IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Application no.: 4614/2022

In the application between:

MAMATEKETOA LINDI MOLIBELI	Applicant
and	
THE SPEAKER OF THE MUNICIPAL COUNCIL: FEZILE DABI DISTRICT MUNICIPALITY	1st Respondent
THE FEZILE DABI DISTRICT MUNICIPALITY	2nd Respondent
THE MEC: FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	3rd Respondent

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CORAM: VAN ZYL, J

HEARD ON: 14 OCTOBER 2022

DELIVERED ON: 15 NOVEMBER 2022

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[1] This is an urgent application in which the applicant is seeking relief in the following terms:

> "1. The applicant's non-compliance with the rules of this court related to time period and service is condoned and the application is heard as an urgent application in terms of Rule 6(12).
> 2. The second respondent's Council Resolution taken on 9 September 2022 and in terms of which the applicant was suspended as the Municipal Manager of the second respondent, is declared unlawful and is set aside.
> 3. The first and/or second respondents are ordered to – consequent to the order granted in prayer 2 above – allow the applicant to resume her duties as Manager of the second respondent in all respects, and to allow her to perform all her executive and statutory functions.
> 4. The first and second respondents are ordered to pay the costs of this application."

[2] The application is being opposed by the first and second respondents, to whom I will henceforth collectively refer to as "the Municipality".

Late filing of the answering- and replying affidavits:

[3] In the notice of motion truncated time periods were indicated for purposes of the filing of the answering affidavit and the replying affidavit, respectively. The Municipality was unable to file its answering affidavit within the aforesaid time-period and duly advanced reasons in its answering affidavit for its failure to have done so. The applicant does not take issue with the late filing of the answering affidavit. In fact, as a result of the late filing of the answering affidavit, the applicant was

mutatis mutandis unable to file her replying affidavit within the truncated time-period set in the notice of motion. She duly dealt with this aspect in her replying affidavit.

[4] Since I was satisfied with the reasons advanced by the parties for the late filing of their respective affidavits, and moreover because the parties do not take issue with each other regarding the late filing, I consequently, at the commencement of the hearing of the application, granted condonation for the late filing of the answering and replying affidavits respectively.

Jurisdiction:

[5] The applicant duly dealt with the aspect of jurisdiction of this court to hear the application in her founding affidavit. In addition thereto, Mr Pienaar, who appeared on behalf of the applicant, also dealt with this aspect in the heads of argument filed on behalf of the applicant.

[6] At the commencement of the hearing, upon my enquiry from Mr Rautenbach, who appeared on behalf of the Municipality, he confirmed that the issue of jurisdiction is not being placed in dispute by the Municipality; in my view, correctly so.

Background:

[7] The applicant is the Municipal Manager of the Fezile Dabi District Municipality, the second respondent.

[8] The first appointment of the applicant as Municipal Manager of the second respondent was in 2012, when she was appointed for a term of five years. During 2018, the applicant was again appointed as Municipal Manager for a period of five years, ending on 30 November 2022.

[9] It is common cause between the parties that the Local Government: Disciplinary Regulations for Senior Managers, 2010, published in Government Gazette no. 34213 of 21 April 2011, under Government Notice no. 344 ("the Disciplinary Regulations") are applicable to the applicant.

[10] The applicant was initially suspended on 1 August 2022 ("the first suspension"), when the Municipal Council resolved to place the applicant on precautionary suspension in terms of Regulation 6 of the Disciplinary Regulations, pending a disciplinary process regarding alleged misconduct by the applicant.

[11] The applicant, at that stage, approached court by means of an urgent application under case number 3834/2022 ("the first urgent application") to have the first suspension declared unlawful and set aside due to the Municipal Council's failure to have complied with the Disciplinary Regulations. Although the Municipality initially opposed the application, it, after having received legal advice, withdrew its opposition and consented to an order as prayed for by the applicant, which order was subsequently granted by agreement between the parties on 31 August 2022.

[12] On 24 August 2022, after the parties have agreed to the aforesaid order, although the order had not yet been granted, the Municipality's attorney addressed a letter to the applicant's attorney in which letter the applicant was invited to forthwith return to work in her capacity as Municipal Manager. On even date, 24 August 2022, the Speaker of the Municipal Council (the first respondent) gave notice that the "First Special Council Meeting" of the Municipality was to be held on 29 August 2022.

[13] During the aforesaid meeting of 29 August 2022 the Municipal Council resolved, *inter alia,* that the allegations of misconduct against the applicant are serious and merit investigation, that (in principle) the applicant was to be placed on precautionary suspension with full pay, that the applicant was to be provided with an opportunity to make written presentations as to why she should not be suspended and that the applicant be provided with a letter to advise her accordingly.

[14] The applicant duly submitted her written representations as to why she should not be suspended in terms of Regulation 6(2) of the Disciplinary Regulations.

[15] On 6 September 2022 the Speaker gave notice that the "Second Special Council Meeting" of the Municipal Council was to be held on 9 September 2022. During the said meeting of 9 September 2022 the Municipal Council resolved, *inter alia,* to place the applicant on precautionary suspension ("the present suspension") with immediate effect pending an investigation into the allegations of misconduct by the

applicant and to inform the applicant of the Municipal Council`s resolutions as soon as possible after the meeting. The applicant indeed received such a letter of suspension in which she was advised accordingly.

[16] The applicant subsequently approached court with the present urgent application.

[17] It is the applicant's case that her suspension is unlawful and stands to be set aside due to the Municipal Council's failure to have properly complied with the prescripts of Regulations 5 and 6 of the Disciplinary Regulations. The Municipality`s contention is that they duly or substantially complied with the Disciplinary Regulations and that the applicant's suspension is consequently lawful, with the result that the application stands to be dismissed.

Urgency:

[18] According to the applicant she received the letter of suspension on 13 September 2022. This is confirmed by the return of service in terms whereof the said letter was served upon the applicant on 13 September 2022 at 18h00 by affixing a copy thereof to the main gate of her residence, which return of service is attached to the answering affidavit as annexure "O9". According to the applicant a consultation was immediately thereafter scheduled with counsel and the application was drafted on 19 September 2022. It is evident from the papers that the founding affidavit was signed on 21 September 2022 and the application was issued on even date.

[19] In paragraph 90.2 of the answering affidavit the following is stated:

> "If the applicant had attended to her workplace as she was required to do, she would have been informed of the council resolution on 9 September 2022 already and not on 13 September as she alleges – she was absent without leave, yet again on 9 September 2022. …"

However, I have to remark that it is evident from the letter of suspension, attached to the founding affidavit as annexure "LM9", that it is dated 12 September 2022 and that it was also only signed by the Executive Mayor only on 12 September 2022. It is therefore not evident that the letter would have been ready and available at an earlier date to provide to the applicant, even if she had been at work.

[20] In the answering affidavit the Municipality also lamented the fact that the applicant only issued the urgent application eight calendar days after she had been informed about her suspension, but provided the Municipality with only five calendar days within which to have delivered its answering affidavit. In addition, the Municipality also dealt with the practical problems they ensued since a meeting of the Municipal Council had to be held in order to decide whether the application should be opposed and to nominate a person to depose to the answering affidavit. Due to the Standing Rules and Orders applicable to the Municipality which require a 48-hour notice period for an urgent special council meeting, the meeting only took place on 28 September 2022. This led

to the Municipality's failure to have timeously filed its answering affidavit. However, as already indicated, I granted condonation for the said late filing of the answering affidavit.

[21] Rule 6(12) deals with urgent applications and Rule 6(12)(b) has been amended to explicitly set out the requirements for purposes of an urgent application:

> "In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [*sic*] averred render [*sic*] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at the hearing in due course."

