



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

CASE NO: 19623/2024

In the matter between:

DEMOCRATIC ALLIANCE

First Applicant

LINCOLN DE BRUYN

Second Applicant

And

**COUNCIL OF THEEWATERSKLOOF
LOCAL MUNICIPALITY**

First Respondent

**SPEAKER OF THEEWATERSKLOOF
LOCAL MUNICIPALITY**

Second Respondent

THEEWATERSKLOOF LOCAL MUNICIPALITY

Third Respondent

JOHN MICHELS

Fourth Respondent

THEUNIS ZIMMERMAN

Fourth Respondent

Heard: 20 September 2024

Delivered: 15 November 2024

JUDGMENT

LEKHULENI J

INTRODUCTION

[1] This application is brought by the Democratic Alliance (*the DA*) and Councillor Lincoln De Bruyn (*Councillor De Bruyn*) seeking urgent declaratory relief from this Court regarding two decisions made by the Council of Theewaterskloof Local Municipality. These decisions were taken during a special council meeting held on Monday, 2 September 2024. The decisions involve the removal of Councillor De Bruyn from his position as Executive Mayor of the Municipality and the election of Theunis Zimmerman (*the fifth Respondent*) as the new Executive Mayor. The applicants seek an order that these decisions (*the impugned decisions*) be declared unconstitutional, unlawful and invalid and that they be reviewed and set aside.

[2] In addition, the applicants seek a personal, punitive costs order against the Speaker of the Council (*the fourth respondent*). This prayer is based on the premise that the Speaker acted in bad faith, was grossly negligent, and ignored clear and obvious mandatory legal requirements. The applicants contend that the Speaker overstepped his authority and failed to comply with his duty as a public official and grossly violated Councillor De Bruyn's right to a fair and lawful process in relation to his removal as the Executive Mayor.

FACTUAL BACKGROUND

[3] The first applicant is the Democratic Alliance a registered political party with 11 seats in Theewaterskloof Municipal Council. Councillor De Bruyn, the second applicant, is a member of the DA and was officially appointed as the Executive Mayor of Theewaterskloof Municipality on 14 August 2024. However, he was

removed from his position following a motion of no confidence during a special council meeting held on 2 September 2024. Subsequent thereto, the fifth respondent was appointed new Executive Mayor of Theewaterskloof Municipality in that meeting.

[4] The applicants seek to challenge the impugned decisions made by the Council during the special council meeting to remove Councillor De Bruyn from the position of Executive Mayor of the Municipality and to appoint the fifth respondent as the new Executive Mayor. The sequence of events leading to the meeting held on 2 September 2024 and the subsequent removal of Councillor De Bruyn from the position of Executive Mayor can be summarised as follows:

[5] Theewaterskloof Municipality can be considered a hung Municipality, meaning no party has an outright majority of the Council. Coalition parties manage the Council. The Municipality operates on a precarious balance since the Council is governed by coalitions rather than a simple majority. In July 2024, a motion of no confidence was proposed to remove Ms Mary Liebenberg, who was serving as the Municipality's Executive Mayor. The motion was driven by a joint Coalition Caucus comprising the Good Party, the DA and SRWP. After the removal of Councillor Liebenberg, Councillor De Bruyn was appointed as an Executive Mayor of the Municipality. The appointment of Councillor De Bruyn was due to a joint coalition caucus.

[6] On 16 August 2024, the African National Congress (*'the ANC'*), through its Councillors, gave notice of a motion of no confidence for the removal of Councillor De Bruyn as the Executive Mayor. In the Notice of Motion, substantial reasons were provided for the removal of Councillor De Bruyn. The ANC presented the following reasons for Councillor De Bruyn's removal:

“The reasons for moving the motion is because the Executive Mayor, Councillor is as follows:

Interference in Administrative Functions: The Mayor has directly intervened (sic) in administrative matters, undermining the authority and independence of municipal officials. On 15th August 2024, the Mayor gave

verbal instruction(s) to the acting Municipal Manager to “fire” and remove an official from the municipality administration.

Violation of Municipal Systems Act: The Mayor's actions contravene the Municipal System Act, which mandates a clear separation between the council's policy-making role and the administration's implementation role.

Obstruct the implementation of Council decisions: The Mayor's interferences has obstructed a senior manager and prevented him to implement council decisions, as evidenced by the Mayor's direct instructions to the senior manager (Wilfred Solomons-Johannes) in front of his staff in a meeting held on 15th August 2024, that he is not allow (sic) to manage anything and can only have access to his work emails.

Erosion of Public Trust: The Mayor's actions have eroded public trust in the municipality's ability to govern effectively and transparently.”

[7] The applicants assert that section 29(1) of the Local Government Municipal Structures Act 117 of 1998 (*the Structures Act*) empowers the Speaker to decide when and where the Council meets and provides that if a majority of the councillors request the Speaker in writing to convene a council meeting, the Speaker must convene a meeting at the time set out in the request. The applicants further aver that in terms of Rule 6(6) of the Rules of Order adopted by the Council, the Speaker must convene a special council meeting pursuant to a written request from a majority of Councillors. However, on Friday, 23 August 2024, Ms Marelize Faul, the Manager of Corporate Services, gave notice to Councillors that a special council meeting had been called for Thursday, 29 August 2024 and that the agenda for the meeting would be distributed as soon as it was available.

[8] According to the applicants, Ms Faul had no authority to call for a special council meeting. Furthermore, the applicants asserted that the special council meeting for 29 August 2024 was also unlawfully called in violation of Rule 6(6) of the Rules of Order, as there was no written request submitted to the Municipal Manager by a majority of Councillors to call a special council meeting.

[9] The applicants contend that the special council meeting held on 29 August 2024, was unlawfully convened. They assert that the Council was not legally permitted to consider or make decisions on any matters due to non-compliance with Rule 6(6) of the Rules of Order and Section 29(1) of the Structures Act. On 26 August 2024, a municipal official, Mr Zamion Baron, distributed an agenda for the 29 August 2024 council meeting. In terms of this correspondence, the Municipal Manager gave notice that a special council meeting had been called for 09h00 on 29 August 2024 to discuss matters listed on the agenda. None of the matters on the agenda included the removal or election of the Executive Mayor.

[10] On Tuesday, 27 August 2024, at 15h37, Mr Baron notified Councillors that the Speaker had requested a change in the time of the special council meeting scheduled for 29 August 2024. According to Mr Baron, the Speaker wished to change the time for the meeting from 09h00 to 14h00. Later that day, at 16h35, Mr Barron distributed a further agenda for the special council meeting scheduled for 29 August 2024 to the Councillors for discussion. The second agenda for 29 August 2024 did not include any matters dealing with the removal or election of an Executive Mayor of the Municipality.

[11] On Wednesday, 28 August 2024, at 11h36, Mr Baron distributed a further supplementary agenda for the special council meeting scheduled for 29 August 2024 to the Councillors for discussion. The third agenda also did not include any matters dealing with the removal or election of the Executive Mayor of the Municipality. On 28 August 2024, at 15h22, Mr Baron distributed a fourth supplementary agenda for the special council meeting scheduled for 29 August 2024 to Councillors for discussion. This agenda only referred to the report presented by the directorate of community services for discussion. It did not include any matters dealing with the removal or election of the Executive Mayor of the Municipality.

