have to do in any other case of serious breach which in its view warranted removal because it is common cause that, in cases falling outside item 4(2) of the Code, only the MEC may decide on removal.)

[112] The DC did not, in the case of the 11 councillors, make such a recommendation. It purported itself to decide upon their removal. On 28 February 2014 the council merely 'noted' the DC's decision (by which stage the 11 councillors had already been notified of their purported removal). The DC's conduct was on this account unlawful.

[113] In the case of Harmse, the DC on 11 April 2014 resolved to recommend that Harmse be removed. The difficulty for the respondents is that the council did not thereafter consider and act upon the recommendation. Harmse was notified of his removal without further consideration of the matter by the council. That too was unlawful.

[114] I have thus far assessed the legality of the DC's process on the assumption that the DC which made the decisions in the present case was the DC envisaged in para 30 of the Delegations. That seems to me the most favourable assumption to the respondents. Their own version[6] is that the DC which acted in this case was an *ad hoc* committee appointed by the council on 6 February 2014, its terms of

[6] Paras 25-30 record 787-789 (first case).

reference being the alleged absences of the 11 councillors (though the minutes do not record any terms of reference). If that is so, the complaint that no USP was followed is an *a fortiori* one, since the respondents could then not even rely on the Delegations as supposedly supplying the USP. The council did not lay down any procedure for the supposedly *ad hoc* DC to follow. The council did not even decide that the *ad hoc* DC would have delegated power finally to determine any question. Furthermore, there does not appear to have been any further decision by the council expanding the terms of reference of the *ad hoc* committee so as to include Harmse's three alleged absences.

Representivity of DC?

[115] The applicants alleged that the DC was not validly constituted because it lacked the representivity required by s 160(8)(a) of the Constitution. Whatever merit a contention of that kind might have in other contexts,[7] it seems to me to be unrealistic to contend, on the facts of the present case, that the DC in this case should have included members of the DA coalition. In regard to the 11 removed councillors, they themselves could obviously not have served on the DC. The only other members of the DA coalition were Harmse and Roberts but both of them had been absent from two of the three meetings for the same reasons as their colleagues. If their colleagues were in breach, so were they, even though they did not face the mandatory sanction of removal if found guilty of the breach. A further consideration is that, of the 13 DA coalition councillors, only Roberts was present at the meeting of 6 February 2014. Apart from the fact that by 6 February 2014 Roberts was at loggerheads with the DA coalition caucus and thus unlikely to have been for them an acceptable member of the DC, the minutes reflect that Roberts supported the appointment and composition of the DC (the resolution having been unanimous).

[116] In regard to Harmse's removal, Roberts, the only remaining member of the coalition, had by then broken ranks with the DA coalition. He had been expelled from the caucus on 6 February 2014 and was suspended from the DA on 13 March

[7] Cf *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC) paras 18, 42 and 61.

2014. I hardly think the applicants would have found it satisfactory if Roberts had served on the DC which was to consider Harmse's removal. The applicants' counsel pointed out that, by the time Harmse's three absences were under consideration, the 11 councillors had been temporarily restored to their positions by the order granted by agreement on 6 March 2014. Whether the temporary order went quite that far is unclear. (In relevant part, the order stated that the respondents were not to take any action to prevent the 11 councillors from performing their functions as councillors in terms of the Structures Act, Rules or any other applicable legislation.) Be that as it may, the 11 councillors were still involved in their contested removal on grounds similar to those levelled against Harmse. They could hardly have served in a disinterested fashion on the DC investigating Harmse's removal.

[117] Accordingly, if the DC had otherwise been duly established and empowered to investigate the successive absences, I would not have upheld a challenge to its representivity, though the circumstance that the DC was drawn only from members of the ANC coalition may have imposed upon the DC members a heightened duty to perform their functions with scrupulous fairness and objectivity.

Bias and ulterior motive?

[118] There is little doubt in my mind that Stoffels and the ANC coalition anticipated that, in view of the ruling suspending the voting rights of Nel and Van Wyk, the DA coalition councillors might refuse to attend or remain in attendance at council meetings and that they (Stoffels and the ANC coalition) found congenial the prospect that the DA coalition councillors could as a result be removed for three successive absences. The same is true in regard to the meetings from which Harmse was allegedly absent – the ANC coalition would have realised that Harmse would feel compromised in attending the meetings in the absence of his 11 purportedly removed colleagues.

[119] However, Mr Rosenberg in oral argument acknowledged that, if the DA coalition councillors had indeed absented themselves on three successive occasions as contemplated in item 4(2), disciplinary action, otherwise lawful, could not be impugned merely because Stoffels and the ANC coalition councillors

relished, for unworthy political motives, the mandatory removal of the DA coalition councillors. (The same applies *mutatis mutandis* in the Harmse case.)

