

SACHS J ABRIDGED JUDGMENT

Democratic Alliance and Another v Masondo NO and Another

[37] I agree with O'Regan J that the mere fact that the mayoral committee is appointed by and answerable to the mayor and not the council, does not exempt it from being considered "a committee of the council" subject to the fair representation requirements of section 160(8)(a) of the Constitution. I believe, however, that the converse also holds true: the mere fact that people function as a committee engaged in work for the council, does not automatically constitute them into "a committee of the council".

[38] The issue is not whether in literal terms the phrase "committee of the council" is broad enough to include the mayoral committee – clearly it is – but whether constitutionally speaking it must be so regarded. In this respect, I agree with much of the eloquent and forceful reasoning in the judgment of O'Regan J, particularly in relation to the importance of the principle of inclusivity at the local government level. In South African conditions much of the work of overcoming the divisive effects on public life of apartheid has to be done at this level. The healing and transformation of our cities and villages will be enhanced if, to use current terminology, all role-players or stakeholders as represented on the council, take part in the work of the committees of the council. Further, the development of a shared spirit of civic responsibility is promoted by mechanisms that encourage civility and mutual accommodation in the conduct of council business. At the same time, the requirement that diverse participation in committee activity should be "consistent with democracy" emphasises that however desirable consensus-seeking might be, it is a procedurally encouraged objective, and not a substantively required obligation. In the end, after participatory processes have been followed, decisions in the council and its committees are taken democratically by majority vote. Nevertheless, while accepting these broad principles and agreeing with much of O'Regan J's characterisation of local government, and not without some hesitation, I have come to conclusions that differ from hers and coincide with those of Langa DCJ. I give my reasons briefly below. Since the relevant constitutional and statutory texts are set out comprehensively in the majority and minority judgments, I will not repeat them here.

[39] The starting off point of the analysis must be to construe the Structures Act in the light of the Constitution, and not the Constitution in the light of the Structures Act. Thus, the problem of deciding whether the mayoral committee is covered by the provisions of section 160(8)(a) cannot be resolved simply by the descriptive and question-begging statement that it is “a committee of the mayor”, and not “a committee of the council”. Indeed, there is no reason, in principle, why a committee of the mayor should not be regarded as a committee of the council: the two terms are not mutually exclusive. Up to this point I agree with the approach adopted by O’Regan J. I do not, however, accept her conclusion that the Structures Act is reasonably capable of being read so as to require proportionate multiparty representation on the mayoral executive committee. To my mind the language used and the purposes made manifest in the Act point incontrovertibly in the opposite direction.

[40] The very purpose of providing for a distinct mayoral executive committee system is to create an alternative to the executive committee system (where proportionality has to be observed). The mayoral committee not only has a different composition from an executive committee, it has a different nature. It is manifestly designed to be appointed by and answerable directly to the mayor, and to serve as a mayoral team similar to the way the national and provincial executives work with the President and Premiers respectively. The power given to the mayor unilaterally to appoint members of the committee is incompatible with the purposes underlying fair representation as delineated by O’Regan J. If the mayor, rather than the parties concerned, could choose who should be on the mayoral committee, as well as who could be sacked from it, the spirit of inclusive multiparty democracy contended for would be compromised rather than enhanced. Thus I cannot see how minority representation could be considered fair if the mayor is at large to choose his or her favourites from the parties concerned, and disregard the nominees of the parties themselves. Yet this, I believe, would be the consequence of adopting the interpretation advanced by O’Regan J. To my mind, the mayoral executive committee and section 160(8)(a) cannot be married. The text and spirit of the Act prevent such a union.

[41] The real and difficult question for me is whether the objective of having a strong mayor with a strong and unified mayoral executive team directly answerable to him- or herself, and not reflecting the broad political diversity on the Council, is compatible

with section 160(8)(a). In the absence of clear textual pointers going either way it is necessary to look at section 160(8)(a) and determine its reach in the context of Chapter 7 as a whole and to examine the basic features of democracy at the local government level as envisaged by the Constitution.

[42] The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.

[43] The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not to exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, “South Africa belongs to all who live in it . . .”. At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, an appropriate balance has to be established between deliberation and decision.

[44] A third basic feature of the manner in which local government is to function relates to the need of government to devise and implement policies which respond to the pressing requirements of the people of South Africa. At the level of local government these responsibilities expressly include ensuring the provision of services in a sustainable

manner, and promoting social and economic development. The effective delivery of services is therefore at the heart of local government.

[45] In my view, therefore, in the absence of clear textual signifiers to indicate its meaning, the determination of what is covered by the phrase “committees of the council” has to be made in the light of the three mutually reinforcing values of inclusivity, democracy and efficacy. All are central to local government and have to be reconciled and balanced in an appropriate manner.

[46] With these considerations in mind, I turn to a consideration of the place of mayoral executive committees in the scheme of local government. The objective is to determine whether they fall within the ambit of the term “committees of the council” as used in section 160(8)(a).

[47] A striking feature of Chapter 7 dealing with local government, is the absence of detailed provisions concerning executive and legislative structures, such as are to be found in the national and provincial spheres of government. Thus, no provision is made for the institution of a governmental leader equivalent to the President or Premier, who act together with Cabinet and the provincial executive respectively. Section 160 simply provides that the council must elect a chairperson, and may elect an executive committee or other committees. Coupled with this notable absence of particularity regarding council leadership is an express requirement that national legislation be used to fill in gaps or provide a regulatory framework. Section 164, for which there is no equivalent provision in relation to national and provincial government, has a particularly wide sweep. It states:

“Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.”

[48] Because the Constitution is silent on the question of the kind of executive leadership that councils may have, I regard it as one of the areas not dealt with in the Constitution and accordingly left for legislative determination. The Structures Act fills the lacuna by providing for three forms of municipal executives. I see no reason in principle why one of the forms, namely, a team clustered around the mayor with strong policy-making powers, intended to drive the process of delivery in a coherent way, should not in

structural terms coexist with committees elected by the council as contemplated by section 160. Nor do I see anything in section 160 which either prevents members of the mayoral team from heading the elected committees of the council, or else requires these teams to function in a multiparty way. The legislation presupposes that the very purpose of knitting together our divided communities, as persuasively outlined by O'Regan J, could better be served by a strong, cohesive mayoral team, agreed on basic philosophy, than by a divided one in which different "portfolios" were headed by people of different persuasions pulling in different directions.

[49] Section 160 does not purport to cover the field as far as committees are concerned. It leaves space for the mayor to act with a mayoral team which need not be diversely representative in the way that the council committees contemplated by the section must be. The purpose of such a team working closely with and accountable to the mayor would be to strengthen the capacity of the mayor to give effective leadership to the council in dealing with its many heavy responsibilities. There is no evidence before us that the mayoral teams are designed to undermine the deliberative functions of the ordinary committees of the council. At the end of the day, all are answerable to the council, where appropriate space must be given for minority voices to be heard and diverse interests acknowledged.

[50] Thus I do not find that the mayoral committees as envisaged in the Act in themselves deprive section 160(8)(a) of efficacy. Should it turn out in practice that these mayoral committees are used in such a way as to circumvent, negate, or suppress the proper functioning of committees of the council rather than to activate and guide them, then appropriate constitutional remedies could be sought on a case by case basis. Such remedies would, however, be based on the manner of implementation of the Act rather than on constitutional defects in the Act itself. Accordingly, I do not find anything in the Structures Act that prevents it from being applied in a manner consistent with achieving a constitutionally mandated and functionally appropriate balance between the principles of inclusivity, democracy and efficacy. I concur in the judgment of Langa DCJ.