

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case No. 73/2021

In the matter between:

NTOMBIZODWA GAMNCA

Applicant

and

**MEC FOR CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS
BUFFALO CITY METROPOLITAN
MUNICIPALITY
THE INDEPENDENT ELECTORAL
COMMISSION**

First Respondent

Second Respondent

Third Respondent

**REASONS FOR GRANT OF
INTERLOCUTORY INTERDICT**

HARTLE J

[1] On 6 April 2021 I granted a ruling in respect of an urgent application for the grant of an interim interdict pending the determination of a review application launched under Bhisho case number 73/2021 in the following terms:

“1. Pending the finalization of the review application launched under case number 73/2021 the respondents are interdicted from:

1.1 implementing the first respondent’s decision to remove the applicant from the office of the councillor for Ward 20 in the Buffalo City Municipality and withholding her remuneration and other benefits.

1.2 Conducting by-ward elections in Ward 20 in the Buffalo City Metropolitan Municipality in respect of the vacancy created by the first respondent's decision under review.

2. The costs of this interlocutory application for interim relief will be costs in the review application.

3. Any party requiring reasons for my ruling may request same within ten days."

4. The first respondent requested reasons.

5. It is common cause that the applicant without delay issued out the review application in the main application immediately upon being apprised by the first respondent on 26 January 2021 of the fact that she had with immediate effect been removed from office as ward councillor¹ on the premise that she had breached the provisions of item 2 (b) of Schedule 1 (the Code of Conduct for Councillors) of the Local Government: Municipal Systems Act No 32 of 2000 ("the Code").²

6. The provisions of the relevant item require a councillor in peremptory terms to "(b) at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised".

7. The stated basis for the review, *inter alia*, is that the decision of the first respondent to remove her as councillor was reached in a procedurally unfair manner, was arrived at without taking into account relevant considerations, and was made arbitrarily or capriciously. The applicant submits further that the impugned investigation report (which formed the premise for the applicant's removal) was the "product of a process undertaken contrary to the rules of natural justice" thus providing cause for the court ultimately hearing the review application to set aside the first respondent's decision.

¹ The review application was issued on 2 February 2021.

² The Code was established, according to the Preamble to the Schedule, in order to ensure that councillors fulfil their obligations to their communities and support the achievement by the municipality of its objectives set out in section 19 of the Municipal Structures Act, No. 117 of 1998.

8. In respect of the process undertaken by the first respondent culminating in his decision to remove her as councillor, the applicant notes, *inter alia*, that details of the investigation were advised to her after the fact (meaning that she was denied the opportunity to meaningfully participate by responding to the allegations before the “finalization of the investigation report”); that the first respondent instead of conducting an investigation such as is mandated by the Code in effect merely accepted the (one-sided) allegations made by those who complained against her; and that the first respondent “hijacked” the investigation whereas it was supposed to have been undertaken strictly in line with the Code. Indeed, the applicant claims that the first respondent allegedly usurped the powers of the Municipal Council in this respect.

9. Concerning the substantive basis for the anticipated review, the applicant’s complaint is that the first respondent’s decision was unreasonable and that he harbored a mistaken belief that the conduct complained of amounted to a breach of the Code. Further if her conduct indeed constituted such a breach or contravention (the premise for his decision in any event being fundamentally flawed or mistaken according to her), she denies that such conduct warranted the sanction of her permanent removal in all the circumstances.

10. The premise of the application for the interdict was that she enjoys good prospects of success in the proposed review application and would suffer irreparable harm if the two key consequences flowing from her removal as councillor were implemented pending the determination of the review application. These are, firstly, that she stood to be deprived of her remuneration and benefits earned by her in this position and, secondly, the selfsame vacancy opened up as a result of her removal was about to be filled pursuant to a by-election scheduled to take place in the ward on 21 April 2021.

11. Before proceeding I set out below what the Code provides in respect of an investigation undertaken against a councillor accused of being in breach of the Code’s provisions, whether initiated by the chairperson of the municipal council or the member of the executive council:

“13. Duty of chairpersons of municipal councils.—

- (1) If the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of this Code has been breached, the chairperson must—
 - (a) authorise an investigation of the facts and circumstances of the alleged breach;
 - (b) give the councillor a reasonable opportunity to reply in writing regarding the alleged breach; and
 - (c) report the matter to a meeting of the municipal council after paragraphs (a) and (b) have been complied with.
- (2) A report in terms of subitem (1) (c) is open to the public.
- (3) The chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.
- (4) The chairperson must ensure that each councillor when taking office is given a copy of this Code and that a copy of the Code is available in every room or place where the council meets.

14. Breaches of Code.—

- (1) A municipal council may—
 - (a) investigate and make a finding on any alleged breach of a provision of this Code; or
 - (b) establish a special committee—
 - (i) to investigate and make a finding on any alleged breach of this Code; and
 - (ii) to make appropriate recommendations to the council.
- (2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may—
 - (a) issue a formal warning to the councillor;
 - (b) reprimand the councillor;
 - (c) request the MEC for local government in the province to suspend the councillor for a period;
 - (d) fine the councillor; and
 - (e) request the MEC to remove the councillor from office.
- (3) (a) Any councillor who has been warned, reprimanded or fined in terms of paragraph (a), (b) or (d) of subitem (2) may within 14 days of having been notified of

the decision of council appeal to the MEC for local government in writing setting out the reasons on which the appeal is based.

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

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

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

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

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

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

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

(b) remove the councillor from office.

(7) *Any investigation in terms of this item must be in accordance with the rules of natural justice.*” (Emphasis added.)