The third set of questions: Were the DC's decisions correct?

[120] If, as I have found, the MEC is the person with the authority finally to determine whether any of the councillors in question breached item 4(2) and with the power to impose the sanction of removal, the function of the council or a committee is to investigate the matter and make a recommendation to the MEC. The circumstances in which review in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and in terms of the legality principle is available to impeach preliminary investigations and recommendations is not altogether clear. There is authority that a preliminary investigation by a statutory functionary culminating in a recommendation that action be taken by another statutory functionary may in appropriate circumstances be subject to review, at least where the preliminary process did not comply with the principles of natural justice (see, for example, *Oosthuizen's Transport (Pty) Ltd & Others v MEC, Road Traffic Matters, Mpumalanga, & Others* 2008 (2) SA 570 (T) and cases there discussed; see also Hoexter *Administrative Law in South Africa* 2nd Ed at 436-443).

[121] In so far as natural justice is concerned, I do not think the process followed by the DC was deficient, though in the case of the 11 councillors it was somewhat hurried. In both cases the affected councillors were invited to make representations. The 11 councillors did so through their attorneys. Harmse decided not to make representations.

[122] Insofar as the correctness of the DC's decisions is concerned, several questions of fact and law arise and were the subject of argument before me. In the first case, I can summarise the questions as follows:

(a) In view of the speaker's unlawful insistence, at the meetings of 31 January and 4 February 2014, that the voting rights of Nel and Van Wyk were suspended, were Nel and Van Wyk 'required to attend' those meetings within the meaning of item 4(2)?

(b) If Nel and Van Wyk were not required to attend those meetings because of the speaker's unlawful ruling, were any of the other councillors (and in particular the other nine councillors who feature in the first case) 'required to attend' them, given the unlawful exclusion of two of the councillors? (Another way of putting this and the preceding question might be whether, more fundamentally, the said meetings were lawful meetings in the light of the unlawful ruling.)

(c) If the DA coalition councillors were required to attend the meetings of 31 January and 4 February 2014, were they 'absent' from those meetings within the meaning of item 4(2), given that they signed the attendance register and were present at the commencement of the meetings, thereafter leaving in protest?

(d) Were there three separate meetings of 31 January, 4 February and 6 February 2014 within the meaning of item 4(2) or, as the applicants claim, was a single meeting which started on 31 January 2014 simply resumed on 4 and 6 February 2014 due to the absence of a quorum, so that the councillors were only absent from one meeting?

[123] In the second case, the correctness of the DC's decision involves a consideration of the following questions:

(a) If the purported removal of the 11 councillors was unlawful, was Harmse 'required to attend' any of the three meetings from which he was allegedly absent, given the unlawful exclusion of his colleagues? (Again, another way of putting this question might be whether, more fundamentally, the said meetings were lawful meetings in the light of the unlawful ruling.)

(b) Was the convening of the meeting on 24 February 2014 defective because of an alleged failure to give notice to Harmse and Roberts and because of the admitted absence of publication in a local newspaper? And if so, was Harmse (who as a fact became aware that a meeting was to be held) 'required to attend' the meeting?

(c) If Harmse was required to attend the three meetings, was he prevented by the security guards from attending the meeting of 24 February 2014 (in which event it is common cause, I think, that he could not be said to have been absent from it within the meaning of item 4(2))?

(d) Was Harmse 'absent' from the meetings of 25 and 28 February 2014, given that he signed the attendance register and was present at the commencement of the meetings, leaving in protest thereafter?

(e) Were there three separate meetings of 24, 25 and 28 February within the meaning of item 4(2) or, as the applicants claim, was a single meeting which started on 31 January 2014 simply resumed on 4 and 6 February 2014 due to the absence of a quorum, so that the councillors were only absent from one meeting?

[124] If the DC or the council had the power to make a final determination and to impose the sanction of removal, a determination of one or more of these questions in favour of the applicants would or might constitute a ground for reviewing and setting aside the removal decisions, on the basis that the decisions were not authorised by the empowering legislation and were materially influenced by errors of law.

