

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 490/17

In the matter between:

MARTIN PHILIP VERMAAK**Applicant**

and

GREATER TAUNG LOCAL MUNICIPALITY**First Respondent****K.T GABANAKGOSI N.O.****Second Respondent****C. MOTLHABANE N.O.****Third Respondent****E. MORULE N.O.****Fourth Respondent****Heard: 11 May 2018****Delivered: 13 June 2018**

JUDGMENT

Introduction

- [1] The applicant, Mr Martin Vermaak (Vermaak) seeks various forms of urgent relief. Chief amongst them is to have the decision by the second respondent (the Municipal Manager) to place him on precautionary suspension as from 25th April 2018, be reviewed and set aside, and/or that the notice of suspension be declared to be of no force and effect, as it is alleged to be in breach of the provisions of section 5 and 6 of Local Government Disciplinary Regulations for Senior Managers. Vermaak further places reliance on the provisions of clause 13 of the South African Local Government Bargaining Council's (SALGBC) Main Collective Agreement (2015 – 2020) in contending that his precautionary suspension is unlawful.
- [2] Other forms of relief sought included *inter alia* an order restraining the Respondents from suspending him in future or placing him on special leave on account of frivolous and vexatious reasons related to the ones already used and mentioned in his supplementary and founding affidavits; directing that he remains employed as the Municipality's Chief Financial Officer, and for the Municipality to continue to give effect to the terms of his written contract of employment, until such time as the contract of employment is lawfully terminated.
- [3] In opposing application, the Municipal Manager and deponent to the answering affidavit on behalf of the respondents, questioned the formulation and competency of the relief sought by Vermaak. He further denied that based on the provisions relied upon by Vermaak, there was any unlawfulness in placing him on precautionary suspension.

Preliminary issues

- [4] The Municipality other than challenging the formulation and competency of some of the relief sought by Vermaak conceded that to the extent that he sought an order setting aside his precautionary suspension, the application

had the hallmark of urgency. On the averments made in the founding affidavit outlining the reason as to why the matter should be treated as urgent, and the concession made by the Municipality in this regard, I will treat the matter as one of urgency.

- [5] There are essentially fourteen (14) prayers sought by Vermaak in his Notice of Motion. The Municipality correctly took issue with most of those prayers other than those pertaining to the uplifting of his precautionary suspension. I agree that no basis for urgency was laid for those prayers to be granted. In prayer 6 and to a certain extent, prayer 11, Vermaak seeks an order restraining the respondents from suspending or placing him on special leave *in future* for any frivolous and vexatious reasons. This prayer, despite reference to reasons related to why he was currently on suspension, is in generalised and future terms, making it not competent for this court to grant.
- [6] In prayers 7 and 8 Vermaak seeks that he remains employed until the lawful termination of his contract, or until such time the High Court in Mahikeng sets aside the arbitration award issued in his favour in a matter pending before it under case number M104/2018. Clearly this form of relief is superfluous. Vermaak remains employed, *albeit* he was placed on precautionary suspension, which is the primary subject of this application. It is not for this Court to grant such a generalised order, let alone in circumstances where the private arbitration award in respect of his status as an employee is a subject of another court proceedings.
- [7] Prayers 9 and 10 pertains to the discovery and handing over of the Council's resolutions in respect of the decision to place Vermaak on special leave or precautionary suspension. I fail to appreciate the reason such an order should be sought in the context of this urgent application, and also in view of the issues related thereto being a subject of review proceedings before the Mafikeng High Court.
- [8] In prayer 12, Vermaak seeks an order to compel the Municipality to put up security for costs in the event that it opposed this application or pursuing any other litigation, and to further order it to pay all its wasted costs and counsel's

day fees in respect of a matter heard on 9 March 2017. As to the reason such an order should be sought on an urgent basis is incomprehensible. Once a court has made an order in respect of costs, that remains a matter for the successful party to pursue. In any event, to the extent that the respondents have not complied with a previous order of this court in respect of costs, Clause 13 of this Court's Practice Manual¹ outlines the procedure to be followed when a contempt order is sought, and it is impermissible for Vermaak to seek such an order in the manner he has. Furthermore, there is no basis for any order to be made in respect of security of costs for the purposes of this application. In the event that a further cost order is made in this application, that is a matter for Vermaak to pursue at a later stage.