12. Although not stating when exactly, the first respondent averred that he initiated an investigation acting in terms of his powers contained in item 14 (4) of the Code. The premise for an investigation pursuant to this item is (1) that the municipal council having the primary responsibility to investigate the facts and circumstances of the alleged breach and make a finding of a reasonably suspected breach of the Code’s provisions does not conduct an investigation (or conclude it I believe can be read in here) and (2) he considers it necessary. If this jurisdictional basis exists, the first respondent is in my view according to the provisions of item 14 (4), expected to

appoint a person or a committee to investigate the alleged breach of a provision of the Code and, as is provided for in item 14 (1), to make a finding thereon as well as recommendations to him as to the appropriate sanction that befits the finding of the relevant breach of the Code's provisions. The investigation, whether initiated by the chairperson of the municipal council or the member of the executive council acting pursuant to the jurisdictional basis provided for in item 14 (4), clearly takes place subject to the rules of natural justice which according to item 13 (1)(b), as an elementary procedural safeguard, requires that the person suspected of a breach is given "a reasonable opportunity to reply in writing regarding *the alleged breach*".

13. The first respondent claims that in this instance he tasked the Amathole District Support Centre ("ADSC") which is a component part of his department to conduct the relevant investigation. The report which he identifies as the work of the ADSC, or the outcome of the investigation is the impugned report in the record of decision to which I will shortly refer. This report focuses on allegations against the applicant concerning her claimed manipulation of a beneficiary list by using her Area Committee to distribute food parcels and vouchers during the COVID 19 State of Emergency instead of adhering to a list provided to her by the ward committee of the area, in the process benefiting her friends and close associates who would otherwise not have benefitted from the programme. He also alludes to "other findings in the report."³ These findings, included the fact that the applicant has a criminal record obtained whilst a councillor in March 2019 and that she purportedly "also committed fraud" in that she sold a house to a Ms. Mabileni for R300 000.00 in June 2019 (also during her term of office) which, although paid for in full, was never transferred to her. Transfer is however supposedly not possible, so the first respondent asserts, because the same house has been sold by the applicant to a different person as well.

14. The report adds that the applicant "also committed another fraud" involving property by selling a different house to a Mr. Odwa Matshaya which the applicant has also failed to transfer to him to date.

³ What the alleged breaches were in exact terms, the fact and circumstances of which required investigation, is not stated.

15. This investigation report the first respondent references as being the premise for his decision that will go under scrutiny in the anticipated review hearing must have existed before 2 July 2020 because the first respondent claims that on this date he wrote to the Speaker Councillor Mr. Mtsi “bringing to his attention *the serious findings in the report*” and that he directed him to investigate and invite the implicated councillors, including the applicant, to provide written submissions in response to the findings. He alludes to the fact that in the letter aforesaid he had specifically stated that he was of the view that the conduct of the implicated councilors including that of the applicant, *may* have amounted to a breach of the Code.

16. Five days after the dispatch of the letter Mr. Mtsi unfortunately succumbed to COVID. The first respondent avers that due to his untimely death, the “misconduct issues (he) had raised with him remained unresolved” but he clarifies that this “was mainly due to factional power dynamics within the Council”.⁴ As a result, so he rationalized, no action was taken or could be taken against implicated councilors including the applicant since July 2020. This is the situation that pertained until 27 November 2020 when he himself wrote to the applicant, *inter alia*, “bringing to her attention *the serious findings against her in the report*”. He specifically informed her in that letter of his view “that she may have acted in breach of the Code” and of his “powers in terms of the Code to act against her when, in (his) opinion, there (was) evidence of such breach including (the) possible removal of her as a Councillor”.

17. The first respondent felt obliged to explain the circumstances under which he felt constrained to step in and exercise the power referred to in item 14 (4) of the Code to address the peculiar conundrum as follows:

“22. The aforesaid factional divisions have perpetrated an untenable situation where the Council may act and deal with some rogue councilors but fails to deal with others for political expediency depending on the factional power dynamics in the Council. This state of affairs if allowed to continue would certainly not only undermine the constitutional mandate of Council but also be detrimental to the interests of the

⁴ What these are are not stated with any clarity.

communities served by the municipal over which as the MEC, I am legally required to conduct my oversight duties.

23. It is therefore my honest view that the enforcement of discipline in terms of the Code is paramount and should be prioritized in a universal manner in respect of all councilors implicated in wrongdoing and the enforcement cannot be seen or perceived to be selective depending on the political allegiance or political power dynamics between factions in the Council.

24. I submit that as the MEC and political head of COGTA, I cannot therefore be expected to watch helplessly where evidence exists of protracted and flagrant violations of the Code by some councilors with no decisive action taken against them or where action against them is unreasonably delayed by the Council due to the factionalism prevailing at the municipality.”

18. The applicant’s attorneys addressed a response to the first respondent’s letter of 27 November 2020 which the first respondent explains did not deal directly and substantively with his request to the applicant to make representations “on (the) specific allegations in the report against her”. He further laments that she had failed to provide him with “any reasons as to why (he) must not proceed suspending her as councillor pending an investigation or, provide (him) with reasons as to why he should not remove her as a councillor for breach of the Code”. He further criticizes her for opting to provide a “bare denial” to the serious allegations of fraud and corruption against her using this as a basis to conclude that her response was not only dishonest but also evasive with regard to the serious allegations levelled against her. He expresses surprise at the notion that “as part of her defence” she opted to question his approach employed to investigate the allegations including his legal standing to conduct the investigation in terms of item 14 (4) of the Code.