[125] However, and for reasons I have explained, the final determination and imposition of sanction is in the hands of the MEC and he has yet to make a decision. If I were to answer the questions I have summarised, I would in effect be making the determination which the MEC must make and my decision on those matters would be *res judicata*, meaning that all that would remain for the MEC would be to impose the mandatory sanction of removal. It is for the MEC, at least in the first instance, to determine the facts and to apply the law as he understands it to those facts. Although Mr Jamie for the MEC made general submissions regarding the interpretation of the Code, the MEC in his affidavits and Mr Jamie in argument specifically refrained from expressing a view as to whether in the present case the DA coalition councillors had been absent from three successive meetings which they were required to attend. That would be a question for the MEC to determine if the court decided that the final decision rested with him and not with the council.

[126] Another way of putting the same conclusion is that the decisions of a disciplinary committee or of a council on these matters do not adversely affect the rights of the councillor or have direct, external legal effect, within the meaning of those concepts in the definition of 'administrative action' in s 1 of PAJA. The

functionary with the right finally to decide them is the MEC. The conclusions and recommendations of a disciplinary committee or council do not have interim effect; councillors may not lawfully be suspended by a committee or council pending the MEC's decision. Review on the 'merits' of the decision should thus await the MEC's decision, if necessary. (Procedural fairness may stand on a different footing, because, even though the final decision lies with the MEC, the investigation and recommendation by a disciplinary committee or council are part of a procedure to the benefit of which the councillor is entitled in the reaching of the final decision on suspension or removal. And, of course, if – as in this case – the disciplinary committee or council has purported to exercise a power of final decision-making which in law it does not have, its decision can on that account be set aside.)

[127] I thus consider that I should refrain from determining these further questions. This may seem unfortunate, since I heard argument on them and since they may well arise if and when the MEC makes his decision. However, this does not justify my usurping the function of the MEC. The council may or may not refer the matter to him. If it does, he may decide it one way or the other. Once he has applied his mind to the particular circumstances of these councillors and made his decision, he would be entitled – if the decision were taken on review – to defend the decision.

[128] I may add, on this aspect, that my reasons for leaving these questions undecided apply *mutatis mutandis* if I am wrong on the first question (ie in holding that the MEC is the official power to make the decision) but right on the second set of questions (ie that the DC could not operate in the absence of a USP and was in any event confined to making a recommendation to the council). If I am right on these latter questions, it will be for a disciplinary committee or the council in due course, after a USP has been adopted, to determine the merits of the matter. The questions I defer may arise upon a review of any decision by the disciplinary committee or council.

<u>The validity of meetings and resolutions of 24, 25 and 28 February 2014</u>

[129] In addition to the three sets of questions dealt with above, the applicants in the first case seek an order declaring that the meeting of 28 February 2014 was a

nullity and an order setting aside all resolutions taken at that meeting. In the second case, the applicants seek similar relief not only in relation to the meeting of 28 February 2014 but also in relation to the two preceding meetings of 24 and 25 February 2014.

[130] Since I have found that the 11 councillors were not lawfully removed, their exclusion from the council meetings on and after 24 February 2014 was unlawful. The same is true for Harmse's exclusion from meetings subsequent to his purported removal on 17 April 2014. At least in the case of the meeting of 24 February 2014, the meeting may also have been defective because notice thereof was not published in a local newspaper.

[131] The unlawful exclusion of these councillors may, depending on the circumstances, justify setting aside one or more of the resolutions passed by the council on 28 February 2014. However, in terms of the principle laid down in *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) the decisions taken at the meeting stand unless set aside, even though in law the meeting may have been unlawful. Insofar as the council purported on 28 February 2014 to 'note' the removal of the 11 councillors, the relief I intend granting will make it clear that they were not lawfully removed. For the avoidance of doubt, the resolution to note the removal should be set aside, though the resolution probably has no substantive effect in any event.

[132] In regard to the other decisions taken on 28 February 2014 (which was a quorate meeting despite the absence of 12 DA coalition councillors), I am not satisfied that the papers sufficiently canvass the prejudice and disruption which may arise if the decisions are set aside. Virtually no attention was devoted to the matter in argument. The applicants will be entitled to approach the court by way of a fresh application if they consider that one or more of those decisions should be set aside.

[133] In regard to the meetings of 24 and 25 February 2014, they were left inquorate by the absence of the 13 DA coalition councillors and no decisions were taken. There are thus no resolutions that need to be set aside. (The same happens to be true of the earlier meetings of 31 January and 4 February 2014.)

[134] The lawfulness of the meetings of 24, 25 and 28 February 2014 is, of course, a matter relevant to a determination of the question whether Harmse was absent from three meetings which he was 'required to attend' within the meaning of item 4(2). A similar question arises in relation to the 11 councillors in respect of the meetings of 31 January 2014 and 4 and 6 February 2014. I have explained, however, that I do not think it would be right for the court at this stage to decide questions which the MEC will need to determine if and when a recommendation is made to him for the removal of the councillors.