[22] The aforesaid amended wording of rule 6(12)(b) is in accordance with the requirements and principles determined and applied in applicable case law. See **East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paras [6] – [7].

[23] In my view the applicant acted with the necessary haste to bring this application before court after having been informed of her suspension.

[24] The applicant refers to the fact that should she be forced to follow the normal time-periods in terms of the Rules, read together with the relevant Practice Directives, the application will probably only be ripe for hearing towards the end of November 2022. The applicant's contract and her

appointment as Municipal Manager comes to an end on 30 November 2022. She consequently contends that should the application not be heard on an urgent basis and should the court eventually find in favour of the applicant, she will be armed with a hollow victory. I have to agree with the applicant that in these circumstances she will not be afforded substantial redress at a hearing in due course.

[25] It has to be accepted that the suspension prejudicially impacts on the applicant's freedom to work and her dignity. In **SA Municipal Workers Union o.b.o. Matola v Mbombela Local Municipality** [2015] JOL 32540 (LC) at paras [29] – [31] the court said the following in this regard:

"[29] The harm that the applicant suffers pending the finalisation of the disciplinary hearing is not financial because he receives his salary during the suspension. The irreparable harm that he suffers has to do with his dignity and freedom to work. The impact of the suspension on the freedom to work and dignity of the suspended employee was stated in *Minister of Home Affairs and others v Watchenuka*, in the following terms:

> '[27] The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.'

[30] In *Muller and others v Chairman of the Ministers' Council House of Representatives and others,* where the court held:

> 'The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred, are not so immediately realized by the outside observer and appear, with respect, perhaps to have been underestimated in the Swart and Jacobs cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries.'

[31] In light of the above, I find that the applicant has satisfied the essential requirements of the claim set out in his notice of motion. In this respect, the applicant has satisfied the requirements of urgency, a clear right, irreparable harm and the balance of convenience for the granting of the urgent relief."

[26] In **Gigaba v Minister of Police & Others** [2021] 3 All SA 495 (GP) at para [9] the court found the violation of reputational dignity to have been a factor which necessitated the urgent hearing of an application without which the applicant would not have been able to obtain substantive redress in the ordinary course.

[27] It has previously been found that when a senior manager is suspended, it equates an arrest. In **South African Municipal Workers Union o.b.o. Matola**, *supra,* the court found as follows at para [25] of the judgment:

"It is apparent from the reading of the various judgments of this Court that suspension is a serious matter which has serious implications for

the employee. It is for this reason that suspension has been equated to an arrest. …"

[28] In the circumstances I am satisfied that the applicant made out a proper case for urgency and the consequent granting of condonation as requested in prayer 1 of the notice of motion.

The Disciplinary Regulations:

[29] As previously indicated, it is common cause between the parties that all disciplinary steps, including precautionary suspension, which the Municipality instituted or intend to institute against the applicant must comply with the Disciplinary Regulations. Failure to do so would make any such step or action unlawful. See **Biyase v Sisonke District Municipality & Another** [2011] JOL 28131 (LC) at para [20].

[30] Regulation 5 deals with "**disciplinary procedures**" and determines, *inter alia,* as follows:

> "5(1) Any allegation of misconduct against a senior manager must be brought to the attention of the Municipal Council.
>
> (2) An allegation referred to in sub-regulation (1) must be tabled by the Mayor or the Municipal Manager, as the case may be, before the Municipal Council not later than seven [7] days after receipt thereof, failing which the Mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report.
>
> (3) If the Municipal Council is satisfied that –
>
> (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the Municipal Council must within seven [7]

days appoint an independent investigator to investigate the allegation[s] of misconduct; and

(b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the Municipal Council must within seven [7] days dismiss the allegation[s] of misconduct.

(4) The investigator appointed in terms of sub-regulation (3)(a) must, within a period of thirty [30] days of his/her appointment, submit a report with recommendations to the Mayor or Municipal Manager, as the case may be.

(5) ...

(6) ...

(7) ..."

[31] The process for a "**precautionary suspension**" is prescribed in Regulation 6, which Regulation determines as follows:

"6(1) The Municipal Council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the Municipal Council has reason to believe that –

(a) the presence of the senior manager at the workplace may –

(i) jeopardise any investigation into the alleged misconduct;

(ii) endanger the well-being or safety of any person or municipal property; or

(iii) be detrimental to stability in the municipality; or

(b) the senior manager may –

(i) interfere with potential witnesses; or

(ii) commit further acts of misconduct.

(2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the Municipal Council why he or she should not be suspended,

within seven [7] days of being notified of the council's decision to suspend him or her.

(3) The Municipal Council must consider any representation submitted to it by the senior manager within seven [7] days.

(4) After having considered the matters set out in sub-regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the Municipal Council may suspend the senior manager concerned.

(5) The Municipal Council must inform –

(a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and

(b) the Minister and the MEC responsible for Local Government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven [7] days after such suspension.

(6)(a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

(b) The period of three months referred to in paragraph (a) may not be extended by council."

The first suspension:

[32] During a Municipal Council Meeting of 29 June 2022 the applicant was asked to leave the meeting and the Executive Mayor presented to the Municipal Council various allegations of misconduct against the applicant. The Municipal Council resolved to appoint Councillor Matwa to report on the allegations made by the Executive Mayor and submit a written report to the Municipal Council during its next meeting.

[33] During the next meeting of the Municipal Council, which was held on 25 July 2022, the report of Councillor Matwa was tabled. The applicant was again requested to leave the meeting whilst the report was being discussed. The said meeting was postponed to continue on 1 August 2022.

[34] On 1 August 2022 the report was again discussed and the Municipal Council took the decision to place the applicant on precautionary suspension.

[35] The applicant was advised by means of a letter that the Municipal Council had unanimously resolved to suspend her as a precautionary measure. The said letter is dated 1 August 2022 and was signed by the Executive Mayor, which letter is attached to the founding affidavit as annexure "LM2" (the "first suspension letter"). I will later herein return to the contents of this letter.

[36] The Municipal Council consequently completely failed to comply with the provisions of Regulation 6(2) in that the applicant was not given an opportunity to make any representation as to why she should not be suspended.

[37] It is also common cause between the parties that Mr Matwa was not an independent investigator.

[38] As previously indicated, pursuant to the first urgent application which the applicant instituted with regard to the aforesaid process, the Municipality conceded the irregularities and

agreed to an order to have the first suspension declared unlawful and set aside.

The present suspension:

A. The resolutions of 29 August 2022:

[39] I have already pointed out that on the very same day that the Municipality invited the applicant back to work, 24 August 2022, notice was given of the First Special Council Meeting to take place on 29 August 2022.

[40] I deem it apposite, at this stage, to set out the alleged acts of misconduct which were presented against the applicant by the Executive Mayor on the meetings of 29 June 2022, 25 July 2022 and 1 August 2022 and on which the first decision to institute disciplinary proceedings against the applicant, was based. They were stated in the first suspension letter, dated 1 August 2022, annexure "LM2", to have been the following:

> "1. That the Municipal Manager failed to comply with an instruction to refrain from any further appointments or promotion of personnel until such time as the planned Skills Audit process is completed.
>
> 2. That the Municipal Manager has failed to provide the Executive Mayor with a written report regarding the dismissed employees (*costs implications, status of appeal process, legal costs incurred)* currently being appealed by the Municipality and that failure to do so may place the Municipality into an unwanted/unplanned financial dilemma.