- [9] Under prayer 13, Vermaak seeks an order for contempt of court in respect of the second to fourth respondents. He seeks that they be arrested for allegedly victimizing, harassing him, and unlawfully suspending him. This relief is clearly not competent, and courts do not as a general rule, issue contempt orders in circumstances where litigants complain of victimisation, harassment or unlawful suspensions, unless there is a court order in that regard. Even then, and to the extent that Vermaak seeks to rely on the previous order issued by this court on 9 March 2017, the procedures mentioned in Clause 13 of the Practice Manual of this Court as indicated above still have to be complied with.
- [10] Counsel for Vermaak at the commencement of these proceedings took issue with the late filing of confirmatory affidavits by the first and fourth respondents, and their further filing of a supplementary affidavit. It was argued that inasmuch as the rules of this court pertaining to the time frames on the urgent roll were flexible, that flexibility did not extend to the filing of further documents.

¹ **13 CONTEMPT OF COURT**

- 13.1 '... In order to avoid this and the prejudice which results therefrom an application for contempt of Court must be launched on an *ex parte* basis on a Friday in Motion Court, where the applicant must seek an order that the respondent be ordered to appear at the Labour Court to show cause why it should not be held to be in contempt.
- 13.2 An application which seeks for the court to make a finding that a party is in contempt of an order of the Labour Court must be made *ex parte* by way of a notice of motion accompanied by a founding affidavit...'

- [11] The Notice of Motion and founding affidavits were filed and served on 5 May 2018. The answering affidavit followed on 7 May 2018 and the matter was set down on 8 May 2018. It was subsequently postponed to 10 May 2018 in order to afford Vermaak an opportunity to file his replying affidavit. The confirmatory affidavits complained of were filed on 10 May 2018, and do not add any further substance to the merits other than to confirm the contents of the answering affidavit, and it is apparent that Vermaak cannot complain of any prejudice in that regard.
- [12] In respect of the respondent's supplementary affidavit, it is trite that in motion proceedings, parties are entitled to three sets of affidavits². A party can only submit supplementary affidavits with the leave of the court in the exercise of its discretion. In this case, no basis was laid as to the reason that discretion should be exercised in favour of the respondents.

Background

- [13] Vermaak commenced his employment with the Municipality with effect from 16 January 2012 as the Chief Financial Officer. He is a Senior Manager employed in terms of the provisions of section 56 of the Local Government Systems Act (Systems Act).³
- [14] There is some litigation history between the parties. Vermaak was initially dismissed sometime in 2013, and having referred a dispute to the CCMA, he was reinstated in terms of an award issued on 18 August 2013. In February 2017, the Municipality sought to terminate his contract of employment and or place him on special leave. He had approached this court on an urgent basis on 9 March 2017 under the present case number. This court, per Van Niekerk J, and following an agreement between the parties, declared the decision to place him on special leave and to cancel his contract of service to be of no force and effect. He was to resume his duties pending private arbitration proceedings meant to determine the status of his employment contract.

² *Hano Trading CC v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) at para 10.

³ Act 32 of 2000, as amended.