[12] The applicants asserted that on 29 August 2024, the special meeting began at 14h00. The applicants stated that after the declarations of the Speaker and Councillor De Bruyn as the Executive Mayor, the Speaker ought, in terms of the agenda, to have proceeded to deal with the announcement of Councillor De Bruyn

as the Executive Mayor of members of the Mayoral Committee. The Speaker, however, unilaterally removed the relevant item from the agenda and sought to deal with the announcement of Chairpersons and committee members. The applicants assert that representative Councillors of the ANC complained that the Speaker could not deal with the announcement of Chairpersons and committee members without first allowing for the announcement of the members of the Mayoral Committee.

[13] After a heated debate and disruptions, the Speaker adjourned the special council meeting for an hour. When the special council meeting recommenced at 16h30, the representative Councillors of the ANC complained about the Speaker's failure to adhere to the rules. According to the applicants, the ANC Councillors complained that because the Speaker had adjourned the special council meeting, it could no longer continue, and a new meeting with an agenda had to be called in terms of the Rules of Order.

[14] The applicants further state that the Speaker subsequently adjourned the meeting to continue on Monday, 2 September 2024. According to applicants, the Speaker's decision to adjourn the 29 August 2024 special council meeting to 2 September 2024 contravened Rule 33 of the Rules, which regulates the adjournment of Council meetings. This Rule prescribes that a council meeting may only be adjourned pursuant to a motion that is proposed by a Councillor, seconded by another and adopted by the Council. In terms of Rule 33(6) of the Rules of Order, a meeting that has been adjourned must be reconvened on the date specified in the motion or amended motion.

[15] The applicants contend that there was no proposal for the 29 August 2024 special council meeting to be adjourned, let alone a proposal that was submitted and adopted by the Council. To this end, the applicants averred that the Speaker's decision to adjourn the 29 August 2024 special council meeting to 2 September 2024 was unconstitutional and unlawful.

[16] In anticipation of the meeting for 2 September 2024, on Sunday 1 September 2024, at 11h47, Ms Faul sent an email to the Councillors on behalf of the Speaker regarding the special council meeting scheduled for 2 September 2024. In the said

email, the Speaker requested that an annexe and supplementary agenda be distributed for discussion at the meeting on 2 September 2024. The annexe distributed on behalf of the Speaker dealt with a matter entitled *Validity of the appointment of the Executive Mayor of the Municipality*. This item also included a report from the Municipal Manager concerning the validity of Councillor De Bruyn's appointment as the Municipality's Executive Mayor.

[17] In addition, through Ms Faul's email, the Speaker also distributed a supplementary agenda with an item entitled '*Notice of motion for the removal of the Executive Mayor of Theewaterskloof Municipal Council (Alderman LM de Bruyn) in terms of Rule 26 of the By-law on Rules of Order for the Internal Arrangement of the Municipal Council*'. Given the extremely limited time frame between when the applicants were informed about the notice of motion calling for Councillor De Bruyn's removal and the 2 September 2024 special council meeting, Councillor De Bruyn asserts that he could not collect and prepare evidence and submissions to the Council to deal fairly with the allegations against him. Councillor De Bruyn further contended that it was plainly unfair of the Speaker to afford him, and other Councillors less than 24 hours' notice to consider and prepare for the motion of no confidence in him as the Executor Mayor.

[18] In amplification of their contention, the applicants averred that Councillor De Bruyn was unable to respond adequately to the allegations in the motion in the few hours between when the Speaker gave him the notice just before midday on Sunday, 1 September 2024, and the 2 September 24 council meeting that began at 10h00. The applicants further stated that the unfairness of the Council considering the motion of no confidence, and the 2 September 2024 special council meeting was also compounded by the fact that the motion is dated 16 August 2024 but was only handed to Councillor De Bruyn on the eve of the adjourned special council meeting.

[19] In addition, the applicants asserted that to date, the Speaker has failed to explain why he waited until the day before the special council meeting, scheduled for 02 September 2024, to disclose the notice of motion calling for Councillor De Bruyn's removal as the Executive Mayor.

[20] At the special council meeting held on 2 September 2024, the Council considered the motion of no confidence against Councillor De Bruyn and decided to remove him as the Executive Mayor. The Council subsequently proceeded to elect Theunis Zimmerman as the Executive Mayor of the Municipality. The applicants seek a declaratory and review relief in respect of the impugned decisions. According to the applicants, these decisions constitute the exercise of public power and are reviewable by this Court under the principle of legality. The applicants contended that to the extent that this Court upholds the applicants' review in respect of the Council's decision to remove Councillor De Bruyn as the Executive Mayor, the subsequent decision taken by the Council to appoint the fifth respondent as the Executive Mayor is unlawful and stands to be reviewed and set aside.

[21] On the other hand, the respondents opposed the applicants' application. As the second respondent, the Speaker filed an answering affidavit on behalf of the other respondents and questioned the urgency of this application. The Speaker asserted that the matter could not be urgent as Councillor De Bruyn participated in the 2 September 2024 special council meeting to be appointed Executive Mayor but failed. Regarding the merits of the application, the Speaker stated that the Municipality has complied with both the Rules of Order and the statutory provisions, rendering the removal of Councillor De Bruyn complaint.

[22] To this end, the Speaker implored the Court to dismiss the applicants' application with costs. The Speaker explained that on 16 August 2024, the ANC, through Councillor Derrick Appel, gave notice of the removal of Councillor De Bruyn as the Executive Mayor. The said notice of motion of no confidence was in terms of Rule 26(1) of Theewaterskloof Rules of Order that Councillor Mr Nongxaza seconded.

[23] The Speaker stated that the DA received the notice on the same day, 16 August 2024. The notice provided significant reasons for the removal of Councillor De Bruyn, as detailed in paragraph 6 above. The Speaker asserted that in terms of Rule 26(1) of the Rules of Order, the motion had to be introduced at the next Council meeting or on a date determined by the Speaker in line with Rule 26(1) at least ten (10) working days before the date of the council meeting at which it is to be

introduced. Ten days from 16 August 2024, when the motion was received, was 30 August 2024.

[24] The council meeting took place on 29 August 2024. As a result, the motion of no confidence to remove Councillor De Bruyn was not included on the agenda for this meeting since the required 10-day notice period had not yet expired. The Speaker asserted that on numerous occasions, he informed the DA caucus that there was a motion of no confidence against Councillor De Bruyn for his removal. The Speaker also mentioned that he personally informed Councillor De Bruyn that there was a council motion for his removal and asked him what he would do about it, but the latter did nothing about it.

[25] On 30 August 2024, the ANC formally inquired about the scheduled date for the debate on the motion. A virtual special council meeting was held on 31 August 2024, during which the ANC also inquired about the motion. However, due to network connectivity issues experienced by the councillors, only two items could be addressed on the agenda. On request by the administration, the Speaker asserted that he granted permission for the outstanding issues to form part of the 2 September 2024 special council meeting. The administration advised him that the motion of no confidence could serve at the meeting on 2 September 2024. Despite his instruction on 31 August 2024, the supplementary agenda, which included the motion of no confidence against Councillor De Bruyn, was only sent on 1 September 2024.