[135] As I have said, in the first case a question of law which the MEC will need to consider is whether the 11 councillors were 'required to attend' the meetings of 31 January 2014 and 4 and 6 February 2014, given the unlawful suspension of Nel and Van Wyk's voting rights. In the second case, there is a similar question of law which the MEC will need to consider, namely whether Harmse was 'required to attend' the meetings of 24, 25 and 28 February 2014, given the unlawful exclusion of the 11 councillors (and, of course, the fact that they were not even invited to the meetings).

[136] In that regard, a distinction may need to be drawn between the state of affairs which prevailed at the point the DA coalition councillors absented themselves and the state of affairs which prevailed after the remaining councillors purported to make decisions. The only relevant meetings which were quorate despite the absence or departure of DA coalition councillors were the meetings of 6 and 28 February 2014. On *Oudekraal* principles, the decisions taken at those meetings might stand. Whether a court would set them aside would require a consideration of the prejudice and disruption which might ensue if such an order were made, having regard to the circumstances obtaining at the time the court is called upon to exercise its review power. Notionally certain resolutions might be set aside and others not. On the other hand, an obligation to attend a meeting (as connoted by the phrase 'required to attend') may require an assessment of the circumstances prevailing at the time the councillor decides not to attend or decides to leave. The fact that, looking back after the lapse of some time, a court decides that resolutions should be allowed to stand does not mean that, retrospectively as it were, a councillor can be found to have acted in breach of his obligations by not attending the meetings.

[137] I have said on more than one occasion in this judgment that the speaker unlawfully suspended Nel and Van Wyk's voting rights at the meetings of 31 January and 4 and 6 February 2014. That has been finally determined in the judgment of Schippers J, all avenues of appeal having failed. A misconception in the respondents' answering papers and written submissions is that the suspending effect of the applications for leave to appeal to the Supreme Court of Appeal and Constitutional Court meant that the refusal to allow Nel and Van Wyk to exercise their voting rights at these meetings was not unlawful. That is obviously not so. Schippers J gave a declaration as to the legal position. The fact that the Municipality and Stoffels applied for leave to appeal does not mean that Stoffels' conduct was temporarily lawful. A person who in the meanwhile acted on the view that Schippers J's declaration was correct may have been at risk if on appeal the legal position was found to have been different from his declaration, but that did not occur.

[138] However, the question whether, despite the unlawful suspension of Nel and Van Wyk's voting rights, they and the other DA coalition councillors were nevertheless 'required to attend' the three meetings which they allegedly failed to attend is something in the first instance for the MEC to decide if the matter is ever referred to him. The same applies to the question whether, in turn, the unlawful removal of the 11 councillors had a 'domino effect' which freed Harmse from the obligation of attending the three meetings which he allegedly failed to attend.

Conclusion

[139] The applicants are thus entitled to the orders which are set out below.

[140] In regard to costs, the applicants in each case seek costs effectively only against the Municipality. The office bearers joined as respondents were cited *nomine officii* and Mr Rosenberg stated in argument that the applicants did not seek costs against them in their personal capacities. I confess to a considerable measure of unease at this state of affairs. It appears to me that, once again, the ratepayers are being asked to foot the bill for ongoing battles between political factions. Given the stance adopted by the parties on costs and the limited argument on the matter, I do not think it would be fair for me to deprive the applicants of their costs or to order

that the costs be paid personally by any of the individual respondents. However, all councillors and the parties to which they belong should be warned that in future litigation the court may wish to be more fully addressed on why they, rather than the ratepayers, should not be ordered to pay or bear the costs of this type of litigation.

[141] I am aware of the protection against civil liability accorded to councillors by s 28 of the Structures Act,[8] the provisions of which were considered in *Swartbooi & Others v Brink & Others* 2006 (1) SA 203 (CC). While the scope of the protection afforded by s 28 as interpreted in *Swartbooi* is wide, it may not be limitless. In para 22 Yacoob J, writing for a unanimous court, said the following:

'Interesting hypothetical questions were raised during argument concerning the outer limits of this protection. For example, whether members of a council would be protected from criminal liability if they admitted in the course of legitimate council proceedings that they had committed a serious criminal offence, or whether councillors would attract personal liability if they utilise the processes of the council for a party political or some other ulterior purpose. None of these issues arises in this case. There may be conduct that is so at odds with the values mandated by our Constitution that neither the Constitution nor the National Legislature could conceivably have contemplated its protection. It is unnecessary to decide these issues here…'

[142] Councillors in general should also bear in mind that, if they cause a municipality to raise meritless claims or put up meritless defences and if as a result their municipality is ordered to pay costs to the other litigant, they may, in terms of s 32 of the Local Government: Municipal Finance Management Act 56 of 2003, become personally liable for deliberately or negligently making or authorising 'fruitless and wasteful expenditure' (defined in s 1 of that Act as meaning 'expenditure that was made in vain and would have been avoided had reasonable care have been exercised').