- [15] In the course of the private arbitration proceedings, a grievance pertaining to allegations of sexual harassment and unbecoming behaviour was lodged against Vermaak by his personal assistant on 11 September 2017. He had responded to the allegations in writing on 12 September 2017. The private arbitration proceedings were completed and an award was issued in Vermaak's favour on 8 January 2018. That arbitration award is a subject of review proceedings before the Mahikeng High Court.
- [16] The above-mentioned grievance was brought to the attention of the Municipality through its former Manager: Human Resources. It is common cause that the complaint was then dealt with in terms of the Grievance Procedure as contained in the SALBC Main Collective Agreement. The Municipality contends that the HR Manager, who has since resigned from its employ, erroneously followed that particular procedure in respect of the complaint against Vermaak in the light of the serious nature of the complaint. It is submitted that a disciplinary procedure as provided in the Local Government Disciplinary Regulations for Senior Managers ought to have been invoked.
- [17] At a grievance hearing convened by the Municipal Manager on 6 February 2018, its outcome was *inter alia* that the complainant would be transferred from the Finance Department, and that she would be given two days within which to detail her allegations against Vermaak in writing. The complainant nonetheless failed to meet the deadline and only filed further particulars on 14 March 2018.
- [18] Vermaak complains that upon receipt of the complainant's further particulars in respect of the allegations, he was given a mere six days to reply thereto, and had done so on 22 March 2018. This was after the Municipality had on 20 March 2018, written a letter to him requesting his reply to the allegations against him, and where he had on 21 March 2018 informed the Municipality that he was not in a position to respond to the allegations at that stage.
- [19] The Municipality denies that a response to the allegations was forthcoming from Vermaak. The Municipal Manager addressed a letter to him on

27 March 2018, in which it was recorded that his letter of 21 March 2018 was an indication that he was not going to respond to the substantiated allegations made by the complainant, and that officially, the grievance procedure had been concluded and the grievance remained unresolved. Vermaak was informed that the matter was now out of the hands of the Municipal Manager as the Accounting Officer.

- [20] The Municipal Manager contends that since the grievance procedure at that stage had been exhausted and the complainant remained unsatisfied, he was of the opinion that in view of the seriousness of the allegations against Vermaak, the matter ought to be referred to the Municipal Council for its consideration. The Council in turn passed a resolution to initiate an investigation into the allegations of misconduct against Vermaak.
- [21] On 29 March 2018, Vermaak was invited to make written representations on why he should not be placed on suspension, and to do so by *23 January 2018*. On 3 April 2018, Vermaak through his attorneys of record sent correspondence to the Municipality to protest against what he viewed to be frivolous disciplinary processes against him. He further threatened to institute urgent proceedings to interdict the intended suspension. Vermaak further demanded that he be provided with a copy of the resolution in terms of which the Council took the decision to contemplate placing him on suspension. He demanded that his suspension be uplifted by no later than 5 April 2018 at 14:00.
- [22] On 25 April 2018, the Municipality wrote to Vermaak to inform him that the deadline date by which written representations should be made was corrected as 13 April 2018. The letter further recorded that Vermaak had not made any representation and that the deadline of 13 April 2018 came and passed. He was also advised that an investigator had been appointed to look into the allegations against him.
- [23] The Municipality proceeded to suspend Vermaak without his written representations, and concluded that his presence at the premises might interfere with the investigations against him. In the result, he was placed on

precautionary suspension, excused from attending work with effect from 26 April 2018, and ordered to hand over his tools of trade.

- [24] On 26 April 2018, Vermaak put the Municipality on notice of his contemplated legal proceedings, and again demanded that his suspension be uplifted. The Municipality nonetheless refused to yield to his demands, resulting in this application being launched on 5 May 2018.

Submissions and evaluation

- [25] Vermaak seeks final relief, and as such, he must demonstrate the existence of a clear right; an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy. Being a senior manager, his terms and conditions of employment are governed by the Local Government: Regulations: Appointment and Conditions of Employment of Senior Managers promulgated in terms of the Local Government: Municipality Systems Act of 2000 (the Regulations).
- [26] His claim of a clear right is grounded in those provisions, particularly its clauses 5 and 6. The provisions of Clause 13 of the SALGBC Main Collective Agreement (2015 – 2020) are relied upon by Vermaak for the contention that the grievance not having been resolved as the Municipality had alleged, it ought to have been referred to the SALGBC by the Complainant, and that there was no basis for the Municipality to convert that grievance into a disciplinary matter.

Non-compliance with Clause 13 of the SALGBC Main Collective Agreement (2015 – 2020)?