19. Evidently, however, as appears from my appraisal of the record of decision below, the first respondent took whatever admissions the applicant made in her reply into consideration in justifying his decision to remove her as a councillor with immediate effect.

20. For the rest, in opposing the application for interim relief the first respondent denied that the applicant had established the requirements for the grant of an interim interdict. He also resisted the application on the basis that it lacked urgency.

21. He further lamented the fact that if this court were to rule in the applicant's favour that such an order would render futile the powers lawfully exercised by him in enforcing and ensuring compliance by councillors with the Code and that it would in fact be "legally harmful to the principle of public accountability".

22. An applicant who seeks an interdict *pendente lite* must establish the usual requirements for the grant of an interim interdict. These are: the existence of a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interim order is not granted; the balance of convenience must favour the grant of the interdict; and the applicant must have no other satisfactory remedy at her disposal.

23. *Inter alia* as regards the requirement to prove a *prima facie* right, the court held in *SA Informal Traders Forum and Others v City of Johannesburg & Others*, *South African National Traders Retail Association v City of Johannesburg & Others*⁵ that the proof thereof may be established by the applicant when he or she is capable of demonstrating prospects of success in an anticipated review application, as *in casu*, the express purpose of the application argued before me being to maintain the status *quo* pending the determination of such an application.

24. The proper manner of approach in establishing a *prima facie* right is to take the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant, he could not succeed in obtaining temporary relief.⁶ In this instance however there was hardly a factual dispute at play, the prospects of success in the review application almost suggesting

⁵ 2014 (4) SA 271 (CC) at par 25.

⁶ *Webster v Mitchell* 1949 SA 1186 (W) at 1189.

themselves from the record of decision and what the first respondent himself says guided his actions and considerations.

25. The requirements for an interim interdict have to be considered not separately or in isolation but in conjunction with one other in order to determine whether the court should exercise its discretion in favour of granting the interim relief. Our courts have consistently applied the “sliding scale test”. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant, the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.⁷

26. In considering the balance of convenience this court must also weigh the prejudice to the applicant if the interim interdict is refused against the prejudice to the first respondent should it be granted.⁸

27. As indicated above, apart from what course of action the first respondent says he took and the justification provided by him for his decision, it was necessary for me to have regard to the record of decision as well, which by the time the interim application was argued before me had already been filed by the first respondent pursuant to the provisions of rule 53 (1)(b) and on its own in my view was somewhat instructive of the situation of the applicant’s prospects of success in the anticipated review application, especially in respect the applicant’s complaint that the rules of natural justice were denied to her.

28. As an aside, Mr. Phoshera on behalf of the first respondent argued vociferously on the basis of the authority in *Masina v MEC for Co-Operative Governance and Traditional Affairs & Another*⁹ that the first respondent was well placed to have commissioned the investigation pursuant to the provisions of item 14 (4) of the Code. I have no quarrel with that finding that members of the executive council are required to act consistently in enforcing the Code in all the municipalities under his jurisdiction and that he need not wait by helplessly before stepping in unless and until a

⁷ *Eriksson Motors (Welkom) v Protean Motors, Warrenton* 1973 (3) SA 685 A at 961 F – G.

⁸ *Eriksson Motors (Welkom) supra* at 619 F – G and 11 LAWSA 408, page 423.

⁹ (223/2020) [2020] ZAECHC 21 (5 November 2020).

municipal council has investigated the matter as provided for in sub-item (1) and/or concluded it if the circumstances warrant such intervention.

29. One has only to peruse the Memorandum on the Objects of the Local Government Laws Amendment Bill, 2007 (preceding the enactment of the Local Government Laws Amendment Act, No. 19 of 2008) to understand the clear objective of the legislature by the amendment to item 14 (4) of schedule 1 to the Systems Act. Paragraph 1.21 thereof provides that clause 20 (which corresponds to section 21 of the Local Government Laws Amendment Act, No. 19 of 2008) is amended “to provide that where the municipality does not conduct an investigation in terms of sub-item 1 and the member of the executive council in his or her discretion considers it necessary the member of the executive council may appoint a person or committee to do so.”

30. I was accordingly not of the view that sentiments of the notion of co-operative government precluded the first respondent *in casu* from acting as he contended for, but rather that the applicant had raised an arguable case that the first respondent had perhaps not acted in accordance with the prescripts of the provisions of item 14 (4) of the Code in assuming the reins, more especially in recognizing her rights in the first place to procedural fairness in pursuit of his objective.

31. I turn now to consider the record of the first respondent's decision.

32. The focus or ambit of the investigation undertaken against the applicant (I will assume for present purposes at the instance of the first respondent and in terms of his entitlement to invoke the provisions of item 14 (4) of the Code) is recorded in the said undated investigation report. This is the primary document on which the first respondent says his decision to remove the applicant rested. The investigation referenced in the report however ostensibly related only to complaints against her around the issue of the allocation of food parcels or vouchers in certain affected wards.

33. The purpose and background to the investigation referenced in the report is outlined as follows:

“1. PURPOSE

The purpose of this memorandum is to give a report on the fact-finding investigation on the alleged food parcel corruption in the Buffalo City Metropolitan Municipality.

2. BACKGROUND

The ADM/BCMM DSC Senior manager received a WhatsApp message alleging corrupt activities in the distribution of food parcels in the following wards: wards: 01, 08, 10, 20, 41 and 49 in the Buffalo City Metropolitan Municipality.”