[143] I cannot but think that, over the past several years, the political factions in this Municipality have allowed their unseemly jockeying for power to distract them from

[8] Substantially repeated in s 3 of the Western Cape Privileges and Immunities of Councillors Act 7 of 2011.

the mandate laid down in s 152 of the Constitution, s 19(2) of the Structures Act and s 6(2) of the Systems Act. They exist for the community, not the other way round.

[144] Despite contrary argument, I do not think there is any basis for depriving the applicants of any of the reserved costs. The cases were urgent. In each case interim arrangements for the protection of the removed councillors were reached and in the event the applicants have been vindicated. It is also clear to me that the cases were eminently suitable for consolidation and that the opposition to consolidation was ill-founded.

[145] In Case 3517/2014 I make the following orders:

(a) The decision of a disciplinary committee comprising the second to fourth respondents, made on or about 17 February 2014, that the third to thirteenth applicants were removed from their seats on the first respondent's council ('the council'), is reviewed and set aside.

(b) It is declared that the third to thirteenth applicants have at all material times remained members of the council.

(c) The council's purported noting, at a meeting on 28 February 2014, of the third to thirteenth applicants' removal is set aside.

(d) The first respondent and its officials and the eighth respondent ('the IEC') are interdicted from taking any action to call for or hold by-elections in respect of the seats held by the third to seventh applicants on the council (being the seats for wards 1, 2, 3, 11 and 12) as a result of the decision in (a).

(e) The IEC is interdicted from taking any action to fill the seats held by the eighth to thirteenth applicants as a result of the decision in (a).

(f) The first respondent is directed to pay the applicants' costs, including the costs of two counsel, such costs to include those which stood over for determination on 6 March 2014 and 26 May 2014.

(g) The alternative prayer for an order of constitutional invalidity, contained in para 10 of the notice of motion, is postponed *sine die*. In the event that the applicants or the ninth respondent consider that a costs order should be made in respect of the

claiming of such relief, the question of costs matter may be set down for hearing on due notice.

(h) No order is made on the remaining prayers in the notice of motion.

[146] In Case 8813/2014 I make the following orders:

(a) The decision of a disciplinary committee comprising the second to fourth respondents, made on or about 11 April 2014, that the second applicant had absented himself from three consecutive meetings of the first respondent's council ('the council') on 24, 25 and 28 February 2014 in contravention of item 4(2) of Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000, is reviewed and set aside.

(b) It is declared that the second applicant has at all material times remained a member of the council.

(c) The first respondent and its officials and the eighth respondent ('the IEC') are interdicted from taking any action to call for or hold by-elections in respect of the seat held by the second applicant on the council (being the seat for ward 13) as a result of the decision in (a).

(d) The first respondent is directed to pay the applicants' costs, including the costs of two counsel, such costs to include those which stood over for determination on 5 June 2014.

(e) The alternative prayer for an order of constitutional invalidity, contained in para 9 of the notice of motion, is postponed *sine die*. In the event that the applicants or the ninth respondent consider that a costs order should be made in respect of the claiming of such relief, the question of costs matter may be set down for hearing on due notice.

(f) No order is made on the remaining prayers in the notice of motion.

ROGERS J

APPEARANCES

For Applicants:	Mr SP Rosenberg SC and Mr D Borgström (both cases) Instructed (in both cases) by: Minde Shapiro Smith Attorneys Tygervalley Office Park Building No. 2 Cnr Willie van Schoor & Old Oak Roads Bellville
For First to Sixth Respondents:	Mr WJ Vermeulen SC & Mr JP Snijders (Case 3517/14) Instructed by: Mills Attorneys Plettenberg Bay
	Mr H van der Linde SC & Mr JP Snijders (Case 8813/14) Instructed by: Webber Wentzel 15th Floor, Convention Tower Heerengracht, Foreshore Cape Town

For Seventh Respondent:	Mr I Jamie SC & Ms M Adhikari (both cases) Instructed (in both cases) by: State Attorney (Ms T Gangen) 4th Floor, 22 Long Street Cape Town
For Ninth respondent	Mr AT Ncongwane SC & Mr K Ramaimela (both cases) Instructed by: State Attorney (Ms T Gangen) 4th Floor, 22 Long Street Cape Town