3. That the Municipal Manager has failed to carry out the instructions as resolved by council;
   (a) has failed to prepare and submit to Council for consideration of the Language Policy;
   (b) has failed to administer the process for the urgent establishment of the approved Section 79 Committee: Audit and Performance Committee.
4. The unauthorised absence from duty by the Municipal Manager on 6 days during June 2022.
5. As the custodian of Council records, the Municipal Manager's apparent disregard for safeiy keeping in archives, the recordings of previous Council meetings.
6. The use of security personnel of the Municipality for the personal benefit of the Municipal Manager.
7. That the Municipal Manager delayed the replacement of the CFO, having known that the contract of the CFO would be ending in June 2022 that has complicated the operational efficiency of the municipality."

[41] In paragraph 32 of the answering affidavit the Municipality stated that the aforesaid allegations of misconduct "*remained serious and some of the identified steps constituting misconduct are of a continuous nature … and therefore the council was again informed of the serious allegations against the applicant at its meeting held on 29 August 2022*".

[42] The Municipality attached the Index and the Agenda for the meeting of 29 August 2022 to the answering affidavit as annexure "O5". "*Item 03*" on the agenda was indicated to be the following:

"**FEEDBACK ON DISCIPLINARY PROCESS OF MUNICIPAL MANAGER: MS L. MOLIBELI**

(SPEAKER)

Item will be circulated during the Council Meeting.

RECOMMENDATION

For consideration by Council."

[43] In paragraph 35 of the answering affidavit the following is stated:

> "35. The item/report that was prepared to inform the councillors of the aspects of the disciplinary enquiry to be considered against the Municipal Manager was circulated at the meeting and I append a copy thereof hereto as annexure 'O6'.
>
> 36. The council considered the said 'O6' and ultimately took the resolution on 29 August 2022 to place the applicant on precautionary suspension, of which resolution a copy is appended hereto as annexure 'O7'."

[44] As correctly pointed out by the applicant in her replying affidavit, annexure "O6" consists of two documents. The one document bears the heading "**ITEM 03**", which is clearly a reference to the item number *on the agenda. This document is titled "**REPORT ON THE LEGAL / LITIGATION 'NOTICE OF MOTION' BY MS M.L. MOLIBELI // THE SPEAKER OF FDDM AND FEZILE DABI DISTRICT MUNICIPALITY COUNCIL AND THREE OTHERS**"* and underneath the heading the words "*(The Office of the Speaker)*" are noted. The said report consists of two pages and deals with the first suspension of the applicant and her subsequent challenge thereof by means of the first urgent application. The report

further indicates that although the Municipality initially intended opposing the application, subsequent to consultation with legal experts, "*the Speaker and the Executive Mayor agreed with the advice*" that its processes and decisions did not meet all the requirements of the Disciplinary Regulations. Therefore, and in order to avoid any further unnecessary legal costs, it was agreed that the decision to suspend the applicant be set aside and that the Municipal Manager be required to take up her position as Municipal Manager. The report concludes as follows:

"**RECOMMENDATIONS:**

1. It is recommended that Council take note of the actions taken by the Speaker of Council and the Executive Mayor to resolve the legal matter.
2. It is recommended that the Council condone the actions taken by the Speaker of Council."

[45] There is nothing untoward about the aforesaid report. It only dealt with the first suspension of the applicant and feedback on the subsequent legal process and basically sought the ratification of the decisions by the Executive Mayor and the Speaker to have conceded the merits of the first urgent application. The resolution taken by the Municipal Council as a result of this report is reflected in paragraphs 1 and 2 of the minutes of the meeting, attached to the answering affidavit as annexure "O7", to have been the following:

"**RESOLVED**

1. The Council take [*sic*] note of the actions taken by the Speaker of Council … and the Executive Mayor … to resolve the legal matter.
2. The Council condone [*sic*] the actions taken by the Speaker of Council."

[46] What is of utmost importantance about this report, is that it is evident from the contents thereof that it clearly constituted the document/item which was referred to in Item 03 of the agenda. This is confirmed by the fact that the agenda specifically made provision for "recommendation" and the said report also concludes with "recommendations". In my view, this report was therefore intended to and did in fact take care of and concluded Item 03 on the agenda.

[47] The second document which forms part of annexure "O6", I will deal extensively with hereinafter. The crux of the matter is that the nature and contents thereof do not fall within the ambit of the description of Item 3 on the agenda. It cannot be considered to have been any form of "*feedback*", as it does not deal with any previous or past process or events, like the abovementioned report did. It deals with a completely new disciplinary process against the applicant. On the Municipality`s own version it "*was prepared to inform the councillors of the aspects of the disciplinary enquiry to be considered against*" the applicant.

[48] Consequently, and as correctly stated in paragraph 32 of the applicant's replying affidavit, the consideration and discussion of the new disciplinary process against the applicant and

consequently the allegations of misconduct against her and her precautionary suspension were not included in the agenda for the said meeting.

[49] Rule 45 in Part 8 of Chapter 2 of the Standard Rules and Orders, which the Municipality has to comply with, attached to the founding affidavit as annexure "LM10", determine, *inter alia,* as follows:

> **"Only matters included in the agenda are dealt with:**
>
> 45(1) Subject to the provisions of sub-rules (2) and (5) only matters included in an agenda for a meeting may be dealt with.
>
> (2) A councillor may at any time during a meeting propose that sub-rule (1) be suspended to allow a discussion of any matter not included in the agenda and must give reasons for his or her proposal.
>
> (3) ...
>
> (4) ...
>
> (5) ..."

[50] It is not the Municipality's case that the consideration and discussion of the allegations of misconduct against the applicant and her precautionary suspension were allowed in terms of Rule 45(2). I consequently have to agree with the contention by the applicant contained in paragraph 33 of her replying affidavit that the Municipal Council was therefore not entitled to have dealt in any manner whatsoever with the new disciplinary process against the applicant during the meeting of 29 August 2022.

[51] The totality of the resolutions taken by the Municipal Council during the meeting of 29 August 2022, as reflected in annexure "O7" to the answering affidavit, with the exclusion of paragraphs 1 and 2 thereof, are therefore, in my view, unlawful.

[52] It follows *ex lege* that the subsequent actions and/or decisions taken by and/or on behalf of the Municipality with regard to the disciplinary process against the applicant on the basis of the decisions taken in this regard during the meeting of 29 August 2022, including the decision of 9 September 2022 to suspend the applicant, are *mutatis mutandis* unlawful and *void ab initio.*

[53] Based on this finding alone, the application stands to be granted in favour of the applicant. However, should I be wrong in my finding in this regard, and also due to the importance of this matter to both parties and the fact that the Municipality is a public entity, I deem it necessary to also deal with the further issues regarding the merits of the application.

[54] I will now deal with the second document which forms part of annexure "O6" ("the annexure "O6"-document") which, according to the Municipality, "*was prepared to inform the councillors of the aspects of the disciplinary enquiry to be considered against"* the applicant, which *"was circulated at the meeting"* and which "*the council considered*" and "*ultimately took the resolution on 29 August 2022 to place the applicant on precautionary suspension, of which resolution a copy is appended hereto as annexure 'O7'*".

[55] Although I dearly realise the prolixity of the process I am about to embark on, I unfortunately deem it essential to quote substantial parts of some of the documents to which I will henceforth be referring.

[56] The annexure "O6"-document reads as follows (emphasis added by myself):

"**FEZILE DABI MUNICIPAL COUNCIL MEETING**
MONDAY 29 AUGUST 2022

THE EXECUTIVE MAYOR TABLES THE FOLLOWING:

1. The Municipal Council **already took notice on 1 August 2022 of the allegations of misconduct** against the Municipal Manager, Ms. ML Molibeli ("the MM"). Those allegations of misconduct **are again herewith tabled** by the Mayor, such allegations being:

    1.1 That the MM has failed to comply with an instruction to refrain from any further appointments or promotion of personnel until the Skills Audit process undertaken by the Municipality is completed.