[26] On 29 August 2024, the joint coalition caucus agreed that certain items be withdrawn and that the announcement of the Mayoral Committee would be made with the second item, which dealt with the composition of the section 80 Committees of which members of the Mayoral Committee would be the chairpersons. The Speaker further stated that because they anticipated disruption of the ANC challenging Councillor De Bruyn as Executive Mayor, the DA and Councillor De Bruyn did not object when the meeting was adjourned on 29 August 2024. The Speaker disputed vehemently the assertion by Councillor De Bruyn that he unilaterally and unlawfully removed certain items from the agenda. According to the

Speaker, the joint coalition caucus decided to remove the items of which the second applicant was the chairperson.

[27] The reconvened meeting of 29 August 2024 after the adjourned meeting was requested by the majority of the councillors led by the DA. The Speaker contended that the ANC representative Councillors correctly pointed out that the reconvened meeting was against the Rules of Order. As a result, a new meeting was called; therefore, the meeting of 2 September 2024 was not a resumption of the 29 August 2024 meeting. The Speaker indicated that the meeting on 2 September 2024 was agreed upon by all parties involved. To claim that this meeting is unlawful is unreasonable, as everyone consented to it.

[28] The Speaker further propounded that the meeting of 2 September 2024 was not a resumption of the meeting of 29 August 2024. According to the Speaker, in a meeting that the Speaker had with Councillor De Bruyn, they agreed that matters of 29 August 2024 would be dealt with on 31 August 2024 and 2 September 2024, respectively. The meeting of 31 August 2024 was a resumption of the meeting of 29 August 2024 in terms of rule 33(9).

[29] The Speaker asserted that Ms Faul, as Manager for Corporate Services, is the official delegated by the Municipal Manager to compile an agenda. The Speaker did not compile the agenda, but he only instructed Ms Faul to place the item on the agenda through a supplementary agenda. The Speaker further averred that he instructed Ms Faul to include the motion of no confidence against Councillor De Bruyn to be included in the supplementary agenda and to distribute it to the Councillors on 31 August 2024. The instruction was only executed on 1 September 2024, at 11h47, when Councillor De Bruyn received a notice of his removal.

[30] However, the Speaker conceded that the motion of no confidence against Councillor De Bruyn was not urgent and not brought under Rules 28 of the Rules of Order.¹ In his view, neither the Rules of Order nor section 58 of the Structures Act set

¹ Rule 28 of the Rules of Order provides that: “(1) A councillor may direct the attention of the Municipal Council to any matter that does not appear on the agenda and of which prior notice has not been given, by stating briefly the subject of the matter, and propose an urgent motion, *that the matter which*

the time for 'prior notice'. Only Rule 6(4) refers to a period of 5 working days' notice to be given to call a meeting for the Councillors and the public in respect of an ordinary meeting. The Speaker contended that he had personal knowledge of Councillor De Bruyn's interference in the administration. It started on the 14 August 2024 meeting in which the Speaker was elected as Speaker, and Councillor De Bruyn was elected Executive Mayor.

[31] At the council meeting of 22 August 2022, the allegations mentioned in the motion were brought to the attention of the Council after receiving two complaints from senior managers. The Council resolved to investigate the matter via external investigations. According to the Speaker, they have already appointed external legal representatives to investigate the matter.

[32] The Speaker postulated that section 58 of the Structures Act does not explicitly state the time frame in which prior notice of motion must be sent. It only referred to 'prior notice'. When the Speaker receives a notice of motion of no confidence and decides at which council meeting it will be placed on the agenda, the agenda is sent out to the Councillors prior to the meeting, allowing them to receive the notice of motion. In the motion of no confidence in Councillor De Bruyn, no charges were brought against him. The Speaker stated that the motion of no confidence is ostensibly about the loss of confidence in the elected office branch, here being the Executive Mayor.

[33] The Speaker mentioned that there is no need to prepare evidence or submissions, and like any other motion, the Speaker calls on the proposer and seconder to read out the motion to confirm and move it. The Speaker contended that the applicants partook in the process from the beginning to the end. The colleagues from the DA did not oppose the motion of no confidence against Councillor De Bruyn. The motion for Councillor De Bruyn's removal was confirmed and read out by the ANC caucus, and the DA did not oppose the motion; therefore, it became an

has been brought to the attention of the municipal council, be considered forthwith as an urgent matter.

(2) When the motion referred to in subsection 28(1) of this by-law, has been seconded and adopted, the councillor who proposed the motion, shall be permitted to have the matter considered without further notice."

unopposed matter in terms of Rule 13 of the Rules of Order. The Speaker contended that the ANC made a proposal that was seconded for the appointment of an Executive Mayor. After that, the DA also made a proposal that was also seconded for the appointment of an Executive Mayor.

[34] The ANC nominated the fifth respondent, and the DA nominated Councillor De Bruyn, who accepted the nomination. Councillor De Bruyn participated in the election and competed with the fifth respondent. The voting proceeded, and the fifth respondent was successful and duly elected. The Speaker explains that Councillor De Bruyn is dead silent on his participation in the election and in being nominated by the DA. The Speaker opines that if Councillor De Bruyn had been successful, we would not have been seized with this application for his appointment.

[35] According to the Speaker, the process of the removal of the Executive Mayor only became unlawful because the DA and Councillor De Bruyn were voted out of power. If any other party structure had been voted out, the applicants would not have raised any issue. The Speaker averred that the removal of Councillor De Bruyn was correctly dealt with in terms of the Rules of Order, and Councillor De Bruyn was, therefore, rightfully removed at a lawfully convened and constituted special council meeting on 2 September 2024. The Speaker denied that the applicants are entitled to the relief sought in the notice of motion and asked this Court to dismiss the applicants' application with costs.

PRINCIPAL SUBMISSIONS BY THE PARTIES

[36] At the hearing of this matter, Mr Sive, the applicants' Counsel submitted that this matter is urgent in that without the urgent intervention of this Court, as the lawfully appointed Executive Mayor, Councillor De Bruyn is inhibited by the impugned decisions from continuing to perform any of his duties. Furthermore, Counsel submitted that the impugned decisions create fundamental uncertainty in the democratic system and set a precedent that threatens to undermine the democratic functioning of other Municipal Council.

[37] On the merits, Mr Sive submitted that the applicants' application is underpinned by three guiding principles, which are: *first*, in making the impugned decisions, the Council and the Speaker were bound to comply with the Constitution, the Structures Act and the By-Laws on Rules of Order for the internal arrangements of the Council. *Secondly*, Mr Sive submitted that this Court is compelled by section 172(1)(a) of the Constitution to declare the impugned decisions invalid. *Thirdly*, Mr Sive contended that a final order may be granted if those facts averred in the applicants' founding affidavit, which have not been seriously disputed by the Speaker together with the facts alleged by Speaker, justify such an order.