34. The report records further that the mandate of the first respondent is derived from Item 14 (4), (5), (6) and (7) of the Code, the provisions of which I have set out above.¹⁰

35. The process followed, according to the investigation report, is that, on getting the message (referred to in the “background” described above) “the senior manager¹¹ required sworn statements from the affected wards and reports from the departmental CDWs¹² to solicit information as to what transpired in the wards concerned”. It was pursuant to receipt and analysis of the written affidavits from the complainants and reports from the ward CDWs, so the investigation report records, that a summary was provided in respect of each ward.¹³

36. It is not evident what affidavits exactly or what reports were provided or who exactly the “complainants” were, but the investigation report reflects the following “findings”¹⁴ specifically against the applicant in summary form:

¹⁰ Reading from the first respondent’s affidavit he did not think it necessary to invoke these provisions until the investigation in the hands of the municipal council had reached a stalemate. That eventuality on the first respondent’s own timeline happened after the death of the Speaker Mr Mtsi so it is surprising that an investigation report compiled ostensibly before then references these powers.

¹¹ This person was not identified. It is also not clear if he/she is the same A.Z. Bokwe who evidently prepared the report and who would have been appointed by the first respondent to investigate a breach of the Code’s provisions.

¹² I expect that this is a reference to community development workers and can only relate to the concerns about the distribution of food parcels.

¹³ The sworn statements and reports here referenced are not pertinently identified by the first respondent but again from the context they seem to relate to the distribution of the food parcel complaints.

¹⁴ One looks in vain for the corresponding allegation of a breach of the Code that led to the “findings” in the second paragraph of the excerpt.

The Findings:

“Ward 20: The Ward Councillor did not involve the Ward Committee in the identification of beneficiaries for the food parcel. It was found that she utilized her friends and allocated vouchers to those who were close associates.

It was found that Councillor Gamnca (Ward 20) has committed fraud, and conviction was obtained against her for breaking a cellphone belonging to a member of the community.”

37. The second paragraph above appears to have nothing to do with the subject of the investigation and strangely (as will be seen below) was not responded to by the applicant in the context of the investigation at hand. I should add that the applicant in her replying affidavit referred to the report of the Speaker to the Premier arising from the allegations concerning the food parcel complaints (seemingly in conclusion of the investigation as at that time) which is bereft of any mention of any contemporaneous allegation that she had committed fraud or was convicted.¹⁵

38. On the simple face of it, the reference to the latter complaint is discordant with the rest of the investigation report. It is also not clear when and under what circumstances the finding in the second paragraph above was made. The applicant’s case made out in the application however is that she was not apprised that she was under investigation for fraud or on the basis of her admitted criminal conviction until 27 November 2020.

39. The summary of the applicant’s input or response, supposedly in relation to “the allegations levelled against (her)” is summarized as follows:¹⁶

The response:

¹⁵ Annexure “GG1” to the applicant’s replying affidavit.

¹⁶ The investigation report notes that these responses were obtained via the speaker of the second respondent who was requested by the first respondent to prevail upon them to reply to the allegations levelled against them.

“Councillor Gamnca stated in her response that in her ward she included all the ward committee and political parties’ representatives in the identification of the 800 beneficiaries. There are problems in the ward and the Troika are in the process of intervening to try and resolve the impasse.”¹⁷

40. There is plainly nothing said about the applicant’s responses in the context of an investigation into the purported fraud and conviction complaints, yet the recommendation in the impugned investigation report concludes as follows:

“7. RECOMMENDATIONS

The Code of Conduct for Councillors states that a councillor must-

- (a) Perform the functions of office in good faith, honestly and in a transparent manner; and**
- (b) At all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.**

In terms of item 6 of the code, **a councillor may not use the position or privileges of a councillor, or confidential information obtained as a councillor, for private gain or to improperly benefit another person.**

Based on the abovementioned disposition, on the face of things the cited Councillors have transgressed the spirit of the Code of Conduct and as such for the Honourable MEC must:

- a. Cause the Speaker of BCMM to submit a report on steps that have been taken against Councillor Gamnca (Ward 20) *who is alleged to have committed fraud with conviction, and also Ward 01 Councillor who is alleged to have solicited a bribe of R50 000.00 from the artist.*
- b. The MEC must request the affected councillors to make representations on the findings against them.¹⁸

¹⁷ It appears from Annexure GG1 to the applicant’s replying affidavit that the issue or complaint against the applicant was dealt with conclusively on the basis of what was reported to the Office of the Premier, viz that the “CIr included all the ward committees and political parties’ representatives. We have intervened as Troika for purposes of solving a problem at Ward 20. At the moment we are busy handling the matter with affected community members”. This report to the Premier is unfortunately also undated. Reference is further made to an annexure “C” to the report which was not attached to the applicant’s papers.

¹⁸ This makes absolutely no sense.

c. In the event of an unsatisfactory response, the MEC must take necessary steps to enforce provisions of the code by imposing an appropriate sanction.

d. Going forward the following are the recommendations:

7.4.1 Working relations between Ward Committees and Ward Councillors need to be strengthened to avoid unnecessary conflicts within the ward.

7.4.2 Ward Councillors need to develop word-based profiles so as to be able to identify indigent members of the Ward instead of thumb sucking as to who is indigent in the ward.

7.4.3 Proper planning should take place before a decision on distribution of food parcels as a solution is taken as this puts the municipality in a difficult position in that Ward Councillors are requested in a short space of time to come with names of indigent people in the ward.

7.4.4 CDWs must develop in conjunction with other service departments like Social Development; Health; Education etc. ward profiles to assist Councillors in times like these where lists are required for relief of distress assistance.