- [27] The agreement provides for various steps in resolving grievances. Under Clause 13.2 of the Grievance Procedure, an aggrieved employee must lodge a grievance in writing with his or her immediate superior setting out that nature of the complaint and desired result. Under Clause 13.2, if the grievance has not been resolved to the satisfaction of the aggrieved employee within 10 days of lodging that grievance, the employee may refer the matter within 10 days to the HOD or his or her nominee.

- [28] In terms of clause 13.3, the HOD or nominee shall arrange a meeting to consult and hold discussions with the affected parties in an attempt to achieve a resolution. The HOD must endeavour to resolve the grievance within 10 days of it being referred and shall inform the employee of the outcome in writing.
- [29] Under clause 13.4, if the grievance lodged has not been resolved to the satisfaction of the aggrieved employee within 10 days of it being referred to the HOD, the employee may refer the grievance to the Municipal Manager/nominee within 10 days, who shall hold a meeting with the affected parties. If the grievance still remains unresolved having been referred to the Municipal Manager, the aggrieved party may refer it to the Bargaining Council for adjudication under clause 13.4.5.
- [30] Vermaak's contention was that the Municipality had knowledge of the grievance since 3 October 2017 as evident from annexure 'R2' to the replying affidavit, and had not resolved it even though he had responded to it immediately after he was requested to do so. He contended that the grievance was not dealt with in accordance with the time periods stipulated in clause 13.4 of the Collective Agreement. To the extent that the grievance could not be heard immediately after it was lodged on the basis that the grievant was not 'ready', he submitted that since the grievance hearing was only held in February 2018, it can only imply that the alleged misconduct was not as serious as the Municipality exaggerated it to be.
- [31] Vermaak further submitted that in accordance with the provisions of clause 13.4.5 of the procedure, the aggrieved ought to have referred the matter to the SALGBC and she had not done so. In these circumstances, he questioned the authority of the Municipal Manager to convert a grievance complaint and process into a disciplinary procedure, and submitted that such conduct showed biasness on the part of the Municipality, and was also *ultra vires*.
- [32] It was submitted on behalf of the Municipality that when the complainant reported the matter to the HR Manager, she did not choose that the

allegations be treated as a grievance, and that it was the HR Manager (alleged to be a close friend of Vermaak) who on his own chose to handle the allegations by way of a grievance, with a view of assisting Vermaak to escape the harsher and severe consequences of a disciplinary process.

[33] It was further submitted that to the extent that the Municipal Manager had called the complainant and Vermaak to a meeting to discuss the grievance, there was compliance with clauses 13.4.1 and 13.4.2 of the Collective Agreement. To that end, it was further submitted that since Vermaak failed to submit his further responses after the final meeting, the Municipal Manager was obliged to act against allegations of sexual harassment, and only needed to have sufficient knowledge of the allegations in order to initiate corrective steps as he was obliged to do. This was particularly so since the complainant had not indicated her willingness to refer her grievance to the Bargaining Council, nor did she protest the manner in which the grievance process was concluded. To that end, it was submitted that clause 13.4.5 of the Collective Agreement did not find application in this dispute.

[34] The Municipality's contention being that it had complied with the provisions of the Collective Agreement, and had further taken the initiative to initiate a disciplinary process, it was nonetheless common cause that the complaint first came to light in October 2017. There is no explanation as to the reason that it was not timeously dealt with in accordance with the time provisions stipulated in the agreement, specifically after Vermaak had responded to the allegations as early as October 2017. The only explanation proffered by the Municipality was that the HR Manager effectively delayed the hearing of the grievance as he took long in assisting the complainant, and it was only in December 2017 that the Municipal Manager took over the matter and initiated the hearing. At most, the Municipality conceded that it had not complied with the time stipulated frames in the agreement, but contended that on the whole, all the grievance steps were complied with when Vermaak failed to respond to the further particulars in respect of the complaint, and that the failure to comply with the time frames in any event did not invalidate the grievance procedure.