[38] Mr Sive pointed to several shortcomings which the Speaker and the Council failed to comply with when Councillor De Bruyn was removed as Executive Mayor through a motion of no confidence. Amongst others, Mr Sive referred to section 58 of the Structures Act, which expressly requires that prior notice of an intention to move for the removal of the Executive Mayor must be given. Mr Sive contended that this section requires that fair notice must be given to Councillor De Bruyn and all Councillors about the motion of no confidence calling upon Councillor De Bruyn's removal from office as the Executive Mayor.

[39] Mr Sive further submitted that the Speaker admitted that Councillor De Bruyn was only informed of the motion of no confidence against him as the Executive Mayor on Sunday, 1 September 2024, less than 24 hours before the special council meeting held on 2 September 2024. According to Counsel, the limited time afforded to Councillor De Bruyn meant that he could not collect and prepare evidence and submissions to the Council to deal with the allegations against him in the motion of no confidence.

[40] The applicants' Counsel further submitted that it was irrational for the Council to follow a process that precluded Councillor De Bruyn from fairly submitting relevant considerations and adequately responding to the allegations in the motion calling for his removal. The validity of the decision to elect the fifth respondent as the Executive Mayor depended on the prior decision by the Council to remove the second applicant. Mr Sive submitted that this decision stands to be reviewed and set aside or declared nullified.

[41] In addition, Mr Sive argued that the Speaker's conduct in this matter was egregious. According to Counsel, the Speaker acted in bad faith and in audacious violation of his constitutional and statutory duties by disregarding the Rules of Order when he adjourned the meeting on 29 August 2024 without a motion proposed, seconded and adopted by the Council thus contravening Rule 33 of the Rules. Counsel asked the court to grant the relief sought in the notice of motion and to grant costs *de bonis propriis* against the Speaker.

[42] On the other hand, Mr Carolissen, the respondents' Counsel contended that the applicants partook in the process of the removal of Councillor De Bruyn from his position as Executive Mayor from the beginning to the end. The applicants did not oppose the motion. Mr Carolissen submitted that the said motion of Councillor De Bruyn's removal from office was confirmed, read out by the ANC caucus and the DA did not oppose the motion and therefore it became an unopposed matter in terms of Rule 13 of the Rules of Order.

[43] Mr Carolissen further submitted that from the minutes of proceedings, the ANC made a proposal that was seconded for the appointment of an Executive Mayor, and thereafter, the DA also made a proposal that was also seconded for the appointment of an Executive Mayor. Counsel argued that the ANC nominated the fifth respondent, and the DA nominated Councillor De Bruyn, who accepted the nomination. Councillor De Bruyn participated in the election and competed with the fifth respondent. Following that, the voting occurred, resulting in the successful election of the fifth respondent.

[44] The respondents' Counsel contended that Councillor De Bruyn is dead silent on his participation in being nominated by the DA and in his participation in the election. Had Councillor De Bruyn been successful with the election, Counsel argued, we would not have been seized with this application for his appointment. Mr Carolissen further asserted that the process of the removal of the Executive Mayor only became unlawful because Councillor De Bruyn and the DA were voted out of power. Mr Carolissen further explained that the motion of no confidence against

Councillor De Bruyn was confirmed and was not opposed. The removal of Councillor De Bruyn was correctly dealt with in terms of the Rules of Order.

[45] Mr Carolissen further submitted that on 1 September 2024, all the Councillors, including Councillor De Bruyn, were given prior notice for the motion of no confidence to be tabled before the Council meeting. At the Council meeting of 2 September 2024, the motion was tabled and debated by the Councillors, and Councillor De Bruyn was nominated and participated in the meeting. Only afterwards did Councillor De Bruyn and the DA complain about the meeting. No complaints were raised before the meeting. According to Mr Carolissen, the object of the Structures Act and the Rule of Order have been achieved in that Councillor De Bruyn received prior notice of his removal. The Councillors debated the motion in their meeting, and Councillor De Bruyn participated and was nominated for the meeting. Counsel implored the Court to dismiss the applicant's application with costs.

ISSUES TO BE DECIDED

[46] From the discussion above, this application raises four critical questions for consideration, namely:

1. Whether the applicants have made out a case for urgency as envisaged in Rule 6(12) of the Uniform Rules?
2. Whether the decision to remove Councillor De Bruyn as the Executive Mayor should be reviewed and set aside?
3. Whether the participation of Councillor De Bruyn in the council special meeting that led to his removal amounts to a waiver of rights to challenge the procedural fairness of the meeting?
4. Should the Speaker be ordered to pay punitive costs out of his own pocket as a penalty for improper conduct?

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[47] For completeness, I will deal with the disputed issues discussed above *ad seriatim*.

Urgency

[48] The respondents challenged the urgency with which this application was filed. They argued that this matter is not urgent. The respondents, particularly the Speaker, asserted that the applicants brought this application against him as a personal vendetta because, as a coalition partner, the Speaker allowed the motion against Councillor De Bruyn to be confirmed in terms of the Rules of Order and statutory regulations. The Speaker also contended that this application is merely a political ploy to bring change to the Municipality. In the respondents' view, the matter could not be urgent because Councillor De Bruyn participated on 2 September 2024 to be appointed as the Executive Mayor but was unsuccessful.

[49] Rule 6(12) of the Uniform Rules of court confers courts with a wide discretion to decide whether an application justifies enrolment on the urgent court roll based on the facts and circumstances of each case.² An application is urgent when an applicant cannot obtain substantial redress in due course.³ The degree of departure from the modes of service and time frame in the Uniform Rules must be commensurate with the urgency in each case.⁴ I have considered the issues raised in this matter, and I am of the view that it is urgent. If indeed, the impugned decisions leading to the removal of Councillor De Bruyn from his position as an Executive Mayor are unlawful, it would constitute an ongoing affront to democracy which requires urgent rectification by this Court.

² *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] 4 All 67 (GP) at para 63; *Caledon Street Restaurants CC v D'Aviera* 1998 JDR 0116 (SE) at 8.

³ *Dlamini v City Manager of the City of Ekurhuleni Metropolitan Municipality* [2023] ZAGPJHC 147 at para 27.

⁴ *Republikeinse Publikasie (edms) Bpk v Afrikaanse Pers Publikasie (edms) Bpk* 1972 (1) SA 773 (A) at 782A-G.

[50] Furthermore, it is now trite that the reviews of abuse of public power implicating the rule of law are normally urgent.⁵ The applicants asserted that the Speaker acted egregiously by flouting the Rules of Order and the relevant statutory provisions of the Structures Act when the special council meeting was called which led to the removal of Councillor De Bruyn as an Executive Mayor. In my view, as it will be demonstrated hereunder, the impugned decisions constitute an ongoing affront to democracy, which requires urgent rectification by this Court.

[51] Without the urgent intervention of this Court, the applicants will be unable to obtain substantial redress in respect of the further damage or harm that will virtually result from the implementation of the impugned decisions. The impugned decisions create fundamental uncertainty in the democratic system and set a precedent that threatens to undermine the democratic functioning of other municipalities.

[52] To this end, I agree with Mr Sive's assertions that, should this Court fail to intervene promptly in this matter, the Municipality's operations will remain in disarray. The various officials employed by the Municipality will find themselves uncertain regarding the legality of decisions made by any newly appointed Executive Mayor. This ambiguity will hinder their ability to safeguard and promote the interests of the constituents they serve. In the circumstances, I am of the firm view that this matter is urgent and satisfies the requirements set out in Rule 6(12) of the Uniform Rules of court. I turn to consider the second disputed issue in this application.