    1.2 That the MM has failed to provide the Executive Mayor with a written report pertaining to dismissed employees and in the absence of a report which should have set out the cost implications, the status of the appeal process and the legal costs incurred so far, the Municipality is placed in jeopardy where it may face unplanned financial distress.

1.3 That the MM has failed to comply with instructions from the Municipal Council in that the MM failed to prepare and submit a language policy to the council and the MM failed to administer the process for the urgent establishment of a section 79 committee dealing with audit and performance matters.

1.4 That the MM was absent from duty for a period of six days during June 2022 without authorisation.

1.5 That the MM failed to safely keep archives and recordings of previous council meetings, which jeopardises or may jeopardise the record-keeping of council which is of paramount importance for the effective administration of a Municipality.

1.6 That the MM used security personnel of the Municipality for the MM's personal benefit.

1.7 That the MM failed to deal with the appointment/replacement of the Chief Financial Officer timeously whilst knowing that the contract of the current Chief Financial Officer would have terminated by the end of June 2022 and such failure impacted upon the operational efficiency of the Municipality.

2. **Council again, as on 1 August 2022**, resolves that these allegations are serious and merit investigation. **The decision of 1 August 2022 is therefore re-confirmed, since no further representations or facts have come to the knowledge of council and/or the Executive Mayor which does not merit further investigation.**

3. Council furthermore resolves that an independent investigation based on reasonable cause that the MM has committed an act

or acts of misconduct as municipal manager, is herewith instituted.

4. Council appoints Adv. Jerry Merabi from the Free State Society of Advocates, as the independent investigator, to conduct such investigation necessary which would enable him to submit a report with recommendations to the Mayor within 30 days of his appointment.

5. Council furthermore resolves to place the MM on precautionary suspension with full pay since the Municipal Council has reason to believe that: -

5.1 the MM's presence as the Municipal Manager at the municipal administrative offices may jeopardise further investigation into the MM's alleged misconduct, since the MM as the Head of the Administration has access to all and any relevant documentation which may be required to be secured in order to complete the investigation into the allegations of misconduct.

5.2 The MM's continues presence at the municipal offices will be detrimental to the stability of the Municipality and that the MM may interfere with potential witnesses, seeing that the MM are the Head of the Administration and the accounting officer of the municipality, to whom many of the potential witnesses report either directly or indirectly.

6. The MM will forthwith be provided of a letter **confirming its decision to place her on precautionary suspension**, also providing her with the opportunity to make written representation to the Executive Mayor, who shall report the MM's submissions to the Municipal Council on the reasons why the MM should not be suspended. The MM's written

representation must be received by the office of the Executive Mayor within 7 (seven) days from date of receipt of this letter."

[57] The "*resolution*" to which the municipality refers in its answering affidavit and which the municipality attached to its answering affidavit as annexure "O7", appears to be an extract of the minutes of the said Special Council Meeting of 29 August 2022. The heading thereof reads as follows:

"**ITEM 03**

REPORT ON ALLEGATION OF MISCONDUCT BY THE MUNICIPAL MANAGER, Ms M.L. MOLIBELI IN LINE WITH THE LOCAL GOVERNMENT: DISCPLINARY REGULATIONS FOR SENIOR MANAGERS"

The minutes then contains a secondary heading which reads "**RESOLVED"**, where after the minutes consists of 8 paragraphs. Paragraphs 1 and 2 thereof duly dealt with the resolutions pertaining to the first suspension of the applicant, which I already dealt with earlier in the judgment.

[58] The very important aspect to note is that paragraphs 3 to 8 of the minutes, which include sub-paragraphs 3.1 to 3.7thereof, are an exact copy of paragraphs 1 to 6 of the annexure "O6"-document; hence, a reproduction of the whole annexure "O6"-document.

[59] Returning to the annexure "O6"-document, I will now deal with specific aspects thereof, where after I will deal with the document considered as a whole.

[60] In terms of Regulation 5(2) the allegations of misconduct must have been tabled by the Executive Mayor before the Municipal Council not later than seven days after receipt thereof, failing which the Executive Mayor may request the Speaker to convene a special council meeting within seven days to consider "*the said report*". Although it is not clear when the allegations of misconduct were received, the allegations were for the first time levelled against the applicant on 29 June 2022 already. It is evident that the allegations of misconduct against the applicant which were again tabled on 29 August 2022, are exactly the same as the previous ones on which the applicant's first suspension was based. The tabling of the allegations of misconduct during the meeting of 29 August 2022 consequently definitely fell outside the time-period of seven days after receipt thereof. However, since it was now tabled during a special council meeting, I accept for purposes of this application, without deciding same, that the tabling thereof during the meeting of 29 August 2022, possibly occurred within the second seven-day time-period provided for in Regulation 5(2).

[61] With regard to the allegations of misconduct as such, the Municipality alleges in its answering affidavit that the said allegations "*remained serious*" and "*some of the identified steps constituting misconduct, are of a continuous nature*" and that they were therefore again tabled during the meeting of 29 August 2022.

[62] Mr Pienaar submitted that the annexure "O6"-document did not constitute a report setting out facts and details regarding the alleged acts of misconduct committed by the applicant. Mr Pienaar contended that in the absence thereof the Municipal Council could not have been satisfied on 29 August 2022 that there is reasonable cause to believe that an act of misconduct has been committed by the applicant as required by Regulation 5(3)(a).

[63] Mr Rautenbach submitted that the Municipality did not consider the guilt or innocence of the applicant during the Regulation 5(3) process and that the applicant's contentions regarding the absence of factual substantiation of the allegations are consequently misplaced. Mr Rautenbach relied on the judgment in **Imatu o.b.o. Hobe v Merafong City Local Municipality & Others** [2017] 10 BLLR 1040 (LC) where the court held at para [21] as follows:

> "... Obviously, it is not necessary for the employer to place evidence before the employee but simply to outline the allegations of misconduct that will be investigated. In relation to the reasons why the employer believes the employee's continued presence in the workplace pending the investigation would be a problem. Regulation 6 is very explicit about what must be set out."

[64] However, in paragraph [22] of the **Hobe**-judgment the court specifically placed the aforesaid *dictum* in context when it stated the following:

"The principles enunciated above only address the extent to which an employee must be given an opportunity to address the municipal employer before a decision is taken to suspend him. ..."

[65] The Labour Appeal Court in the judgment of **MEC for Education, North West Provincial Government v Gradwell** [2012] 8 BLLR 747 (LAC) at para [28] held as follows with regard to the allegations of misconduct:

"[28] ... The justifiability of a suspension invariably rests on the existence of a *prima facie* reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible to meaningfully engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable." (Own emphasis)

[66] In **Lebu v Maquassi Hills Local Municipality & Others** (2012) 33 ILJ 2623 (LC) (7 December 2011) at para [16] the court dealt with the procedure relevant to the precautionary suspension of a senior manager and stated the first requirement to be the following:

"a. A municipality is entitled to suspend a senior manager on full pay, if it reasonably believes that the senior manager has committed an act of serious misconduct." (Own emphasis)

[67] When one reconsiders the relevant provisions of Regulation 5, with the aforesaid case law in mind, the following aspects are evident:

1. Regulation 5(2) clearly contemplates the consideration of a "*report*".
2. Regulation 5(3)(a) requires "*reasonable cause to belief that an act of misconduct has been committed*" by the senior manager.
3. Regulation 5(3)(b) determines that if "*there is no evidence to support the allegations of misconduct*", the Municipal Council must dismiss the allegations of misconduct.

