REPUBLIC OF SOUTH AFRICA

IN THE LABOUR OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2931/12

In the matter between:

RUDMAN JANET **Applicant**

and

MAQUASSI HILLS LOCAL MUNICIPALITY **First Respondent**

JONAS RONALD **Second Respondent**

Heard: **22 November 2012**

Delivered: **14 May 2013**

Summary: First Respondent's resolution to suspend and consequent suspension of a senior manager in first respondent's employment as Director: Corporate Services invalid, illegal and void ab initio as both actions were in breach of Clauses 4, 14 Disciplinary Procedure and Code Collective Agreement binding on both employee and employer under section 77(3) of the Basic Conditions of Employment Act 75 of 1995. These decisions also in contravention of sections 29(1)(2) Local Government: Municipal Structures Act 117 of 1998; sections 54A(4), 54A(3) Local Government: Municipal Systems Act 32 of 2000;

Item 2A of Schedule 1 to the Local Government: Municipal Systems Amendment Act 2011 and the First Respondent's Rules of Order By-Law 1 of 2010 which sets out Rules of Order concerning Council Meetings. Labour Court has jurisdiction and power to review and set aside First Respondent's resolution to terminate the employee's contract of employment. Urgency in the matter not self-created.

JUDGMENT

KUMALO, AJ

Introduction

[1] On Tuesday, 13 November 2012, the applicant launched an urgent application in this court seeking an order:

> '2. Declaring the Applicant's suspension to be invalid, unlawful and of no legal effect and setting the same aside, alternatively, uplifting the Applicant's suspension with immediate effect;
>
> 3. The Respondents are directed to reinstate the Applicant with immediate effect and to forthwith comply with the Applicant's contract of employment and conditions of service;
>
> 4. Ordering the 1st Respondent and the 2nd Respondent, in his personal capacity, to pay the costs of this application on a scale as between attorney and client, jointly and severally, the one paying the other, to be absolved.
>
> 5. Further and/or alternative relief.'

[2] By agreement the matter was thereafter postponed by Basson J to 22 November 2012, in order to allow for further pleadings. The respondents delivered their answering affidavits on 14 November 2012 and the applicant's replying affidavit

with annexures thereto on the 20 November 2012. The above mentioned order was to operate as a rule nisi till the 22 November 2012.

Historical background

[3] The Applicant Mrs Janet Rudman was appointed as the First Respondent's Director: Corporate Services, at that time known as the Director: Administration, on 25 August 2010, with effect from 26 August 2010 until further notice.

[4] The First Respondent is Maquassi Hills Local Munucipality established and governed in terms of section 12 Local Government: Municipal Structures Act, 117 of 1998, with its principal place of business at 19 Kruger Street, Wolmaranstad, 2630.

[5] On 14 August 2012, at a meeting of the First Respondent Council, the Second Respondent was appointed the Municipal Manager of the First Respondent's Municipal Council, his appointment to commence on the 16 August 2012 for five years.

[6] In that capacity, the second respondent is therefore the Head of Administration and the Accounting Officer of the first respondent. He is accountable for duties and responsibilities to the first respondent as outlined in the Local Government: Municipal Systems Act, the Local Government: Municipal Structures Act and the Municipal Finance Management Act.

[7] The facts surrounding the present application relates to this appointment of the second respondent as the Municipal Manager of the respondent's council, which appointment the applicant contends was irregular and unlawful, and has resulted in a long and bitter acrimonious litigation between the parties. The applicant has encapsulated it in her founding and replying affidavits to this application.

[8] On 21 December 2011, the first respondent's council, pursuant to the termination of the services of the previous municipal manager, appointed the second respondent, then acting as Director: Community Services, as its Acting Municipal

Manager. In terms of section 2 Local Government: Municipal Systems Act, his term of office was not to exceed 3 months.

[9] On the 6 March 2012, the former MEC: Local Government and Traditional Affairs wrote a letter to the Mayor of the first respondent, confirming that he had received a written complaint from the Speaker of the first respondent's council, which raised serious allegations in respect of irregular appointments of personnel, including that of the Municipal Manager, by the first respondent. On 7 March 2012, first respondent's Mayor replied by letter rejecting the MEC's instructions to halt all further appointments of personnel at the first respondent's council.

[10] On 21 March 2012, the applicant approached the first respondent's mayor and advised her that the issue of the term of the acting municipal manager should be brought, as a matter of urgency, before the first respondent's executive committee. She disagreed.