7.4.5 An administrative function should only be performed by administrators to avoid allegation of being partisan by politicians.

7.5.6 Breach of COVID-19 regulations become serious as this exercise exposes communities to danger.

Public participation exercise which is meaningful need to be adhered to by state organs when rendering services to the people.” (Emphasis added.)

41. It is again significant in my view that paragraph (a) appears discordant with the rest of the conclusions naturally related to the issue of the allegations of corruption concerning the distribution of food parcels. It also refers to “steps taken” against the applicant relating to having “committed fraud with conviction” yet the applicant denied that these allegations surfaced until 27 November 2020. This allegation was not gainsaid by the first respondent in his answering affidavit.

42. A further anomaly is that the affidavits in which the applicant is accused of wrongdoing in breach of the Code ostensibly on the basis of the alleged fraud and the fact of her having a criminal conviction only came to hand on 1 December 2020, which is when the three affidavits on which the allegations are purportedly premised were obviously deposed. These (among other random unexplained documents) are

listed in the index to the investigation report as annexures that on the first respondent's version must have been prepared before his letter to the late speaker dated 2 July 2020, yet they postdate the report.

43. The affidavits said to have fostered suspicion that the applicant was in breach of the Code's provisions comprise firstly a hearsay affidavit by one Ms. Magela. She confirms that she is the sister of one Ms. Malibeni who purportedly bought a house (1963 NU6 Mdantsane) from the applicant for R300 000.00. It suggests that she wanted the purchase price paid cash but that her sister disagreed with such an arrangement and that the money was instead deposited to the applicant's husband's banking account with Nedbank only to find later that the applicant had sold it to someone else before. The affidavit further promises that there is proof. Proof of payment of R300 000.00 into the banking account of A Gamnca appears to be related.

44. Next there is another hearsay affidavit by one Peggy Matshaya that accuses the applicant of having sold an unidentified house to her husband Odwa. He did renovations to the house, but she asserts that it was never ultimately transferred into his name.

45. The third affidavit is one by a directly affected councillor, Mkhuseleli Brian Nombewu, to the effect that the applicant was convicted for hurling insults at him and snatching his cellphone and sentenced by the East London Magistrate's Court in March 2019. It is uncertain what offence exactly the applicant was convicted of, but she claimed in reply that she was fined an amount of R5 000.00 only and not R10 000.00 as asserted by the first respondent. (As an aside it is only a conviction and sentence for a period of more than twelve months without the option of a fine that disqualifies a municipal councillor from holding office.)¹⁹

46. The record of decision also includes the invitation by the first respondent to the applicant dated 27 November 2020 to show cause why she should not be suspended on account of certain concerns regarding her supposed unbecoming

¹⁹ See firstly section 21(1)(b) of the Structures Act which cross references section 158 (1)(c), read together with the provisions of section 47 (1) of the Constitution.

conduct as a councillor and detailing the allegations informing these concerns. The applicant says that this was the first indication of the purported formal investigation concerning these issues or accusations levelled against her. The contents of the “invitation”, which vacillates between the suggestion that the applicant *may* be guilty of a breach of Code versus a finding justifying the imposition of a sanction already, are repeated below:

“RE: THE UNBECOMING CONDUCT OF COUNCILLOR GAMNCA (YOURSELF)”²⁰

My office is in receipt of a report from Amathole District Support Centre of the department on the unacceptable misconduct and Breach of the Code of Conduct for Councillors by Councillor Gamnca (yourself). The report was premised from a series of complaints that were raised through the Community Development Workers of my department, others through the Hotline of the Office of the Premier.

I have several times written to the Council Speaker to urgently institute a thorough investigation on the matter. This proposal was done in line with the below provisions;

Item 13(1)(a) of Schedule 1 – Code of Conduct for Councillors of the MSA

provides that: “If the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of this Code has been breached, the chairperson must – (a) authorise an investigation of the facts and circumstances of the alleged breach.”

The above process was meant to give you an opportunity to explain yourself. The reluctance on the side of the Municipal Council has left me with no choice but to take an action myself as I am empowered by Law as one of the role players responsible for the enforcement of the Code of Conducts for Councillors. Accusations that are levelled against you are as follows:

A. Acts of Public Violence: It is alleged that Councillor Mganca (sic) committed public violence and was convicted to that effect as she broke a cell phone that belongs to a community member and has since admitted to that and repaid the costs of repairing the phone.

²⁰ The notice is addressed to councillor Witbooi incidentally although its contents appear to concern the applicant herself.

Fraud and Corruption Councillor Gamnca is further seriously accused to have solicited money from various community members (affidavits to this effect have been submitted by the affected people) where she fraudulently sold house to certain community members and deposits were made to the bank account of her spouse, values to that are as follows:

- Pumla Marambana – a sum of R200 000 was paid to the councillor
- Viwe Godi – a sum of R180 000 was paid to the councillor
- Khayaletu Matshaya – a sum of R15 000 was paid to the councillor
- Sindiswa Mage - a sum of R300 000 was paid to the councillor
- Monde Tyokolo – a sum of R100 000 was paid to the councillor

Having read the detailed report at my disposal and made analysis thereof, I am of the view that certain Items of the Code of Conduct for Councillors may have been breached. It is however required of me by law that I should act in accordance with the legislation that is relevant to the issues at hand.

Item 14 (6)(b) of Schedule 1 – Code of Conduct for Councillors of the MSA provides that: “If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may – (b) remove the councillor from office.”