[68] In my view the aforesaid three aspects of Regulation 5 are indicative thereof that what is required to serve before a Municipal Council, is definitely more than mere bald allegations like in the present instance. The word "*report*" speaks for itself. A "*reasonable cause to believe*" cannot be formed in the absence of any facts which substantiate the allegations of misconduct. Furthermore, considering that Regulation 5(3)(b) deals with the situation where there is "*no evidence to support the allegations of misconduct*" it follows, in my view, that Regulation 5(3)(a) has to be interpreted to mean that last-mentioned Regulation will be applicable where there is evidence to support the allegations of misconduct, on the basis of which a "*reasonable cause to believe*" can be formed.

[69] The words, "*prima facie reason to believe*" and "*established objectively*", used by the Labour Appeal Court in the **Gradwell**-judgment, *supra,* are, in my view, further confirmation that mere bald allegations, in the absence of any substantiation, do not constitute compliance with Regulations 5(2) and 5(3).

[70] It was impossible for the Municipal Council to have made any of the aforesaid required determinations in the absence of any form of factual substantiation. The present circumstances effectively mean that the Municipal Council blindly accepted the mere say-so of whoever made the respective allegations of misconduct, which is far cry from the requirements set out in the Regulations and in the relevant case law. I am acutely aware that it is not necessary for the Municipality to have evidence available to prove the guilt of the applicant, but more than mere bald allegations are required.

[71] In addition to the aforesaid fatal inadequacies in the process followed by the Municipality, there is also absolutely no indication in the minutes of the meeting of 29 August 2022, annexure "O7", that the allegations were discussed and/or considered in any manner. In respect of the Municipality's allegation that some of the alleged acts of misconduct are of a continuous nature, there is also no indication in the minutes that any such discussions took place.

[72] In paragraph 4 of the minutes of the 29 August 2022 meeting, annexure "O7", the resolution regarding the alleged acts of

misconduct was recorded as follows (an exact copy of paragraph 2 of the annexure "O6"-document):

> 4. **Council again, as on 1 August 2022, resolves** that these allegations are serious and merit investigation. **The decision of 1 August 2022 is therefore re-confirmed, since no further representations or facts have come to the knowledge of council and/or the Executive Mayor which does not merit further investigation.**" (Own emphasis)

[73] According to the averments in the answering affidavit the Municipality "*reconsidered*" the allegations of misconduct and considered it "*afresh*". However, as correctly pointed out by Mr Pienaar in his argument, when the wording of the resolution is considered, as emphasized in bold letters in the previous paragraph, it contradicts and negates the averments that the alleged acts of misconduct were considered afresh. I agree with the submission by Mr Pienaar that it is evident that the Municipal Council merely rubberstamped its pervious decision of 1 August 2022 without having considered the allegations of misconduct *de novo* and objectively.

[74] In my view and for the reasons set out above, the Municipality consequently failed to comply with the provisions of Regulations 5(2) and 5(3). The aforesaid resolution contained in paragraph 4 of the minutes, is consequently unlawful.

[75] For the sake of completeness, I have to point out that as a result of my finding that the resolution in paragraph 4 of the minutes is unlawful, it follows that the resulting resolutions

recorded in paragraphs 5 and 6 of the minutes, are also unlawful:

> "5. That Council furthermore resolves that [an] independent investigation based on reasonable cause that the MM has committed an act or acts of misconduct as Municipal Manager, is herewith instituted.
>
> 6. That Council appoints Adv. Jerry Merabi from the Free State Society of Advocates, as the independent investigator, to conduct such investigation necessary which would enable him to submit a report with the recommendations to the Mayor within 30 days of his appointment."

[76] The Municipality contended in its answering affidavit that Regulation 5(3) concerns a process that is separate from the process of deciding on the precautionary suspension of a senior manager in terms of Regulation 6.

[77] With regard to the "in principle" decision of the Municipal Council on 29 August 2022 to suspend the applicant in terms of Regulation 6 and to call upon her to make representations as to why she should not be suspended, Mr Pienaar submitted that although Regulations 5 and 6 provide for a two-fold procedure and enquiry, a precautionary suspension in terms of Regulation 6 can only follow if the Municipal Council has reasonable cause to believe that the applicant committed an act of misconduct, after having properly complied with the procedure in terms of Regulation 5. In my view Mr Pienaar's submission is line with the *dictum* in the **Gradwell**-case,

supra, which I already referred to, but which I will repeat for purposes of this aspect:

"[28] … The justifiability of a suspension invariably rests on the existence of a *prima facie* reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible to meaningfully engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable." (Own emphasis)

[78] In the judgment of **Matlala v Greater Tzaneen Local Municipality (J2289/19)** [2020] ZALCJHB 2 (3 January 2020) at para [24] the same principle was also applied:

"[24] Was there thus compliance in this case? In answering this question, regard must first be had as to when Regulation 6 can be relied upon. This can only competently happen if the employer has a reasonable belief of the existence of serious misconduct. … has to be a reasonable belief on a prima facie basis. It is therefore important for the respondent in this instance to at least set out a prima facie basis for believing that the applicant committed serious misconduct, as part of any notice of intention to suspend under Regulation 6." (Own emphasis)

[79] Therefore, in the absence of a valid decision in terms of Regulation 5(3), the Municipal Council could not have resolved on 29 August 2022 to place the applicant on precautionary suspension in terms of Regulation 6 and to call upon her to make representations as to why she should not be suspended. I have already found that the resolution by the Municipal Council on 29 August 2022 with regard to the

allegations of misconduct did not comply with Regulation 5(3) and is therefore unlawful. It consequently follows that the "in principle" resolution taken on 29 August 2022 to place the applicant on precautionary suspension and to call upon her to make representations, is *mutatis mutandis* unlawful.

[80] It follows *ex lege* that the subsequent resolution taken on 9 September 2022 to indeed place the applicant on precautionary suspension, is also unlawful and stands to be set aside.

[81] However, I will continue to also deal with the remaining aspects regarding the merits of this application.

[82] I indicated earlier in the judgment that I will also deal with the annexure "O6"-document considered as a whole.

[83] On the Municipality's own version, as previously indicated, annexure "O6" was prepared and circulated *"to inform the councillors of the aspects of the disciplinary enquiry to be considered against"* the applicant. Although annexure "O6" consists of two documents, I have already found that the one document only related to the first suspension of the applicant and consequently, for purposes of the present suspension of the applicant, only the annexure "O6"-document served before the Municipal Council.

[84] I have already quoted the contents of the annexure "O6"-document. The document was distributed before any of the alleged discussions and considerations regarding the

allegations of misconduct and/or the possible precautionary suspension of the applicant had taken place and consequently also before the Municipal Council took any resolutions in respect of any of these two aspects. However, lo and behold, the annexure "O6"-document already contained and reflected the exact resolutions which the Municipal Council took after the alleged discussion and consideration of all the relevant aspects. This is evident from the minutes, annexure "O7", which reflects a repetition of the contents of the whole annexure "O6"-document. I find it beyond comprehension how the Municipality can rely on this document and at the same time attempts to allege that there had been a proper and objective discussion and consideration of the issues at hand. The contents of the annexure "O6"-document are indisputably indicative of the contrary.

[85] In my view, when the whole of the annexure "O6"-document which served before the Municipal Council is considered, there is no basis upon which I can find that the resolutions which the Municipal Council took on 29 August 2022, with the exclusion of paragraphs 1 and 2 thereof, were reasonable and/or objective. The Municipality failed to comply with the provisions of the Disciplinary Regulations and the said resolutions are consequently unlawful.

B. The events between 29 August 2022 and 9 September 2022:

[86] As previously indicated, Regulation 6(2) reads as follows:

"Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the Municipal Council why he or she should not be suspended, within seven [7] days of being notified of the council's decision to suspend him or her."