Should the decision to remove the second applicant as Executive Mayor be reviewed and set aside or declared invalidity?

The Legal Framework

[53] The Constitution of our country establishes local government as a distinctive sphere of government that is interdependent and interrelated with national and provincial spheres of government. Section 155 of the Constitution establishes

⁵ *Democratic Alliance v National Commissioner of Correctional Services; Hellen Suzman Foundation v National Commissioner of Correctional Services; Afriforum NPC v National Commissioner of Correctional Services* [2022] 2 All SA 134 (GP) at para 12.

various categories of Municipalities. The Structures Act, established in terms of section 155(3) of the Constitution, gives effect to the aspirations envisioned in the Constitution of providing municipal services equitably and sustainably. Theewaterskloof Municipality was established in terms of section 12 of the Structures Act. Members of the Council are elected in terms of section 157 of the Constitution.

[54] Section 151(3) of the Constitution confers upon a Municipality the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. Section 160(6) of the Constitution confers on the municipal council the power to make By-Laws which prescribe the rules and orders for its internal arrangements and its business proceedings.

[55] Theewaterskloof Municipal Council adopted Rules of Order in terms of sections 160(6)(a) and (b) of the Constitution to make by-laws that prescribed rules and orders for its internal arrangements and business proceedings. The Rules of Order adopted by the Council for the internal arrangements of the Municipal Council tightly regulate the Council's powers. The purpose of the Rule of Order for the Theewaterskloof Municipal Council is to make provisions for Rules for the business and proceedings of the Municipal Council and to make provisions for internal arrangements and matters in connection therewith.

[56] Consistent with the doctrine of the separation of powers, this Court has a duty to ensure that the Council comply with the Constitution and the Local Government: Municipal Structures Act 117 of 1998 (*Structures Act*). The court has a duty to ensure that the Council safeguard the fundamental constitutional values of accountability, the rule of law and the supremacy of the Constitution. The Court is responsible for ensuring that the decisions taken by the Council are consistent with the constitutional values enshrined in the Constitution. Notably, section 160(8)(b) of the Constitution establishes that members of the Council are entitled to participate in its proceedings and those of its committees in a manner that is consistent with democracy.

[57] The Speaker of a Municipal Council decides when and where the council meets.⁶ If a majority of the Councillors requests the Speaker in writing to convene a Council meeting, the Speaker must convene a meeting at a time set out in the request. In general, the Speaker presides at the meetings of the Council and must ensure that the Council meets at least quarterly.⁷ The Speaker is required to maintain order during meetings and to ensure compliance in the Council with the Code of conduct. Notably, the Speaker must ensure that the Council meetings are conducted in accordance with the Rules of Order and must take responsibility for the ethics and accountability of the Council.⁸

The Special Council Meeting of 29 August 2024

[58] In the present matter, it is common cause that on Friday, 23 August 2024, the Manager of Corporate Services, Ms Marelize Faul, notified Councillors that a special council meeting had been called for Thursday, 29 August 2024. In the correspondence, Ms Faul advised Councillors that a special council meeting has been scheduled for Thursday, 29 August 2024, at the Council Chambers, Municipal Offices in Caledon. In addition, Ms Faul advised the Councillors that an agenda for the meeting would be distributed as soon as it was available. It is common cause that after Ms Faul's correspondence, various agendas were circulated to the Councillors in anticipation of the special meeting of 29 August 2024.

[59] From the express provisions of the Rules of Order, particularly Rule 6(6), Ms Faul, the Manager of Corporate Services, had no authority to call a Special Council Meeting. Rule 6(6) of the Rules of Order sets out the circumstances under which a special council meeting may be called. For completeness, Rule 6(6) of the Rules of Order provides as follows:

“A majority of councillors may request the speaker in writing to convene a special council meeting, and the speaker shall convene such a meeting at a time set out in the request, subject thereto –

⁶ Section 29(1) of the Local Government: Municipal Structures Act 117 of 1998.

⁷ section 37(c) of the Local Government: Municipal Structures Act 117 of 1998.

⁸ section 37(e) of the Local Government: Municipal Structures Act 117 of 1998.

(a) that should the speaker fail to convene a special council meeting as requested by majority of councillors, *the majority of councillors may request the municipal manager to convene such a meeting*, and the *municipal manager shall convene such meeting* at the time as set out in the request; and

(b) the noticed by the majority of councillors for a special council meeting shall clearly indicate the reports to be dealt with at such a special meeting, and no other matters may be dealt with at the special council meeting, except with the consent of the majority councillors.” (emphasis added)

[60] The above Rules of Order explicitly indicate that a special council meeting may be convened by either the Speaker or the Municipal Manager, contingent upon the submission of a written request by a majority of the Councillors. It is evident that the majority of Councillors in this case did not provide a written notice to the Speaker to convene the special council meeting, nor did they outline the reports that were to be dealt with during this meeting. Furthermore, the Municipal Manager had no authority to unilaterally schedule a special council meeting on 29 August 2024, as there was no formal request from the majority of Councillors for convening such a meeting.

[61] From a careful reading of Rule 6(6) discussed above, a Municipal Manager could call a special council meeting as requested in writing by a majority of councillors only if the Speaker had previously failed to call such a meeting despite a written request by a majority of councillors. Rule 6(6)(a) of the Rules of Order makes is abundantly clear that the majority of councillors may request the Municipal Manager in writing to convene a special council meeting if the Speaker has failed to convene the meeting as requested by the majority of Councillors.

[62] In the present matter, there is no evidence whatsoever that the Speaker failed or refused any request by the majority of Councillors to call for the special council meeting on 29 August 2024. There is also no evidence that such a request was ever made in writing by a majority of councillors to the Speaker or the Municipal Manager.

Evidently, the Municipal Manager could not lawfully and independently call for the 29 August 2024 special council meeting. In my view, the purported special council meeting called by the Municipal Manager for 29 August 2029 did not comply with the Structures Act and the Rules of Order of Theewaterskloof Municipality.

[63] I must stress the fact that the exercise of all public power in terms of our law must comply with the Constitution, which is the Supreme law and the doctrine of legality, which is part of our law. In terms of the principle of legality, which flows from the Rule of law as a founding value in section 1(c) of the Constitution, the Speaker and the Council may not exercise any power or perform a function beyond that conferred upon them by law.⁹ Consistent with this principle, in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan*,¹⁰ the Constitutional Court stated:

“It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”

[64] The Council's exercise of public power must be consistent with the law, including the Constitution, Structures Act, and the Rules of Order. As it will be demonstrated hereunder, the special council meeting called by the Municipal Manager was fraught with irregularities and in my view was unlawful.

The Special Council Meeting of 02 September 2024

[65] It is common cause that after a heated debate and disruptions at the meeting of 29 August 2024, the Speaker adjourned the special council meeting for an hour. The respondents contend that on resumption of the meeting, the ANC caucus pointed out that the reconvened meeting was in contrast with the Rules. Pursuant thereto, a new meeting was called, and thus, the meeting of 2 September 2024 was not a resumption of 29 August 2024. According to the respondents, the meeting of 2

⁹ *Affordable medicines Trust of Health* 2006 (3) SA 247 (CC) at para 49.