- [35] Following from the last meeting held with Vermaak and the grievant, the latter was directed to file further submissions within two days, but had taken some time to do so. When she did file her further submissions on 14 March 2018⁴, (since the grievance hearing of 6 February 2018), Vermaak was afforded six days within which to respond. In my view, the period afforded to him to respond was sufficient, and I cannot find anything unfair or prejudicial about it in that regard, particularly in the absence of his indication that he needed more time.
- [36] There is a dispute as to whether or not Vermaak had responded to the further particulars of the complainant on 22 March 2018⁵. The Municipal Manager however denied having received this response and accused Vermaak of being untruthful. Annexure 'MV10' to the founding affidavit is a letter sent by Vermaak on 21 March 2018 to the Municipal Manager, in which he indicated his intention to meet with him, and further stating that he was not at *that point* in a position to respond to the complainant's submissions as it was riddled with hearsay. He questioned whether the grievance was properly handled and further indicated that he had a busy schedule.
- [37] The Municipality's contention was that Vermaak's response showed no commitment as to whether he would respond and if so when. On the same date of 21 March 2018, correspondence was sent to Vermaak by the Municipal Manager, requesting him to make representations as to why he should not be suspended in the light of his response of the same date.
- [38] Vermaak responded via e-mail on 29 March 2018 and complained about a variety of issues. Pertinent with his response was that even though the complainant was given 36 days to respond whilst he was only given 6, he had a response ready as at 22 March 2018 but was delayed by his union representative who was on leave, with whom he wanted to go through his responses.

⁴ Annexure 'MM2' to the Answering Affidavit

⁵ Annexure 'MV9' to the Applicant's supplementary affidavit

[39] Based on a variety of factors, including that (a) the Municipal Manager's assertions that Vermaak's response of 27 March 2018 was not received; (b) Vermaak's failure to indicate in his e-mail of 21 March 2018 that he either needed more time to respond due to his busy schedule or unavailability of union representative, and if so when, or a firm assertion by him that he had responded; and (c) his belated response on 29 March 2018, I am of the view that on the authority of *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁶, the probabilities favour the Municipality's contentions that indeed no response was received from him on 22 March 2018 as he had alleged. It is apparent from his e-mail of 21 March 2018 that his responses could not have been submitted on that date as his union representative was not available at the time to go through those responses with him. Other than pointing out this factor, nowhere is it indicated that despite the non-availability of the Union official, the response was sent through nonetheless, and if so when, upon the union official being available.

[40] In the light of the above conclusions, it should be accepted that the Municipality was therefore entitled to consider the grievance process as closed. It is common cause that the grievant in terms of clause 13.4.5 of the Grievance Procedure had an option of referring the matter to the SALGBC in the event that the grievance was not resolved to her satisfaction, and had not done so. The issue then remains whether that option barred the Municipality from taking the matter any further.

⁶ 1984(3) SA 623 (AD); See also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) where it was held that::

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (Para 26.) The *Plascon-Evans* rule has been emphatically endorsed by the Constitutional Court. See for example *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC); [2011] ZACC 32 para 34"

Non-compliance with the provisions of Local Government Disciplinary Regulations for Senior Managers?:

- [41] Under Clause 4.1 and 4.2 of the Regulations, if a senior manager is alleged to have committed misconduct, the municipal council must institute disciplinary proceedings in accordance with the Disciplinary Code (Regulations). The maintenance of discipline is the responsibility of the municipality. Annexure 'A' to the Regulations contains a list various categories of acts of misconduct subject to discipline. Sexual harassment under Part II of Item 10 is listed under a category of 'Serious Misconduct'.
- [42] As it was correctly pointed out on behalf of the Municipality, given the serious nature of the allegations, they could not therefore have only been treated as a mere grievance. Even if the Municipality had initially chosen the grievance procedure route in dealing with the allegations, in the end, that process had taken its course, and there is no indication that the grievance was satisfactorily resolved. In my view, the Municipality was within its rights based on the provisions of the Regulations to proceed to a disciplinary process. That decision was independent from the complainant's rights to pursue the grievance at the SALGBC in accordance with the provisions of clause 13.4.5 of the Grievance Procedure if she so wished. Vermaak questioned whether in suspending him the Municipality followed the provisions of the Regulations. These provide that;

'5. Disciplinary procedures.