[11] In the meantime, on 4 March 2012, the Speaker of first respondent had written to the MEC requesting him to second a suitable person to act as first respondent's municipal manager, in accordance with section 54A(6)(a) of the Local Government: Municipal Systems Act 32 of 2000, as amended by section 2 Local Government: Municipal Systems Amendment Act 7 of 2011.

[12] On the 25 March 2012, at an In-Committee meeting of first respondent's council, under item 'Appointment of Municipal Manager: 4/3/3/1 [Mayor], there were two seconded proposals that the Speaker received. She requested councillors to indicate their preference by a show of hands.

12.1 Proposal A: The vacant position of Municipal Manager must immediately be re-advertised and the MEC be requested to second an Acting Manager until the post is filled, received 11 votes.

12.2 Proposal B: The appointment of Mr Ronald Jonas and the seeking of the Municipal Manager's concurrence by no later than 28 May 2012 in order to appoint the Municipal Manager before 1 June 2012, received 9 votes.

The following resolution was passed:

'1. The vacant position of Municipal Manager must immediately be re-advertised for the following reasons:

a. The flaws identified in the previous process

b. An outside and neutral person is in a better position to address the following:

- Poor discipline of the work force
- Poor service delivery
- Precarious financial status of the municipality

2. The MEC must be requested to second a suitably qualified person to Maquassi Hills as Acting Municipal Manager until the post of Municipal Manager is filled and further request the MEC to revert back to the Mayor before 29 May 2012.'

[13] The first respondent's Speaker instructed the applicant to immediately prepare and transmit by email a letter signed by the Mayor to the MEC advising him of this council resolution. The applicant prepared the letter and emailed it unsigned as the mayor was not available. On the 28 May 2012, she attended the offices of the Mayor to obtain her signature. She refused to sign it and told her that she would prepare her own letter to the MEC which she did, but stated in it that the Speaker had changed the purpose of the meeting, even though it had been communicated to him and thus 'making it difficult to take a decision as per your request'.

[14] At about 16h30, on the 28 May 2012, the second respondent went to the applicant's office. She berated her for sending the letter to the MEC, accusing her of being the cause of division amongst the councillors of first respondent. She told her she was terminating her employment and instructed her to vacate her office immediately.

[15] On the 29 May 2012, the applicant consulted her attorneys to launch an urgent application to this court seeking reinstatement as result of the unlawful termination of her employment contract. The matter was set down for hearing on 7 June 2012. On that day, as the matter was being argued, the first and second respondents delivered their answering affidavit, deposed to by the second respondent.

[16] Objection was raised on behalf of the applicant to the authority of the deponent to depose to an affidavit on behalf of the first respondent. Basson J ruled that the deponent's *de facto* acting as the first respondent's Municipal Manager was unlawful, that he lacked the authority to depose to an affidavit on behalf of the first respondent; the respondents' affidavit deposed to by the second respondent was struck off; the matter was to be re-enrolled on the urgent court roll by the Registrar either for Thursday 14 June or 15 June 2012.

[17] On the 19 June 2012, the Speaker of respondent's council wrote to applicant's attorneys informing them that council had not appointed the firm of attorneys to act on behalf of council and the Mayor nor had council met and resolved that the applicant's urgent application should be opposed.

[18] The applicant's urgent application was heard eventually by Van Niekerk J on 20 June 2012 and judgment was handed on 29 June 2012 in which he found that: the first respondent Mayor did not have the authority to oppose the urgent application on behalf of the first respondent council; the factual dispute between the first respondent's Mayor and the applicant had become academic and the first respondent's Mayor was to pay part of the applicant's costs in her personal capacity.

[19] The applicant returned to the workplace on 2 July 2012 and resumed her normal duties. But that was not to be the end of her travails at work. On the 5 July 2012, she received a memorandum from the Municipal Manager accusing her of acting dishonestly and questioning her position and authority and asking her to refrain from calling herself Acting Director: Corporate Services as she had not been appointed in consultation with the Council and that her extension of acting appointment had not been approved by the MEC. Her initial reply was "*no comment*" but later that day she replied by a memorandum in which she pointed out that section 16 of the Municipal Systems Amendment Act 7 of 2011 made provision for her current position and her appointment as the Acting Director: Corporate Services could only be terminated by a duly appointed Municipal Manager by Council or as a result of a Council Resolution. She pointed out that Messrs Mphafudi, Mapholi (firm of attorneys) and the Mayor were currently her subordinates in the light of her delegated powers, which she said were equal to that of a Municipal Manager. She further pointed out that her conduct and her memoranda to her with regard to her powers constituted gross insubordination; that she contemplated placing her on precautionary suspension pending an investigation and that she was entitled to institute disciplinary proceedings against her.