¹⁰ 1999 (1) 1 SA 374 (CC) at para 58.

September 2024 was agreed upon with the applicants and for the applicants to say the meeting is unlawful is preposterous. On the other hand, the applicants contend that the meeting of 2 September 2024 was a continuation of the meeting of 29 August 2024.

[66] There is a dispute of fact on whether the meeting of 2 September 2024 was a continuation of the first meeting of 29 August 2024 or whether it was a new meeting. In my view, what is critical is that at that meeting (2 September 2024), Councillor De Bruyn was removed from his position as an Executive Mayor. The Speaker admits that the meeting of 2 September 2024 was a special council meeting. The Speaker does not dispute that contrary to section 29(1) of the Local Government: Municipal Structures Act and Rule 6(6) of the Rules of Order, he did not convene the 2 September 2024 special council meeting pursuant to a written request from a majority of councillors.

[67] As discussed above, section 29(1) of the Structures Act empowers the Speaker to decide when and where the Council meets and provides that if a majority of the councillors request the speaker in writing to convene a council meeting, the speaker must convene a meeting at the time set out in the request. For completeness, section 29(1) of the Local Government: Municipal Structures Act 117 of 1998 provides:

“The speaker of the municipal council decides when and where the council meets subject to section 18(2), but if the majority of the councillors request the speaker in writing to convene a council meeting, the speaker must convene a meeting at the time set out in the request.”

[68] It is clear from the above provision that the Speaker's decision to call the 2 September 2024 special meeting was *ultra vires* and inconsistent with the Rules of Order. The Speaker acted beyond the power conferred on him by section 29(1) of the Structures Act. In addition, Councillor De Bruyn impugned the legality of his removal from his position as he contends that it was fraught with irregularities. I agree with this proposition.

[69] I must state that the Speaker's contention that the meeting of 2 September 2024 was a new meeting and not a continuation of the special meeting of 29 August 2024 is unsupported by the objective facts and cannot be correct. The objective facts, particularly the documentary evidence submitted on record, clearly confirm that the meeting of 2 September 2024 continued the meeting of 29 August 2024. The email correspondence of Ms Faul, the Manager of Corporate Services, on 1 September 2024 corroborates the applicants' version.¹¹ This email was sent under the instruction of the Speaker indicating his intention for the 2 September 2024 special council meeting to be a continuation of the meeting held on 29 and 31 August 2024.

[70] Importantly, the Speaker acknowledges that matters from the 29 August 2024 special meeting were dealt with at the special council meeting of 2 September 2024. Rule 33(9) of the Rules of Order provides that no matters may be transacted at the resumption of an adjourned council meeting other than the unconcluded reports that were on the agenda of the meeting which has been adjourned. Evidently, the inclusion of the motion of no confidence against Councillor De Bruyn for the special council meeting of 2 September 2024 offended Rule 33(9) of the Rules of Order.

[71] On 2 September 2024, a dramatic series of events unfolded that ultimately resulted in the removal of Councillor De Bruyn from his position as an Executive Mayor. I turn to consider those events. It is common cause that on Sunday, 1 September 2024, at 11h47, Ms Faul communicated on behalf of the Speaker an annexe and a supplementary agenda for the meeting of 2 September 2024. The annexe distributed on behalf of the Speaker dealt with a matter entitled validity of the appointment of the Executive Mayor. This item included a report from the Municipal Manager concerning the validity of the Speaker's appointment as the Executive Mayor of the Municipality. Through Mr Faul's email to the Councillors, the Speaker also distributed a supplementary agenda with an item entitled "*Notice of motion for the removal of the Executive Mayor of the Theewaterskloof Municipal Council*

¹¹ It stated: "the 3 agenda-items of the special council in-committee Meeting of the 31st August 2024, which was not discussed, will also be discussed as part of the in-committee Agenda of the Special Council Meeting of the 2nd of September 2024."

(Alderman LM De Bruyn) in terms of Rule 26 of the Bylaw of Rules of Order for the Internal arrangements of the Municipal Council.

[72] It is a matter of record that the motion of no confidence against Councillor De Bruyn was incorporated into the agenda for the meeting scheduled on 2 September 2024. This development was communicated to the Councillors at 11h47, on 01 September 2024, leaving them with less than 24 hours to adequately prepare for the motion. Notably, the motion was neither urgent nor did it necessitate any departure from the established Rules of Order. The timing of this notification in my view, raises concerns, especially considering that the motion was not of an urgent nature and, therefore, did not warrant any deviation from the established Rules.

[73] In terms of Rules 6(4) and 6(7), the Municipal Manager or his delegated official had to give notice of every council meeting to each Councillor and the public at least 5 working days before such meeting takes place. It cannot be disputed that adequate notice was not given at all to the Councillors and to Councillor De Bruyn for the special council meeting of 02 September 2024. The Speaker has not explained or advanced any plausible explanation as to why he waited until the day before the Council meeting to disclose the notice of motion calling for Councillor De Bruyn's removal as the Executive Mayor.

[74] The Speaker admitted in his answering affidavit that the Councillors were only informed of the motion against Councillor De Bruyn, the Executive Mayor, on Sunday, 1 September 2024, less than 24 hours before the special council meeting held on 2 September 2024 where the Council adopted the motion. According to the Speaker, despite his instruction on 31 August 2024, the supplementary agenda, which included the motion, was only sent on 1 September 2024.

[75] What is concerning is that the Speaker does not dispute that the limited time afforded to Councillor De Bruyn meant that he could not collect and prepare evidence and submissions to the Council to deal with the allegations made against him in the motion of no confidence. Instead, the Speaker contends that Councillor De Bruyn would be granted ample time to defend the allegations levelled against him when an external investigation into the allegations against him commences.

[76] In my view, this contention misses the point and cannot be correct. It must be stressed that Councillor De Bruyn and the Councillors in the Council do not represent their own interests but the interests of the electorate or their constituencies. The short notice on the motion of no confidence given to the Councillors deprived them of the opportunity to consult with the constituencies they represent on the motion of no confidence against Councillor De Bruyn. Furthermore, removing an Executive Mayor is a decision with profound consequences which, in my view, absent true urgency, cannot be rushed and must follow the proper process in the Rules of Order. The motion of no confidence was plainly not urgent. The motion was submitted to the Speaker on 16 August 2024 and was not placed before the Council by the Speaker as an urgent motion.

[77] I must emphasise that the demand for the Council to observe a fair process is a cornerstone of democratic governance. It ensures that an Executive Mayor facing removal is given a fair chance to present his case. As an incumbent Executive Mayor, Councillor De Bruyn should have been given adequate notice of the motion of no confidence against him. Significantly, section 160(8)(b) of the Constitution enjoins members of a Council to participate in its proceedings in a manner that is consistent with democracy. Furthermore, our constitutional democracy values require that Councillors be given adequate notice to review the motion, understand its grounds, and make an informed decision.