- (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 or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.
- (5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).
- (6) After having considered the report referred to in sub regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.
- (7) The resolution in sub-regulation (6) must-
- (a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature;
 - (b) authorize the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to -
 - (i) appoint -
 - (aa) an independent and external presiding officer; and
 - (bb) an officer to lead evidence; and
 - (ii) sign the letters of appointment.

6. Precautionary suspension

- (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 subregulation (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."

[43] Vermaak's contentions were that the Municipality failed to comply with the above provisions, thus making his suspension unlawful on the grounds that:

- 43.1. There was no reasonable *prima facie* evidence indicating that he committed the alleged transgression and as such, there was no basis for his suspension.
- 43.2. The provisions of section 5(3) of the Systems Act read with clause 6(1) of the Local Government Disciplinary Regulations for Senior Managers, 2010 (Regulations) required that there must be sufficient indicators of a misconduct before a suspension could be imposed.
- 43.3. In respect of irreparable harm, Vermaak contends that he had tasks to complete and to meet the deadline of 30 June 2018. He pointed out that it had come to his attention that the Financial Department he was in charge of was not coping and needed his assistance; that it was in the best interest of the citizens that he be brought back to the Municipality; and to safeguard against wasteful expenditure of public funds. Vermaak further alleged that it was apparent even from the Municipality's own opposing affidavit that those within it were hell bent on helping themselves to state funds.
- 43.4. He further submitted that he had no alternative remedies except for this proceedings, and that several attempts were made to resolve the matter internally to no avail. He contends that the Bargaining Council does not deal with this matters on urgent basis and its jurisdiction was limited to testing the fairness of suspensions and not to deal with the unlawfulness thereof.

- [44] The Municipality denied that the suspension was in contravention of clauses 5 and 6 of the Regulations, and further contended that there was no need for a strict compliance with the Regulations, in that an invitation for representation would ordinary be regarded as sufficient to demonstrate adequate compliance with the requirement of a fair procedure. It was pointed out that Vermaak was in fact invited to make representation and had opted not to do so.
- [45] The Municipality relied on the decision in *Mere v Twaing Local Municipality and Another*⁷ for the proposition that a Senior Manager who was invited to make representations but failed or refused to do so could not then at a later stage complain about the lawfulness of the suspension if so imposed. The Municipality contends that the circumstances of Vermaak's case fell squarely within the principle stated in *Mere*. To this end, since Vermaak failed to take the opportunity to make representations, he was precluded from challenging the lawfulness of his suspension.
- [46] Vermaak's main contention in respect of the provisions of the pre-suspension procedures was that there was no reason for the Municipality to believe that he had committed the alleged misconduct as contemplated in clause 5 (3), or that his suspension and removal from the workplace was justified.
- [47] I accept that based on the provisions of Item 10 of Annexure 'A' to the Regulations, allegations of sexual harassment are indeed serious, necessitating the Municipality to take the necessary disciplinary action. The fact that the conduct complained of is classified as serious by the Regulations is however not the end of the matter, in that it is both the process of investigation under clause 5 (3) (a) of the Regulations and the opportunity to make representations under clause 6 (2) that determines through a factual enquiry, as to how serious that conduct is for the purpose of further disciplinary action.
- [48] Vermaak alleged that the appointed investigator was not independent, and was compromised as he had a relationship with the Municipality's attorneys of record. Other than this complaint, Vermaak submitted that in light of the time

⁷ [2015] 36 ILJ 3094 (LC)

periods that had lapsed since the complaint surfaced, it could not be said that it was serious enough as portrayed by the respondents.