[87] Paragraph 7 of the resolution reflected in the minutes of the meeting of 29 August 2022, annexure "O7", records the resolution as though the decision has already been taken to suspend the applicant. It is not worded or reflected as an "in principle" decision:

"7. That council furthermore resolves to place the Municipal Manager … on precautionary suspension with full-pay …"

[88] The fact that it appears not to have been just an in-principle decision, is further confirmed by the first part of paragraph 8 of the resolution recorded in the minutes, annexure "O7":

"8. That the Municipal Manager … will forthwith be provided of a letter confirming its decision to place her on precautionary suspension …"

[89] However, it is evident from the second part of paragraph 8 of the resolution that it was also decided to provide the applicant with the opportunity to make written representations as to why she should not be suspended:

"8. … also providing her with the opportunity to make written representations to the Executive Mayor, who shall report the MM's submissions to the Municipal Council on the reasons why the MM should not be suspended. …"

[90] It is also common cause that the letter which was delivered to the applicant indeed made provision for her to provide reasons as to why she should not be suspended. I will later return to the contents of the said letter.

[91] The reason why I refer to the wording of the resolution despite the fact that the applicant was granted the opportunity to advance reasons why she should not be suspended, is that, in my view, it constitutes one of the factors which is indicative of an absence of objectivity and proper compliance with the Regulations – a matter of merely paying lip-service to the provisions of the Regulations.

[92] The further events are also relevant in this regard. In paragraph 19.4 of the founding affidavit the applicant states as follows:

> "19.4 But on the same day, the Executive Mayor contacted me and instructed me to vacate the Municipal premises. The reason that he gave for this instruction was that I was already suspended. Further to this, the Executive Mayor wrote and circulated a memorandum to all employees of the Municipality informing them that I was already on suspension. I append a true copy of that memorandum (dated 31 August 2022) and mark it "LM6".
>
> 19.5 Indeed and even prior to me receiving this letter, the Executive Mayor attended to my personal residence on 30 August 2022. I was not at home but one of my children was. I believe the Executive Mayor wanted to have a personal discussion with me and given his subsequent actions (one day later) no doubt he wanted to tell me that I had indeed been suspended. What his true intention however was remains a mystery."

[93] In the answering affidavit the response to the aforesaid two paragraphs is the following:

> "88. **AD PARAGRAPHS 19.4 – 19.5:**
>
> I have already explained the mistake that the Executive Mayor made in distributing the memorandum, but the applicant is not telling the truth when she alleges that the Executive Mayor attended to her personal residence and I refer again to the confirmatory affidavit by the said Executive Mayor."

[94] What is evident from the aforesaid, is that the Municipality does not deny that the Executive Mayor contacted the applicant and instructed her to vacate the Municipal premises due to her suspension; hence, an immediate suspension.

[95] The memorandum which the applicant refers to, annexure "LM6" to the founding affidavit, is dated 31 August 2022 and was signed by the Executive Mayor. It was directed to the "Directors and Managers" and also forwarded for the attention of the "FDDM Secretaries". The contents thereof read as follows:

> "**RE: NOTICE OF PRECAUTIONARY SUSPENSION OF MS. LINDI MOLIBELI:**
>
> I hereby inform you that Council on its sitting on the 29th of August 2022 resolved that Ms Lindi Molibeli be placed on precautionary suspension with effect from 30 August 2022.
>
> Further communique will be issued to inform you of the appointed acting Municipal Manager.

Hope you find the above in good order." (Own emphasis)

As can be seen, the memorandum even made mention of the appointment of an acting Municipal Manager.

[96] The explanation by the Municipality in the answering affidavit reads as follows:

"45. The Executive Mayor of the Municipality, who was tasked with providing her with a letter of suspension, unfortunately misunderstood the council resolution of that day and he caused the memorandum, appended as annexure 'LM6' to the founding affidavit to be distributed to the senior management of the Municipality informing them of the decision of the council to place the applicant on precautionary suspension with effect from 30 August 2022.

46. ...

47. The Executive Mayor made a mistake to provide the said memo to the officials and to hold the position that the applicant was suspended with effect from 30 August 2022 which was not the case.

48. ...

49. The Mayor was subsequently advised of his erroneous interpretation of the council resolution of 29 August 2022 and he admits that he had made a mistake. His memo, 'LM6', suggests that he was 'jumping the gun' by informing senior management of the Municipality that the applicant was suspended with effect from 30 August 2022 which was not the case and which was not the resolution that the council took.

50. It is humbly submitted that the Municipality cannot be held to be penalised for the Executive Mayor's wrong interpretation of the council resolution and that such notice distributed by him had no effect since this was not what the council resolved as is clear from the contents of annexure 'LM5' to the founding affidavit.

51. The Executive Mayor informed me that he apologised for his erroneous interpretation and confirm that he acted in his personal capacity when he harboured the wrong impression of what the council resolved on 29 August 2022.

52. I append hereto as annexure 'O8', a confirmatory affidavit deposed to by the Executive Mayor, Councillor Dennis Khasudi.

53. The Executive Mayor, however, never went to the house of the applicant or spoke with her minor child and strenuously deny these submissions from the applicant.

54. The Executive Mayor sent a driver from his office to the address of the applicant and it could be that the child of the Municipal Manager mistook the driver of the Mayor for being the Mayor, but the Mayor never attended at any stage the house of the Municipal Manager."

[97] I deem it necessary to deal with the applicant's response in her replying affidavit:

"49. The Executive Mayor is clothed with delegated powers of the Municipal Council and therefore plays an oversight role on behalf of the Municipal Council. He also exercises executive authority on behalf of the Municipal Council in the implementation of decisions.

50. The Municipal Council can therefore not lightly escape and be exonerated from the acts carried out and powers exercised on its behalf by the Executive Mayor.

51. The Executive Mayor therefore clearly did not only act in his personal capacity when he distributed the said memorandum on 30 August 2022.

52. ...

53. I wish to also point out that the alleged mistake was never corrected at any time thereafter by either the Municipal Council or the Executive Mayor.

54. I persist that I was informed by one of my children that the Executive Mayor and his driver, Mr Moletsane attended to my residence on 30 August 2022. As recorded in paragraph 5 of Matlho Attorneys' letter to the Municipality dated 31 August 2022 (annexure 'LM7'), when my child telephonically called me, Mr Moletsane identified himself and said he is with the Executive Mayor. My child also confirmed that Mr Moletsane was accompanied by another gentleman.

55. I still do not know why they attended to my residence. I assume that they wanted to deliver the letter, annexure 'LM5', to me, which was delivered to me by hand on 31 August 2022. The Municipality however does not explain why the Executive Mayor's driver attended to my residence."

[98] Suffice to say that it seems strange that the Executive Mayor, who has been involved in the disciplinary procedures against the applicant from the onset, would have misunderstood the precautionary suspension process, especially considering that

he was also involved in dealing with the first urgent application. Objectivity remains one of the most crucial elements of natural justice and fairness as provided for in Regulation 4(4).

C. The resolution of 9 September 2022:

[99] The undated letter which was handed to the applicant on 31 August 2022, signed by the Executive Mayor and addressed to the applicant, annexure "LM5" to the founding affidavit, contains in the first 4 paragraphs thereof a reference to the history of the first suspension of the applicant. Unfortunately, I again consider it necessary to quote extensively from the said letter as from paragraph 5 thereof:

> "5. The Municipal Council **already took notice of the allegations of misconduct against you**, which allegations are serious and merit investigation. The Executive Mayor **once again tabled the allegations of misconduct** against you at a council meeting on Monday 29 August 2022, during which meeting **it was reconfirmed** by council that the allegations are serious and merit investigation.
>
> 6. It is recorded that the council also resolved on 29 August 2022:
>
> 6.1 to institute an independent investigation based on reasonable cause that you have committed an act or acts of misconduct as Municipal Manager, some of which acts of misconduct may be of a serious nature, and;
>
> 6.2 to appoint advocate Jerry Merabi …

7. Ultimately on 29 August 2022, the Municipal council **again resolved to place you on precautionary suspension**, with full pay since the Municipal Council has reason to believe that:

7.1 your presence as the Municipal Manager at the municipal administrative offices may jeopardise further investigation into your alleged misconduct;

7.2 your continued presence at the municipal offices will be detrimental to the stability of the Municipality and that you may interfere with potential witnesses, seeing that you are the Head of Administration and the accounting officer of the Municipality, to whom many of the potential witnesses reported either directly or indirectly.