[20] On the 10 July 2012, the applicant received a memorandum in which she was notified that the Executive Committee had resolved on 9 July 2012 that she be relieved from the position of Acting Director: Administration. Her response was to write to the Deputy Director General, informing him of the harassment and victimisation she was suffering as a result of her exposing the Mayor's abuse of her powers. On the 17 July 2012, she consulted her attorneys who wrote to the Mayor pointing out that the Executive Committee did not possess the authority nor had the powers been delegated to it to terminate her appointment, and, unless the resolution was rescinded by no later than 12h00 Thursday 19 July 2012, they would launch an urgent application to have the resolution of 9 July 2012 declared unlawful and set aside and a declaration that the applicant remained to be employed as the Acting Director Administration.

[21] The respondents failed to respond to her attorneys' letter of demand. Accordingly, an urgent application was once again launched on the 19 July 2012 and set down for hearing on the 26 July 2012. On the 24 July 2012, the first respondent's Mayor informed the applicant that the Executive Committee had at its meeting on the 23 July 2012 rescinded the resolution terminating her services as Acting Director Administration. The matter having become academic and first respondent having tendered costs the matter was eventually removed from the urgent roll and withdrawn pursuant to the applicant's attorneys' notice of withdrawal.

[22] On 30 July 2012, the Speaker of first respondent's Council wrote a letter to the MEC, seeking a response to the letter dated 25 June 2012 reflecting the first respondent's Council Resolution of 25 May 2012 in which the first respondent's Council accepted that it be under the control of an Administrator in terms of section 139(1)(b) of the Constitution.

[23] On 7 August 2012, the MEC replied he had considered Mr Mokwena for the position of Acting Municipal Manager of first respondent and as an intervention in terms of section 154 of the Constitution. He further requested that an urgent meeting of Council be convened to communicate his decision. On 8 August 2012, the Speaker issued a notice in terms of section 29(1) of the Local Government: Municipal Structures Act, 117 of 1998 that a Special Council Meeting was scheduled to introduce Mr Mokwena to Council and section 56 Managers. The Special Council Meeting was scheduled for Friday 10 August 2012 at 10h00. The MEC was so informed as were all councillors, directors and the Station Commander of SAPS at Wolmaranstad. The meeting did not proceed on that day due to disruptions and disturbances caused by employees and those members of the community opposed to the MEC's decision.

[24] Thereafter, the Speaker called a briefing session of first respondent's Council for 14 August 2012 to inform Council and officials of the MEC's decision. The applicant together with other officials was invited as well. However, at the start of

the briefing session, the Mayor and her supporters said that they wanted to proceed with a Special Council Meeting to discuss items on the agenda that the Mayor produced. The Speaker pointed out that there was no Special Council Meeting scheduled and would not proceed with that meeting. Thereupon, one councillor proposed another councillor to be the Acting Speaker for the day. This was seconded and he took the chair on the podium. The Speaker left the meeting. The majority of Councillors left the meeting as well. An attendance register was prepared. But it disappeared once complaints were received pertaining to a lack of quorum.

[25] The Mayor's agenda contained the following items:

1 The rescission of two Council Resolutions, dated 25 May 2012 and 25 July 2012, in terms of which it was resolved that:

1.1 The vacant position of Municipal Manager was to be re-advertised;

1.2 The MEC was requested to appoint an Administrator and a request for intervention as contemplated by section 139(b) of the Constitution.

2 Appointment of the Municipal Manager;

3 Delegation to represent Council in the absence of the Municipal Manager.

[26] Pursuant to the above resolutions being rescinded, the remaining Councillors resolved that:

'1 Mr I R Jonas be appointed as the Municipal Manager with immediate effect from 14 August 2012;

2 Mr I R Jonas is appointed in (*sic*) five years contract;

3 Mr I.R. Jonas must conclude 6 months probation;

4 All the powers and functions assigned to the Municipal Manager by law, by delegation and by any other form are delegated to Mr I R Jones;

5 The package be reduced from the current package to R950,000.00;

6 The Mayor is delegated to sign appointment letter, conclude employment contract and performance agreement.'

[27] On 23 October 2012, the applicant received a letter from the second respondent advising her that her appointment as the first respondent's Acting Director: Administration had been terminated with immediate effect. The applicant immediately responded by means of a memorandum disputing the legality of the second respondent's decision and telling him that she intended to challenge the same.

[28] On 24 October, her attorneys addressed a letter of demand to the first and second respondents, *inter alia*, seeking the following:

'1 Confirmation that the decision to terminate my services has been terminated; or

2 Confirmation that I would be reinstated as the first respondent's Acting Director: Administration, with immediate effect.'