[49] In this case, as at the hearing of this matter, the investigations into the allegations were under way. Whether the investigator is biased against Vermaak is not an issue which this court can presently determine, nor is it for the court to pre-judge the conduct and conclusions of the investigator.

[50] Pending that investigation however, the Municipality took a decision to place Vermaak on precautionary suspension. He contends that such a step was unlawful as he was not afforded an opportunity to make representations. Both parties correctly referred to *Mogotlhe v Premier of the North West Province & another*⁸ for the proposition that certain minimum criteria should be satisfied prior to an employee being placed on suspension. These are that the employer must have justifiable reason to believe *prima facie* at least, that the employee was engaged in serious misconduct; that there is some objectively justifiable reason to deny the employee access to the workplace; and that the employee must be heard before a decision to suspend is imposed.

[51] Various other authorities were relied upon for the proposition that there is no requirement for strict compliance with the regulations, and that only substantial compliance was sufficient⁹; or that an opportunity to make written representations showing cause why a precautionary suspension should not be imposed will ordinarily constitute acceptable and adequate compliance with the requirements of procedural fairness¹⁰.

[52] The question that arises in this matter is whether the respondent, in suspending the applicant, complied with regulation 6 of the Regulations. A related question is whether the respondent has complied with the principles of natural of justice as provided for in regulation 4 (4) of the Regulations¹¹. This is in line with the expectation that the employer will afford an employee a

⁸ [2009] 4 BLLR 331 (LC)

⁹ *Bernard v Kannaland Municipality & others* Case Number C714/2016

¹⁰ *Member of the Executive Council for Education North-West Provincial Government v Gradwell* [2012] 33 ILJ 2052 (LAC)

¹¹ Which provide that;

'The principles of natural justice and fairness must be adhered to notwithstanding criminal or civil action having been instituted.'

reasonable opportunity to make representations prior to a suspension being imposed. This is a requirement of the *audi* rule, which is part of the rules of natural justice deeply entrenched in our constitution and the Regulations themselves.

[53] In this case, in the light of the nature of the complaint, which Vermaak had responded to as soon as it had surfaced in September/October 2017; the meeting held between Vermaak, the complainant and the Municipal Manager in the course of the grievance hearing; and the subsequent further particulars provided by the complainant, I am satisfied that it can safely be said that Vermaak was fully aware of the allegations against him.

[54] The question whether Vermaak was afforded an opportunity to make representations prior to the precautionary suspension being imposed however has to be determined within the context of correspondence exchanged between the parties with effect from 29 March 2018, when the Municipal Manager called upon Vermaak to show cause why he should not be placed on precautionary suspension. Vermaak's attorneys of record's response on 3 April 2018 was to *inter alia* complain about the unlawful and frivolous legal processes against him and continued victimisation and harassment. They nonetheless went further and demanded that the letter be retracted by 5 April 2018 failing which an urgent application would be brought to this court. In the letter, the attorneys also demand copies of the council's resolution. The Municipality did not respond to Vermaak's attorneys of record correspondence. The Municipal Manager in his correspondence of 25 April 2018 then informed Vermaak that he was placed on precautionary suspension with effect from 26 April 2018 until further notice. It was further stated in that letter that the date of 23 January 2018 in previous correspondence was incorrect; that Vermaak had until 13 April 2018 to make his written submissions, and had failed to do so.

[55] It is not clear from the pleadings or correspondences exchanged between the parties as to when the Municipality had corrected the date from 23 January 2018 to 13 April 2018. Be that as it may, following the correspondence advising Vermaak that he was placed on suspension, his attorneys on 26 April

2018 in their last correspondence did not dispute that the date was corrected or indicated that they needed more time to make representations.

[56] The difficulties Vermaak finds himself in are essentially of his own making. It is appreciated that he was or is aggrieved by what he perceived to be his relentless persecution, victimisation and harassment by the Municipality. One can understand his frustrations and views on the matter in light of the history of litigation between the parties, and the fact that the Municipality appears to have targeted him for whatever reason. The difficulty however remains that an employee cannot complain of unlawfulness or breach of pre-suspension procedures in circumstances where that employee failed to take an opportunity to make written representations when called upon to do so as was stated in *Mere*.