It is therefore, in light of the above-mentioned allegations that you are kindly requested to make written representations on the allegations and submit valid reasons to my office within **SEVEN (7) DAYS** from the date of receipt of this letter, why you should not be suspended without pay pending the criminal investigation or removed from office for breaching the Code of Conduct for Councillors.” (sic)

47. Next in chronological order is the letter of the applicant’s attorneys to the first respondent in response dated 1 December 2020. It relates that:

47.1 the applicant had never before been apprised of the investigation taking place, save that her co-operation had been sought by way of representations, “to assist the investigation to arrive at just and fair conclusion”;²¹

47.2 the applicant had not received a copy of the complete investigation report referenced in the first respondent’s invitation under reply;

47.3 the first respondent was in the applicant’s view acting prematurely;

47.4 the applicant assumed that the only concerns investigated against her up until that point had been those raised by the Ethics Committee of the second respondent;²²

47.5 the applicant complained that the first respondent had failed to appoint a person or committee to investigate any alleged breach of the Code pursuant to the provisions of Item 14 (4);²³ and

47.6 the applicant was concerned by the equivocation of the first respondent between being certain that she had breached the Code and was acting upon recommendations and being uncertain both at the same time by pointing out his view that “the provisions *may* have been breached”.

48. In the letter of 1 December 2020 her attorneys demanded that the first respondent withdraw this correspondence on the basis that the first respondent’s intervention was premature and requested him to refrain from implementing the provisions of item 14 (6)(b) prematurely pending compliance with the Code. He was further prevailed upon to provide the applicant with the report he purported to have in his possession so that the applicant could fully respond to the allegations.

49. On 8 January 2021 under cover of a letter also included in the record of decision the legal advisory services department of the first respondent’s office provided the applicant’s attorneys with the impugned investigation report which it

²¹ I assume that this relates to the food parcel investigation which the applicant says was concluded without any adverse outcome against her. Indeed, the first respondent is silent regarding the upshot of these allegations that were investigated against her which seems to suggest that nothing negative came of them.

²² Again, this must be a reference to the food parcel corruption allegations.

²³ Indeed, given the anomalies with the investigation report highlighted above, this does not appear to be an authentic contemporaneous report by Mr./Ms. Bokwe in relation to the allegations which costs her her appointment as ward councillor. It appears to me that the supposed investigation by the first respondent was tacked on to the earlier report, or that a cut and paste template was used that unfortunately gives the impression of an irregularity.

was claimed would address the applicant's queries "in detail". The letter assures the reader of the first respondent's authority to decide, purports to convince them that the first respondent indeed took the necessary procedural steps and concludes with the assertion that he will not withdraw the correspondence sent to the applicant. The applicant is further placed on terms to provide her representations by 15 January 2021, failing which it is intimated that the first respondent will otherwise take a decision without her representations.

50. The next letter from the applicant's attorneys to the first respondent dated 21 January 2021 constitutes the applicant's representations. They deny that there is any foundation to the allegations and suggest that an underhanded agenda is at play. Contrary to the first respondent's contention that she vaguely brushed off the serious allegations against her, the letter deals on her behalf with each allegation separately as follows:

"Acts of Public Violence"

Councillor Gamnca strongly denies that she was ever charged and appeared before any court of law in the Republic facing charges of public violence especially against a member of the public. The only incident which Councillor Gamnca can recall which led to her conviction in court, was an altercation with a fellow party member and councillor Mr Mkhuseleli Nombewu which occurred at a private organizational meeting which was held at the ANC regional office in East London. The meeting had nothing to do with her duties as a councillor but was meant to deal with organizational matters.

The incident was well choreographed by the complainant who wanted to achieve his selfish interest at the time. You will note from the affidavit of the complainant Mr Nombewu that he states that he is a councillor himself with his address as City Hall. Unfortunately, he declared himself an opponent within the movement, hence our client reiterates that this is nothing but dirty politics at play.

I therefore deny that I violated the code of conduct in any manner especially with reference to your correspondence.

Fraud and Corruption

Pumla Marambana – Councillor Gamnca has no knowledge of the allegations brought by Ms Marambana. She is adamant that she never accepted any money in whatever form from Ms Marambana, and if possible may she be furnished with proof of payment.

Viwe Godi – Councillor Gamnca denies that she ever received an amount of R180 000.00 from Viwe Godi.

Ms Godi is the former Ward Committee member in the previous administration who never accepted transition. Ms Godi refused to vacate a house where her mother was boarding in Mdantsane. Councillor Gamnca had a duty to intervene on behalf of the family that Ms Godi had refused accommodation. That is why Ms Godi campaigns against Councillor Gamnca. Ms Godi is once again challenged to produce any proof of payment to prove her claim.

Khayaletu Matshaya – Councillor Gamnca denies ever receiving any money from Mr Matshaya. Proof of payment is requested as these allegations are denied in the strongest terms. Even the report commissioned by the MEC bears no proof of these allegations.

Sindiswa Magela – Councillor Gamnca admits that she sold her house to Ms Ntombizanele Malibeni a cousin of Sindiswa Magela. According to Councillor Gamnca there has never been a complaint from Ms Malibeni who purchased the house. Even the affidavit attached to the report is deposed to by Ms Magela which is quite strange, and the person who sold the house is quiet. According to our client's knowledge, the reason why the house has not been transferred is because Ms Ntombizanele Malibeni has not yet financially instructed her own attorneys to proceed with transfer, hence she has to submit the complaint with the office of the MEC. Ms Sindiswa Magela also declared herself an opponent of councillor Gamnca within the ANC. We attach herewith Deed of Sale for ease of reference and mark same HN.²⁴

Monde Tyokolo – Councillor Gamnca can confirm that on or about 2009/2010 she sold one of her properties to Mr Tyokolo but the deal fell through as Mr Tyokolo failed to fulfil the terms of the agreement. The sale took place before I was even a councillor.”