8. The aforesaid belief of the Municipal Council emanates from the alleged acts of misconduct which are the following:
[The alleged acts of misconduct are then set out in paragraphs 8.1 – 8.7, a repetition of what was set out in the annexure 'O6'-document and in paragraphs 3.1 – 3.7 of the minutes of the 29 August 2022 meeting, annexure 'O7'.]

9. You are provided with the opportunity to make written representation to the Executive Mayor, who shall report your submissions to the Municipal Council on the reasons why you should not be suspended. Your written representation must be received by the office of the Executive Mayor within 7 (seven) days from date of receipt of this letter.

10. You are accordingly invited to make written representations on why you should not be placed on suspension within seven days from date of receipt of this letter." (Own emphasis)

[100] When the reasons for the precautionary suspension as set out in paragraph 7 of the aforesaid letter are compared with the reasons recorded in paragraphs 7.1 and 7.2 of the resolutions of 29 August 2022, as contained in the minutes, annexure "O7" to the answering affidavit, it is evident that a part thereof as contained in the letter differs from the actual resolution. In respect of the alleged jeopardising of the further investigation, the letter does not contain the part of paragraph 7.1 of the resolution which reads "*since the MM as the Head of the Administration has access to all and any relevant documentation which may be required to be secured in order to complete the investigation into the allegations of misconduct.*" This had the result that the applicant was not properly informed of the alleged reasons for her precautionary suspension.

[101] The applicant duly submitted written representations, a copy of which is attached to the answering affidavit as annexure "O11".

[102] On 6 September 2022 notice was given of a Second Special Council Meeting to be held on 9 September 2022. Attached to that notice was an Index and Agenda, attached to the answering affidavit as annexure "O10". Item 21 of the said agenda duly made provision for "**FEEDBACK ON THE PRECAUTIONARY SUSPENSION OF THE MUNICIPAL MANAGER**".

[103] With regard to the aforesaid item on the agenda and the manner in which the Municipal Council dealt with it during the

meeting of 9 September 2022, the following averments are stated in paragraphs 66 to 68 of the answering affidavit:

"66. I append a copy of the item that served before the municipal council in support of the aforesaid item on the agenda hereto as annexure 'O11', which item informed the council of the reasons why the Municipal Manager is required to be placed on precautionary suspension, as well as her response to these allegations.

67. The council ultimately concluded that the precautionary suspension should still be implemented; the reasons advanced by the applicant did not convince the council that her presence at or in the municipal administrative offices would not jeopardise further investigation or that possible witnesses may be interfered with.

68. Accordingly, the council resolved on 9 September 2022 to place the Municipal Manager on precautionary suspension as is evident from the resolution appended hereto as annexure 'O12'." (Own emphasis)

[104] As already indicated, annexure "O11" to the answering affidavit is the written representation which the applicant submitted on 7 September 2022. Although paragraphs 7.1 – 7.3 thereof summarised the reasons which were set out in the undated letter which informed the applicant of the request to make written submissions, the said document does not and could not have been considered to have "*informed*" the council of the reasons why the applicant is to be placed on precautionary suspension. This is moreover so since a part of the reasons on which the Municipal Council allegedly based

their decision during the meeting of 29 August 2022, was not even conveyed to the applicant in the letter of suspension.

[105] Furthermore, annexure "O11" is a 13-page document which sets out numerous factual allegations and reasons as to why, according to the applicant, she should not be placed on precautionary suspension. In terms of the agenda this document was not circulated prior to the meeting. This, in my mind, immediately raises the question to what extent the Municipal Council was able to and did in fact apply their minds to the contents of annexure "O11" if same was only handed to them during the meeting.

[106] The resolution on which the Municipality relies as contained in annexure "O12" to the answering affidavit, which appears to be an extract from the minutes of the said meeting of 9 September 2022, was recorded to have been the following:

> "**RESOLVED:**
>
> 1. That after having **considered and discussed the written representation** submitted by the Municipal Manager ... as to why the council should not place her on precautionary suspension, ..., the council unanimously agreed to place Ms M.L. Molibeli on precautionary suspension with immediate effect while investigations into the allegations of misconduct against her are being investigated."

[107] The rest of the resolution recorded that the suspension shall be subject to certain conditions, which conditions were also recorded. Paragraph 2.5 of the resolution further recorded the following as part of the resolution:

"That the Executive Mayor informs the Municipal Manager of the aforementioned council resolutions as soon as possible after the council meeting."

[108] From the aforesaid it is evident that there is no indication in the minutes of the contents or the nature of any alleged consideration and/or discussion that took place with regard to the precautionary suspension of the applicant. Very importantly, the resolution does also not reflect the alleged reasons for the precautionary suspension of the applicant.

[109] In **Matlala v Greater Tzaneen Local Municipality**, *supra*, the court held as follows at para [29] of the judgment:

"[29] The resolution of 22 October 2019 appears to simply recommend the contemplated suspension of the applicant without any reason for it, solely for the purpose that the council could investigate the issue relating to the tenders for the two road projects. This does not comply with what is required by Regulation 6. In my view, it should at least be apparent from the resolution adopted by the respondent's council on what basis it is believed that the applicant committed serious misconduct, and why it was required to suspend the applicant, with specific reference to the requirements in regulation 6(1)(a) and (b). ..."

[110] In the judgment of **Lebu v Maquassi Hills Local Municipality**, *supra*, at para [16] the court determined as follows in relation to the procedure relevant to the suspension of a senior manager:

"d. The council is required seriously to consider any representations made by the affected senior manager. It must take those

representations seriously and make a decision, in the light of those representations and its own interests as defined by sub-regulation 6 (1), on whether the manager should be suspended. It follows that if the senior manager's representations are rejected, the reasons for that rejection ought to be furnished." (Own emphasis)

[111] In paragraphs 41 and 42 of the heads of argument filed on behalf of the Municipality, the following allegations were made:

"41.1 The applicant complains that the council resolution of 9 September 2022 does not record the reasons for her suspension, but it is evident that the resolution only reflects the ultimate decision. The deliberations that took place would be recorded and could have been scribed, had the Municipality not been required to have filed its answering affidavit in such an abbreviated period. These reasons would stem from the deliberations in the council meeting.

42. The urgency with which the application was brought, being an urgent review of decisions, prejudices the Municipality since a proper record could not be prepared which could have led to the transcribing of the deliberations of the council meeting on 9 September 2022."

[112] In my view the aforesaid allegations do not assist the Municipality at all. The allegations were not part of its case in the answering affidavit. Although the Municipality lamented the short period of time which was granted to it in which to file its answering affidavit (which I dealt with at the beginning of the judgment), it made no mention of recordings and/or that it needed additional time in order to have same transcribed. I cannot accept "evidence" contained in heads of argument if

same has not been stated under oath. In **Matlala v Greater Tzaneen Local Municipality**, *supra*, at para [34] a similar principle was applied:

> "[34] Similarly, and in the answering affidavit, there is an attempt to justify his suspension as being that his continued presence at work was likely to cause instability in the workplace, also never raised before. There appears to be an *ex post facto* justification of the suspension, but considering the provisions of Regulation 6 and the purposes thereof, such an approach cannot be permitted." (Own emphasis)

[113] In addition to the aforesaid, the fallacy of the contention that "*the resolution only reflects the ultimate decision*" is evident from the fact that the resolution with regard to the precautionary suspension of the applicant which was taken on 29 August 2022, as reflected in paragraph 7 of those minutes, annexure "O7", did in fact record the alleged reasons for that decision. Therefore, had the reasons for the precautionary suspension of the applicant taken on 9 September 2022 been properly discussed and objectively decided, those reasons would have been recorded as part of the resolution.