[78] In this case, the short notice deprived Councillors of the opportunity to democratically participate in the adjudication of the motion. The failure to provide adequate notice to the Councillors compromised their ability to efficiently and effectively fulfil their duties. I firmly believe that a decision of such significance, namely the removal of an Executive Mayor, ought to be conducted with transparency and accompanied by full disclosure of the reasons and evidence supporting the motion. The public must also have confidence in the fairness and transparency of the Council's procedures. The short notice given to the Councillors for the removal of Councillor De Bruyn as the Executive Mayor erodes public trust and confidence. Councillor De Bruyn and other Councillors were entitled to fair notice before the Council removed him as the Executive Mayor.

[79] It is also worth noting that section 58 of the Structures Act provides that a municipal council, by resolution, may remove its Executive Mayor or Deputy Executive Mayor from office. However, 'prior notice' of an intention to move a motion for the removal of the Executive Mayor or Deputy Executive Mayor must be given. This section does not set out when prior notice must be given. Consistent with the fundamental principles of the rule of law and the principles enshrined in section 160(8)(b) of the Constitution, it is my considered opinion that it was crucial to provide a fair and timely notice to Councillor De Bruyn, and other Councillors, regarding the motion that sought the removal of the Executive Mayor from office. This timely and transparent notification was critical in enabling the Councillors to engage in a thoughtful and informed manner, thereby allowing them to fulfil their democratic responsibilities and contribute effectively to the decision-making process in the Council.

[80] In *Democratic Alliance v Matika*,¹² the court observed that as far as national legislation is concerned, the provisions of section 58 of the Municipal Structures Act are indeed intended to facilitate and achieve the objects in the Constitution, for the simple reason that the democratic right to participate, as intended in the Constitution, cannot be exercised by a member or councillor if he/she is unaware of the fact that the meeting is going to take place.

[81] In addition to the court's finding in *Matika*, I believe that the notice envisaged in section 58 must be fair, reasonable and adequate. The notice must enable the Councillors to engage expressively and meaningfully with the substance of the motion and give the Executive Mayor ample time to collect and prepare evidence and make submissions to Council to deal with the allegations against him in the motion of no confidence.

[82] To top it all, the evolution of our constitutional jurisprudence has culminated in a principle that recognises rationality as applicable not only to the decisions rendered

¹² 2019 (1) SA 214 (NCK) at paras 43 and 55.

but also to the processes employed to reach those decisions.¹³ Thus, the principle of rationality applies to the process in terms of which the decision to remove Councillor De Bruyn was arrived at. There must be a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.¹⁴

[83] In the present matter, it was irrational for the Council to follow a process that precluded the Councillors and Councillor De Bruyn from fairly and adequately submitting relevant considerations and properly responding to the allegations made in the motion calling for his removal. The procedure set forth by the Speaker did not enable the Council to make a rational decision regarding the motion of no confidence against the second applicant. In my considered opinion, the removal of Councillor De Bruyn from the position of Executive Mayor was unlawful and should be reviewed and set aside. I turn to consider the third disputed issue.

Whether the applicants waived their rights to challenge the procedural fairness of the meeting?

[84] The third disputed issue that demands this Court's attention is whether Councillor De Bruyn, in not only participating in the meeting but being nominated and accepting the nomination, waived his right to contest the validity of the meeting. Mr Carolissen submitted that when Councillor De Bruyn participated in the meeting and was nominated, he waived his procedural rights to later complain about the lawfulness of the meeting. Counsel further submitted that when Councillor De Bruyn accepted the nomination, he at that stage believed that because of the coalition they had with the Good Party and one other party, they would succeed in the election. On this basis, Councillor De Bruyn participated in the meeting and was not concerned about its validity.

[85] The respondents' Counsel argued that Councillor De Bruyn, as an Executive Mayor, was always part of the meeting on 29 and 31 August 2024. He never

¹³ *Law society of South Arica v President of the Republic of South Africa* 2019 (3) SA 30 (CC) at para 61.

¹⁴ *Law society of South Arica v President of the Republic of South Africa* (supra) at para 64.

objected to what happened in that meeting. The applicants have only launched the application because the election did not run in their favour, as Councillor De Bruyn was not appointed as the Executive Mayor. Mr Carolissen contended that Councillor De Bruyn's participation in the meeting and in accepting the nomination waived any right he had to contest the validity of the meeting.

[86] Mr Sive, on the other hand, refuted this proposition and argued that the signed minutes of the special council meeting confirm that Councillor Fredericks of the DA raised an objection during the council meeting on 2 September 2024 and indicated that the DA would bring a review application. Mr Sive further submitted that the applicants could not waive the demands of the statutory provisions and Rules on which they rely in this application. The failure to honour these provisions cannot be ignored by the applicants, as it is the public, not just the applicants, who benefit from them. Mr Sive implored the court to reject the respondents' waiver argument.

[87] Waiver is the legal act of abandoning a right on which one would otherwise be entitled to rely.¹⁵ The onus to prove waiver lies with the party asserting it. A waiver depends on the intention of the right-holder. A waiver can be proved through express actions or by conduct plainly inconsistent with an intention to enforce the right.¹⁶ In *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa*,¹⁷ the Supreme Court of Appeal noted that a waiver is the renunciation of a right, and when the intention to renounce is expressly communicated to the affected party, such person is entitled to act upon it. The Court noted that when the renunciation is evidenced by conduct inconsistent with the enforcement of the right or clearly showing the intention to surrender that right, the intention can be acted upon, and the right perishes.¹⁸

[88] In the present matter, the applicants challenged the decision to remove Councillor De Bruyn from his position as an Executive Mayor under the principle of legality. The principle of legality flows from the rule of law as a founding value in

¹⁵ *National Union of Metal workers of South Africa v Intervale (Pty) Ltd* 2015 (2) BCLR 182 (CC) at para 60.

¹⁶ *National Union of Metal Workers of South Africa v Intervale (Pty)* (*supra*) para 61.

¹⁷ (330/2023) [2024] ZASCA 107 (3 July 2024) at para 23.

¹⁸ At para 23.

section 1(c) of the Constitution. The respondents asserted that the applicants renounced their rights when they participated in the meetings on 29 August and 2 September 2024. To succeed with this defence, the respondents must show that the applicants, as the right-holders and with full knowledge of their rights to challenge the impugned decisions, decided to renounce these rights.

[89] In my view, the respondents have not established that the applicants voluntarily and knowingly abandoned their right to challenge the decision to remove Councillor De Bruyn, an executive Mayor, under the principle of legality with full knowledge and understanding of these rights. The participation of Councillor De Bruyn in the subsequent election for the Executive Mayor is not enough to find that there was a renunciation of a right. It cannot be said that the participation of Councillor De Bruyn in the meeting is inconsistent with an intention to challenge the decision to remove him as an Executive Mayor.

[90] Importantly, at common law, certain rights affecting the public interest may not be waived, and their waiver would amount to a contravention of mandatory provisions.¹⁹ In other words, an individual cannot waive a matter in which the public have an interest. In *SA Eagle Co Ltd v Bavuma*,²⁰ the Appellate Division, as it then was, held that a person may only waive a benefit from a statutory provision if no public interest were affected and no other person may seek to enforce that benefit. Simply put, a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved.