²⁴ Incidentally, the deed of sale relates to Erf 1962, NU5, Mdantsane, a totally different property than the one referred to in the affidavit by Ms. Magela. The purchase price is also stated to be in the sum of R310 000.00. Costs of transfer are expected to be paid by the purchaser and the transfer clause suggests that property shall be passed by the conveyancer and shall be given and taken upon the purchaser having complied with her obligations to pay both the full purchase price and the costs of transfer. Vacant occupation of the property was to be given by 30 June 2018.

51. The culmination of it all is the first respondent's decision advised to the applicant in the letter 26 January 2021 (apparently without any preceding "finding" or recommendation having first being made to him by his appointee) that in his view she has breached the Code, more especially Item 2 (b) thereof, and that he is removing her for this reason believing that the breach or contravention in question warrants the sanction of her removal from office.²⁵

52. The reasons given by the first respondent for so concluding are also instructive and suggest that he opportunistically seized upon the fact of the applicant's concessions rather noted in her attorney's letter dated 21 January 2021. This is self-evident from his reply in the following terms:

"1. In your own representations you admit being convicted of a criminal offence. The duty to act in the best interest of municipality and without compromising municipality's credibility or integrity, must be maintained at all times until you cease to be a councillor. You cannot engage yourself in violent conduct just because you are dealing with another councillor. Conviction of a councillor seriously compromises the integrity of the municipality to which that councillor is a member of.

2. Your response in relation to sale of immovable property between yourself and Ms Malibane (sic) leaves much to be desired. The seller has an obligation to transfer or deliver the property to the buyer, even if the buyer pays costs of transfer. You have failed in your response to mention the name of the conveyancing attorney that was to be responsible for the transfer. It must be said identifying a conveyancing attorney is the responsibility of the seller, even if the buyer is obliged to pay the transfer costs. It is disturbing that more than two (2) years after the purported sale agreement, you are now raising an issue to say that Ms Malibeni did not pay the transfer costs. I must indicate that my office has consulted with an angry Ms Malibeni.²⁶ She advised that you have failed to carry out your responsibilities as a seller and to date she does not know who is the conveyancing attorney and has never received any statement of account from that attorney. You took advantage of

²⁵ Incidentally in paragraph 58.9 of his answering affidavit he asserts that it was proved that the applicant was in breach of item 2 (a) and (b) of the Code.

²⁶ This is evidently the first heard of any complaint by the purchaser herself, not in the form of a sworn affidavit.

a vulnerable member of the community and received payment of R300 000 which was paid to your husband's account. It must be said this is an unusual practice, financial transactions in the contract of sale of immovable property are handled by the conveyancer.

Your failure to furnish me with the firm of attorneys handling this transfer and receipt of the purchase price immediately after the conclusion of "sale agreement" has left my office to conclude that you defrauded Ms Malibeni herein.

You are therefore advised that in terms of Item 14 (6) (b) of the Code of Conduct applicable to Councillors you have been removed from office."

53. It is a trite principle of law that procedural fairness in the form of the *audi alteram partem* rule presupposes that persons are given an opportunity to participate in decisions that will affect them and, crucially, a chance of influencing the outcome of those decisions.²⁷

54. Such participation is a safeguard that not only signals respect for the dignity and worthy of the participants but is also likely to improve the quality and rationality of administration decision making and to enhance its legitimacy. As was stated by Mokgoro J in *De Lange v Smuts N.O.*:²⁸

"Everyone has the right to state his or her case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."²⁹

55. Fairness is a highly variable concept and what makes a hearing fair has always depends on the circumstances. Section 32 (2) of the Promotion of Administrative Justice Act, No. 3 of 2000 expressly recognizes that a fair procedure "depends on the circumstances of each case".³⁰ In the present instance the Code clearly sets

²⁷ Administrative Law in South Africa, Cora Hoexter, 2nd Ed at page 363 (See also footnote 5 on that page.)

²⁸ 1998 (3) SA 785 (CC).

²⁹ *Supra* at para 131

³⁰ Hoexter *supra* at pages 364 - 365

forth the elementary procedural standard that is required to safeguard the rights of a councillor who is suspected of being in breach of a provision of the Code. Even recognizing and accepting the first respondent's version that he was constrained to conduct his own investigation under the relevant circumstances, the provisions of items 14 and 13 mandate the process applicable, underscored by of sub-item (7) that states in peremptory terms that any investigation in terms of item 14 "must be in accordance with the rules of natural justice".³¹

56. What the evidence demonstrated in *casu* is that the purported investigation report on the face of it appears to be irregular and self-evidently raises concerns that the preliminary step envisaged by sub-item (4) was not complied with *before* the applicant was asked to make representations concerning the damning allegations which surfaced for the first time on 27 November 2020, this despite the fact that a suspicion and an allegation of a breach of Code is quintessential to justify an investigation in the first place.

57. Further, after providing the report to the applicant's attorneys as a basis for getting to that point, the record of decision suggests that the sworn statements in proof of those allegations were only obtained after the applicant was placed on terms. As Jolwana J remarked in *Masina*³² "investigation is about establishing facts or confirming the veracity of allegations so that appropriate action is taken" which means that an investigation properly undertaken cannot possibly be to the detriment of anyone concerned. To the contrary in this instance the record appears to be bereft of a proper investigation into the specific allegations which led to the applicant's removal as councillor that instills comfort in one that the process undertaken was beyond reproach.

