

A secret ballot?

The Municipal Structures Act provides that the election of office-bearers must take place in a secret ballot. However, it does not stipulate what the consequences would be if every councillor did not, in fact, cast his or her vote in secret.

Issue

The newly elected council of Breede Valley Municipality elected its office-bearers on 29 March 2006. As there was no political party with an outright majority, negotiations towards a coalition preceded the election. The African National Congress and the Independent Democrats entered into a coalition agreement.

In order to cement this agreement, these parties agreed on a 'monitoring system' to be applied during the vote at this meeting. The councillors belonging to the two parties would be seated next to one another. Furthermore, each councillor would show his or her ballot paper to his or her neighbour to ensure that voting took place in accordance with the coalition agreement.

The municipal manager chaired the meeting until the speaker had been elected, in accordance with the Municipal Structures Act. The municipal manager, being aware of the existence of this 'monitoring system', addressed the councillors on the issue. He indicated that he had ensured that councillors could choose to exercise the vote in secret but that he could not force them to do so, or prevent them from waiving their right to secrecy. Voting proceeded and the council elected representatives of the two abovementioned parties into office.

Arguments

Two other councillors took issue with the lack of secrecy in the ballot and brought the matter before the Cape High Court. At the centre of the dispute were two questions:

1. does the law instruct the municipal manager to enforce secrecy or merely to facilitate it?

Breede Valley Onafhanklik vs The Municipal Manager: Breede Valley Municipality Case No. 3390/006

key points

- This judgment sends out a stern warning to all municipalities to ensure that councillors cast their votes in the election of office-bearers in secret.
- However, it can be argued that the judgment does not appreciate the context of a council decision to elect office-bearers which is different from a general election.
- The Court's argument is based on the general right to a secret vote, which applies to citizens electing their political representative onto legislative bodies.
- In contrast, the election of office-bearers is a decision of the municipal council.
- It could also be argued that the law deliberately does not deal with the specifics of the election as it is the municipality's task to regulate this.

2. What are the legal consequences of an election of office-bearers that was not conducted in secret?

In order to understand what a secret ballot is, the High Court took guidance from the Municipal Electoral Act 27 of 2000, which spells out the electoral procedures for general elections.

It also looked at the general right to vote as a fundamental right. Furthermore, the Court made specific reference to section 19 of the Constitution which contains the right to vote for any legislative body in secret.

Decision

The Court upheld the argument that the municipality did not comply with the Municipal Structures Act. It held that the municipality is obliged to ensure that the requirements of the

Act are met. Similarly, the councillors themselves are under a duty to cast their votes in the prescribed manner, i.e. in secret. The municipal manager was expected to enforce the secrecy.

On the second question, the Court held that the way the election was conducted defeated the provisions of the Municipal Structures Act.

The Court did not see it as a councillor's prerogative to waive his or her right to secrecy as the secrecy requirement is an issue of public law. The Court amplified this argument by commenting that the waiver of secrecy could, for example, put pressure on others to do the same.

The consequence of an election that was not conducted in secret is therefore that the election and council decision is invalid.

The High Court set aside the election and ordered that a new election must be called.

Comment

This judgment sends out a stern warning to all municipalities to ensure that councillors cast their votes in the election of office-bearers in secret.

The judgment is not, however, without its difficulties, as is also highlighted by the dissenting judgement of Moosa J.

For example, it can be argued that the judgment does not appreciate the context of a council decision to elect office-bearers which is different from a general election. The Court's argument is based on the general right to a secret vote, which applies in the first instance to citizens electing their political representative onto legislative bodies.

In contrast, the election of office-bearers is a decision of the municipal council. Local government's electoral system does not



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guarantee an outright majority in each municipal council: coalitions may be necessary.

The enforcement of party discipline so as to operationalise coalitions is in itself not inherently anti-democratic. The law should be reluctant to treat it as such.

It could also be argued that the fact that the law does not deal with the specifics of the election is deliberate: it is the municipality's task to regulate this in a by-law or resolution dealing with internal procedures and the consequences of breaches thereof.

The matter has been taken on appeal by the Breede Valley Municipality. We will keep you abreast of any developments in this regard.

Dr Jaap de Visser
Local Government Project
Community Law Centre, UWC