[91] The Court stated:

“It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms.... this rule has frequently been applied by our Courts in holding that statutory protection

¹⁹ *S v Van Zyl* 1991 (1) SA 804 (A) at 808-G-H.

²⁰ 1985 (3) SA 42 (A) at 49 G-H.

(often in the form of limitation of actions) afforded local authorities and Government departments is capable of waiver when the protection is not intended for the benefit of the public but for the benefit of the local authority or Government department itself. So, for example, it was held in *Steenkamp v Peri-Urban Areas Health Committee* 1946 TPD 424 at 429 that the protection afforded by s 172 of Ord 17 of 1939, which provided that all actions against a local authority shall be brought within six months of the time when the cause of action arose, was not intended for the benefit of the public or the ratepayers but for the protection of the local authority itself, and could therefore be waived.”

[92] While in *Dr JS Moroka Municipality v Betram (Pty) Limited and Another*,²¹ the Supreme Court of Appeal stated:

“The first respondent’s argument on this issue faces a fundamental difficulty. The decision in *SA Eagle Insurance Co Ltd v Bavuma*, referred to as authority for the proposition in the dictum in *Millennium Waste Management* quoted above that condonation can be granted where it is not inconsistent with public policy, related to a statutory provision enacted for the specific benefit of an individual or body. It was held that *such a benefit may be waived by that individual or body provided that no public interests were affected thereby and that it was not open to another person*, whom the statute was not intended to benefit, to insist that the provision be observed.” (emphasis added)

[93] The golden thread from these cases clearly buttresses the point that an individual cannot waive a right in which the public has an interest. It follows that in the present matter, the applicants could not waive their rights to rely on the statutory provisions and the rules they invoke in this application to challenge the impugned decisions. This is so because the statutory provisions and the rules upon which their case for review is founded clearly affect the public interest and are enforceable under the principle of legality. The Rules expressly make provision for the rules of

²¹ [2014] 1 All SA 545 (SCA) at para 18.

order for the business and the proceedings of the Council. Moreover, the Rules and statutory provisions govern the function of the Council, which serves the interests of the public.

[94] The Rules of Order ensure transparency, accountability, fairness and democratic participation in local government processes. The applicants cannot waive these Rules and statutory provisions of the Structures Act that underpin their application. These legal requirements are established not only to support the applicants in their application but also to uphold the welfare and rights of the general public. By adhering to these rules, both the applicants and the public benefit from a structured and equitable process that ensures transparency and fairness within the governance of the Municipality they serve.

[95] In addition, as previously stated, the applicants have brought this application under the principle of legality as enshrined in section 1(c) of the Constitution. In my view, there can be no question of waiver in relation to the demands imposed by the Constitution.²² As pointed out by Mr Sive, the supremacy clause of the Constitution requires that the Constitution itself be treated as the supreme law.²³ This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power, including the removal of the Executive Mayor, is subject to constitutional control.

[96] In light of the Supremacy of the Constitution, it is fundamentally incoherent to suggest that the requirements dictated by the constitutional principle of legality can be waived. Even if the applicants in this case desired to waive the demands of the constitutional principle of legality, they cannot do so because any such act would be unconstitutional and invalid. It follows that the applicants in this matter could not waive their rights to challenge the legality of the decision taken by the Council to remove the second applicant from his position as the Executive Mayor.

²² Woolman Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on Barkhuizen” (2008) 125 SALJ 10 at 13.

²³ *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) at para 88.

[97] Consequently, from the above discussion, it is evident that the impugned decisions made by the Council on 2 September 2024, are unconstitutional and unlawful. In terms of section 172(1)(a) of the Constitution, the decision to remove Councillor De Bruyn from his position as the Executive Mayor is found to be inconsistent with the Constitution and must be declared invalid. The unlawful removal of Councillor De Bruyn as Executive Mayor compromised the legality of the fifth respondent's election as Executive Mayor. Both decisions, in my view, must be reviewed and set aside. This leads to the last disputed issue.

Whether the Speaker should be ordered to pay punitive costs *de bonis propriis* as a penalty for improper conduct?

[98] It is trite that the question of costs is a matter in the court's discretion. It is equally trite that, as a rule, costs follow the result, and successful parties should be awarded their costs.²⁴ This rule should be departed from only where good grounds for doing so exist.²⁵ One of the fundamental costs principles is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation.

[99] The applicants seek an order that the Speaker be ordered to pay the costs of this application personally from his own pocket for flaunting the statutory provisions and Rules of Order in the Council meeting. The applicants contend that the Constitution required the Speaker to discharge his duties to maintain the highest standard of professional ethics and be accountable.²⁶ The applicants assert that instead, the Speaker acted in bad faith and in audacious violation of his constitutional and statutory duties. According to the applicants, the Speaker failed to comply with his constitutional injunctions

[100] The principles pertaining to personal costs orders against public officials are well established in our law. Courts have granted costs *de bonis propriis* against individuals in their personal capacities where their conduct showed a gross disregard

²⁴ *Union Government v Gass* 1959 (4) SA 401 (A) 413.

²⁵ *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 3 SA 692 (C).

²⁶ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 146.

for their professional responsibilities, and where they acted inappropriately and in an egregious manner.²⁷ Mr Sive submitted that the Constitution itself is the source of the power to order personal costs against public officials who are guilty of bad faith or gross negligence in conducting litigation and discharging their constitutional obligations.

[101] When awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case. The decision a court takes is a matter of fairness to both sides.²⁸ The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as to costs as would be fair in the discretion of the court.

[102] Having considered the circumstances of this matter, I am of the view that a punitive costs order against the Speaker is not warranted. I am also not persuaded that any costs order *de bonis propriis* should be granted against the Speaker. Whilst I appreciate that the Speaker failed to adhere to the Rules of Order and the relevant statutory provisions, I am of the view that he should not be personally mulcted with an order of costs. I appreciate that the Speaker presides and maintains order at the Council; however, I am of the view that it is the Council that made the decision to remove Councillor De Bruyn from his position without following due process. I believe that the respondents must bear the costs hereof jointly and severally in their official capacities.

ORDER

[103] Consequently, given all these considerations, the following order is granted:

²⁷ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 146; *Pheko v Ekurhuleni Metropolitan Municipality* 2015 (5) SA 600 (CC) at para 51 and 54.

²⁸ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F- G

[104] The applicants' non-compliance with the Uniform Rules of court relating to forms, service and time periods is condoned, and this application is dealt with as a matter of urgency under uniform rule 6(12).

[105] The decision by the Council of Theewaterskloof Local Municipality at its meeting on 2 September 2024 to -

105.1 remove Lincoln D Bruyn as the Executive Mayor of the Municipality,
and

105.2 elect Theunis Zimmerman as the Executive Mayor of the Municipality
(*the impugned decisions*) are declared unconstitutional, unlawful and invalid.

[106] The impugned decisions are reviewed and set aside.

[107] The respondents are directed to pay the costs of this application jointly and severally on scale C of the Uniform Rules.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellants: Adv Sive

Instructed by: Minde Schapiro & Smith Inc

For the first Respondent: Adv Carolissen

Instructed by: Brink Thomas Cassiem