58. Further, even assuming that the applicant was in effect given the chance to reply and exercise her right to reply albeit after the fact (co-incidentally through the assistance of her attorney), it appeared to me that a review court may well find that the obvious manner in which the applicant's right to procedural fairness was

³¹ See also the provisions of section 27 (d) of the Structures Act which stipulates that a councilor vacates office during a term if he/she contravenes a provision of the Code and is removed from office "in terms of the Code".

³² *Supra* at para [38].

undermined vitiates the process employed by the first respondent to achieve his objectives.

59. I am also constrained to observe that the decision ultimately taken by the first respondent to remove the applicant may not have being reasonable or rational.

60. In weighing up the requirements for an interim interdict I was also influenced by the fact that the first respondent had condemned the applicant as a “rogue councillor” (pejorative in itself) and branded her as a fraudster whereas the bases for these allegations stem from hearsay allegations with the flimsiest of detail nowhere near suggesting criminal fraud.

61. In the premises I concluded that the applicant enjoyed good prospects of success in the anticipated review application and that she stood to be deleteriously impacted by the two highlighted consequences flowing from her removal unless I granted the interdict. Indeed, I was taken in by Mr Nzuzo’s submission that it would be costly to “reverse transactions made consequent to the first respondent’s impugned decision” if the pending review (were) determined in her favour. The absence of her benefits arising from her appointment would also cause her penury.

62. It is common cause that the second respondent at a council meeting held on 27 January 2021 resolved to note the decision of the first respondent and by implication to implement same by stopping her salary and allowances as of 27 January 2021. Evidently due to claimed delays in processing her removal as a councillor the second respondent was unable to stop her February 2021 “salary” in time from being paid to her but warned in a letter dated 2 March 2021 that this would be deducted from any amounts owing to her by the second respondent or alternatively would be deducted from her pension and/or retirement fund before any payments would be made to her.

63. The alleged urgency was premised on the consequences to the applicant of not receiving payment of her salary and the knock-on-knock effect of that. Her medical aid would lapse, and she claimed that she had a sick child and could not afford to be without this benefit pending the review. Although Mr. Phoshera sought to persuade me that such a loss does not ordinarily warrant the intervention of a court on the

basis of urgency, the more compelling consequence was the fact that her removal created a vacancy that was about to be filled by way of the impending by-election. These two components of her status as a councillor go hand in hand and both were impacted by her removal which she submitted had been caused by the first respondent's impugned decision which ought not to stand. In any event the court held in *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others*³³ that the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced "humiliation and degradation" meaning that it is a vital interest worthy of seeking to protect on an urgent basis.

64. On the issue of costs, I was inclined of the view that these should depend on the ultimate success of the intended review application.³⁴ Mr. Nzuzo submitted that I should make a special costs order against the first and second respondents given their haste to achieve their "evil desires" by the questionable decision in the first place and then failing to agree to hold off the implementation thereof pending the determination of the review application (despite a purported undertaking given by the second respondent that it would not follow through with it in the meantime), but I am not in agreement that the perceived undertaking not to carry the consequences of the decision into immediate effect, was read in proper context.

65. In this respect a letter put up by the second respondent's attorneys confirming the way forward was ostensibly misunderstood by the applicant. It reads as follows:

"Our instructions are that your client's assertion that there are attempts to fill her position are untrue and the law is clear on how to replace a councillor in her position.

Our client reiterates its instructions that it will abide by the Court's decision."

³³ *Supra*, at [31]. See also *Mpumulanga Economic Growth Agency v Mthembu Qinoiso Christocentric ZALCJHB* 2015/352 at paras [7] and [8].

³⁴ The review court may well adopt the approach that despite any shortcomings in the process the applicant was meaningfully heard and that her input warranted the decision to remove her.

66. To my mind the second respondent meant nothing more than that the law would take its course. The fact that it expressed the view that the vacancy being filled was not hers is neither here nor there.

67. There was further no basis to conclude that the second respondent had done an about turn as it were by warning her in a letter dated 2 March 2021 that she should not expect any remuneration or benefits going forward and that the payment received in February 2021 was simply because it had failed to process her removal in time.

68. The reserved costs of 30 March 2021 remain reserved for final determination at the hearing of the review application. These costs arose ostensibly because there was a defect in the first respondent's papers (Mr Pitt who appeared for the applicant on this day together with Mr Mhlanti submitted that I could not hear the matter in the absence of a properly commissioned affidavit by the first respondent), but as pointed out by Mr. Phoshera the following day once his client had fixed the defect overnight, the applicant's papers also suffered from a shortcoming in that the applicant had not initialed each page of her replying affidavit. To my mind these were technical issues which did not detract from the substantive issues on hand which the applicant ironically had asked the court to adjudicate upon urgently.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF APPLICATION: 31 March 2021

DATE OF RULING: 6 April 2021

DATE OF REQUEST FOR REASONS: 9 April 2021

DATE OF REASONS: 13 May 2021

*Reasons delivered electronically on this date by email to the parties.

APPEARANCES:

For the applicants: Mr. S Nzuzo instructed by Godongwana Pakade Attorneys, East London (ref. Mr. Godongwana)

For the first respondent: Mr. Phoshera instructed by the State Attorney, East London (ref. Mr Ngwenya).

For the second respondent: No appearance.