[57] In the whirlwind of our local government politics as we have come to know it, it is appreciated that employers often use suspensions for nefarious reasons¹². However, the fact remains that any step taken by an employer in seeking to suspend that employee cannot on the say-so of that employee be deemed to be unlawful, irregular, invalid or whatever term litigants ordinarily use in such proceedings. Even if an employee has reason to believe that the notice of contemplated suspension is flawed for whatever reason, or that there is a sustained campaign to victimise or harass him or her, those are the issues to be raised within the context of written representations the employee is required to make.

[58] It was stated in *Gradwell*¹³ that;

“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

¹² See *Mogothle* at para [38], where Van Niekerk J observed that there is a –

“..... trend apparent in this court in which employers tend to regard suspension as a legitimate measure of first resort to the most groundless of misconduct, or worse still, to view suspension as a convenient mechanism to marginalise an employee who has fallen from favour.”

¹³ See footnote 10.

seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable.”

[59] What this therefore means is that because, as in this case, the nature of the allegations are considered to be serious in terms of the Regulations, it is not sufficient for the employee or his or her attorney to simply criticise the process and refuse to make the submissions as requested. To the extent that a suspension would invariably lead to a removal of an employee from the workplace, it further follows that it is only from the written representations made by the employee that it can be concluded whether the allegations are indeed serious, or whether there is justifiable cause for his removal. If no written representations are forthcoming though, I fail to appreciate on what basis it can be concluded that there is no reason to believe that the allegations are not serious or that there are no justifiable grounds calling for the removal of that employee from the workplace¹⁴.

[60] In regards to the seriousness of the misconduct alleged against Vermaak, it cannot in the absence of his own written submissions prior to his precautionary suspension, be said that there was anything placed before the Municipality to conclude that those allegations were not serious. It is not for this court to make a pronouncement on how serious those allegations are as currently, there are allegations and counter-allegations between Vermaak and the complainant. The issue however remains that those allegations were made, and Vermaak elected not to make representations as to why he should not be suspended.

Conclusion

[61] Having had regard to the pleadings and the submissions before Court, I am satisfied that there is no basis for a conclusion to be reached that the precautionary suspension of Vermaak can be said to be unlawful, or in breach of the provisions of the Regulations, or those of the Grievance Procedure as contained in the Main Collective Agreement. I am satisfied that on the facts, Vermaak was afforded an opportunity under the provisions of clause 6 of the

¹⁴ See *Gradwell* at para 28

Regulations to state the reasons he should not be suspended. Rather than making those written submissions, Vermaak, though his attorneys of record, chose to engage the Municipality at a level which was not consistent with the provisions of the Regulations and refused to make written representations at his own peril. His allegation of a breach of these provisions is therefore unsustainable under the circumstances.

[62] As Vermaak was placed on precautionary suspension with full pay pending investigations, it can also not be correct to suggest that he has no alternative remedies or that he would suffer irreparable harm if the relief he seeks is not granted. Furthermore, the inbuilt limitations contained in clause 6 (a) of the Regulations will ensure that his suspension is not indefinite.

[63] The contentions that the Municipality's citizens would suffer with his removal and/or that those who want to remove him merely seek to do so in order to gain access to the coffers of the Municipality cannot be issues that tilts the balance of convenience in his favour. Those contentions are for now, based on conjecture and not supported by evidence in the pleadings.

[64] I have further had regard to the requirements of law and fairness in respect to the issue of costs, and hold the firm view that each party must pay its own costs.

[65] In the circumstances, the following order is made:

Order:

1. The applicant's application is dismissed;
2. Each party is to pay its own costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Instructed by:

Incorporated

Adv. M.E. Coetzee

Nilsen Steekamp & Koen

For the First Respondent:

Instructed by:

Adv. P.M. Ramoshaba

Mokhetle Attorneys Incorporated

LABOUR COURT