[114] In the subsequent letter of 12 September 2022, from the Executive Mayor addressed to the applicant, annexure "LM9" to the founding affidavit, in which the applicant was notified of her precautionary suspension, the "*considerations*" upon which the Municipal Council based its decision to suspend the applicant, were listed to be the following:

"1. That your presence at the Municipality as Municipal Manager and all its satellite offices may jeopardise any investigation(s) into the alleged acts of misconduct;
2. That your presence may be detrimental to the stability of the Municipality;
3. As the Head of Administration, you may interfere with potential witnesses seeing that you are the Accounting Officer to whom potential witnesses report to you either directly or indirectly;
4. That you may commit further acts of misconduct."

[115] In the absence of any reasons reflected as part of the resolution, I cannot find that the aforesaid reasons were in fact the basis of the decision of the Municipal Council. The arbitrary nature of these reasons is even further evident from the fourth reason, being the commission of further acts of misconduct, since this alleged reason has never previously featured anywhere.

[116] In fact, there are four different versions of the Municipality`s alleged reasons for the resolution to have placed the applicant on precautionary suspension, albeit for purposes of the so-called "in-principle" decision taken on 29 August 2022 or for the final decision taken on 9 September 2022:

1. The reasons contained in paragraphs 7.1 and 7.2 of the resolution reflected in the minutes of the meeting of 29 August 2022, annexure "O7".

2. The reasons reflected in paragraphs 7.1 and 7.2 of the undated letter which was handed to the applicant on 31 August 2022, annexure "LM5".

3. The reasons reflected in paragraphs 1 to 4 of the letter dated 12 September 2022 which was handed to the applicant on 13 September 22, annexure "LM9"

4. The reasons reflected in paragraph 67 of the answering affidavit.

[117] What I also find disturbing is the fact that the letter of 12 September 2022 again refers to the first decision to suspend the applicant and states that the Municipal Council resolved on 9 September 2022 and "*re-confirmed their position to place you on precautionary suspension*". This serves as further confirmation that the Municipal Council did not approach the consideration of the present suspension on a clean slate and with an open mind, but merely went through the motions, or attempted to go through the required motions, without having applied their minds. In this regard the following was stated in **Imatu o.b.o. Daniël**, *supra,* at paras [22] to [26]:

"[22] … Before taking the decision, the Municipality must then consider its reasons and the representations of the employee as to why they should not be suspended. The Municipal Council must at least apply its mind to its reasons and the employee's representations. The decision to suspend the employee is not legally validated just because the employer goes through the motions of giving the employee an opportunity to make representations and tabling those representations before the Council.

[23] …

[24] … Whether because of an oversight or some other reason, it appears that the meeting did not actually consider these representations because the minute only mentioned his request for additional information.

[25] …

[26] In the circumstances, I am satisfied that the respondent afforded the applicant an opportunity to make representations, but when he did so the Council did not consider them and accordingly acted in breach of Regulation 6(3) and consequently his suspension was unlawful. The value of an opportunity to make representations is entirely negated if they are not considered." (Own emphasis)

[118] In any event the aforesaid reasons only constitute a recital of the contents of the Regulation 6(1), which is not sufficient. In **Lebu v Maquassi Hills Local Municipality**, *supra*, the court held, *inter alia,* as follows at para [14]:

[14] … The municipality is then required to consider the matters set out in sub-regulation (1) together with any representations received, and then and only then, may the municipality suspend the employee. I would add that in my view, it is not sufficient for a municipality merely simply to reproduce the justifications listed in paragraphs (a) and (b). In the present instance, that is what the applicant has done, with the omission only of the factor listed in paragraph (a) (i) on the basis, presumably, that the investigation initiated into the applicant's conduct has been completed. …"

[119] Mr Rautenbach contended that in so far as there may have been shortcomings in the procedure, such shortcomings should be condoned on the basis thereof that the Municipality

substantially complied with the Regulations. In this regard he referred to the matter of **Maluleke v Greater Giyane Local Municipality & Others** [2018] ZALCJHB 456 (4 October 2018) at para [33]:

"... However, a failure by a Municipality to comply with the relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole."

[120] In my view there is no basis upon which I can find that the Municipality substantially complied with the provisions of Regulations 5 and 6, considering the totality of facts and circumstances I have already dealt with above.

[121] It has, after all, on numerous occasions now been held that substantial compliance is not necessarily enough. In **Penxa v Beaufort West Local Municipality & Others** [2022] JOL 54312 (LC) at para [21] the following was stated:

"[21] Furthermore, the respondents' contention that there was a substantial compliance with Regulation 6(2) is fallacious. It cannot be overstated that 'suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly'. Moreover, when suspending the Accounting Officer, an act that would invariably interrupt leadership and in turn impedes the rendering of the Municipal services, the Municipality must comply with Regulation 6(2) to the letter; which is not insuperable obligation, in any event."

[122] The serious nature and consequences of a suspension was also dealt with in **Lebu v Maquassi Hills Local Municipality**, *supra*, at para [14]:

> "[14] … Suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly. There appears to be a tendency, especially in the public sector, where suspension is applied as a measure of first resort and almost automatically imposed where any form of misconduct is alleged. The purpose of removing an employee from the workplace, even temporarily and on full pay, must be rational and reasonable, and must be conveyed to the employee concerned in sufficient detail to enable the employee to compile the representations that he or she is invited to make in a meaningful way. Of course there are those instances where precautionary suspension is a necessary measure, and where the reasons to remove an employee from the workplace as a precautionary measure are compelling. But those cases will be the exception rather than the norm." (Own emphasis)

Conclusion:

[123] Considering the totality of the aforesaid findings, the resolution taken by the Municipal Council on 9 September 2022 in terms of which the applicant was suspended, is unlawful and stands to be set aside.

[124] Although I also found most of the other resolutions to be unlawful, no specific relief was or is being sought in relation thereto. However, in my view, the Municipality will be well-advised to also take serious cognisance of those findings.

[125] The fact of the matter is that the disciplinary process against the applicant started off wrongly. As it so often happens in such circumstances, the subsequent attempts to proverbially "patch-up" the process, were not successful.

[126] The applicant consequently made out a clear right for the granting of the relief.

[127] In so far as it may be necessary, I also find that the applicant has no alternative remedy, considering that the relief is based on unlawfulness.

[128] The applicant is in a fixed term contract which is due to expire soon. The applicant stands to suffer irreparable harm if the suspension is not set aside.

Costs:

[129] There is no reason why the costs should not follow the outcome of the application.

Order:

[130] The following order is consequently made:

1. The applicant's non-compliance with the Court Rules relating to time-periods and service is condoned and the application is heard as an urgent application in terms of Rule 6(12).

2. The second respondent's Council Resolution taken on 9 September 2022, in terms of which the applicant was suspended as the Municipal Manager of the Second Respondent, is declared unlawful and is set aside.

3. The first and/or second respondents are ordered to allow the applicant to forthwith resume her duties as Municipal Manager of the second respondent in all respects and to allow her to perform all her executive and statutory functions.

4. The first and second respondents are ordered to pay the costs of the application, jointly and severally, payment by the one the other to be absolved.

C. VAN ZYL, J

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On behalf of the 1st and 2nd respondents: Adv. JS Rautenbach
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