[29] On the 25 October 2012, the applicant's attorneys launched an urgent application seeking interim relief, in terms of which she should be reinstated as the first respondent's Acting Director: Administration pending the final determination of the review application which she brought under case number JR2615/12. She further instructed her attorneys to launch a review application in terms of which she is seeking to review the appointment of the second respondent as the Municipal Manager as well as the second respondent's decision to terminate her appointment as Acting Director: Administration under case number 1615/12.

[30] On 29 October 2012, the applicant received from the second respondent a notice of intention to suspend her from her employment duties pending finalisation of

investigations into ten serious allegations of misconduct which could lead to possible disciplinary proceedings against her. Furthermore the municipality was of the view that her presence at the workplace pending the finalisation of further investigations and/or possible conclusion of disciplinary hearing will be detrimental to its interest. She was, accordingly, instructed to make representation to the Municipal Manager by 11h00 am Wednesday 31 October 2012 as to why she should not be suspended from duty.

[31] On the 30 October 2012, her attorney of record made representations on her behalf to the second respondent. On Friday 2 November 2012, a hand delivered letter to her confirmed that the second respondent had decided to suspend her with immediate effect, pending further investigations into allegations of misconduct leveled against her. On the 6 November 2012, she then instructed her attorneys to proceed with this urgent application for the relief as set out in para 5 of the notice of motion, para 1 *supra.*

Jurisdiction of Labour Court

[32] In terms of section 77(3) Basic Conditions of Employment Act 75 of 1997, as amended ("the BCEA"), states: 'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'. *In casu* this matter concerns the applicant's contract of employment with the first respondent's council.

[33] In terms of jurisdiction, section 157(2) of the LRA provides:

> '(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
>
> (a) Employment and from labour relations;

(b) Any dispute over the constitutionality of any executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) The application of any law for the administration of which the Minister is responsible.

(3) …

(4) (a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration".

Powers of the Labour Court

[34] Section 158(1) provides:

'The labour Court may-

(a) Make an appropriate order, including-

(i) Grant of urgent interim relief;

(ii) An interdict;

(iii) An order directing the performance of any particular act which, when implemented, will remedy a wrong and give effect to the primary objects of this Act;

(iv) A declaratory order;

(v) An award of compensation in any circumstances contemplated in *this* Act;

(vi) An award of damages in any circumstances contemplated in *this* Act;

(vii) An order of costs."

Applicant's legal submissions

[35] Apart from hearing, the matter on an urgent basis, the applicant seeks the relief as set out in para 1 *supra*: essentially:

'1.1 Declaring the Applicant's suspension to be invalid, unlawful and of no legal force and setting the same aside, alternatively uplifting the Applicant's suspension with immediate effect;

1.2 Directing the Respondents to reinstate the Applicant with immediate effect and to forthwith comply with the Applicant's contract of employment and conditions of service.'

[36] The applicant disputes the legality of her suspension on three grounds:

1 lack of compliance with the Disciplinary Procedure and Code Collective Agreement, which agreement forms part of the applicant's conditions of employment and therefore her contract of employment;

2 the second respondent's lack of authority to suspend the applicant;

3 the applicant's suspension being effected for an ulterior motive.

Disciplinary Procedure and Code Collective Agreement

[37] Clause 4 of the Disciplinary Procedure and Code of Collective Agreement, under the subheading 'INTENT', determines that:

'4.1 The purpose of this Disciplinary Code is to establish a fair, common and uniform procedure for the management of employee discipline.

4.2 The code is the product of collective bargaining and the application thereof is peremptory and it is deemed to be a condition of service.'

[38] This Collective Agreement is therefore incorporated into the applicant's contract of employment, binding on both parties under section 77(3) of the basic Conditions of Employment Act 75 of 1997. (see annexure "MMC7" pp 72-73 indexed bundle – respondents' answering affidavit).

[39] Clause 14 of the Disciplinary Procedure and Code Collective Agreement, which deals with precautionary suspensions, provides:

'14. Employee Suspension Pending a Disciplinary Hearing

14.1 The Employer may suspend the Employee or utilize him temporarily in another capacity pending an investigation into an alleged misconduct if the Municipal Manager or his authorized representative is of the opinion that it would be detrimental to the interest of the Employer if the Employee remains in active service.

14.2 If the Municipal Manager or his authorized representative, who shall not be more than two levels below the said Municipal Manager, intends to suspend an Employee, he shall give notice of such intention and afford the employee an opportunity to make representation as to why he should not be suspended. An enquiry shall be held within 48 hours between the Municipal Manager or his authorized representative, and the person intended to be suspended and his authorized representative should he wish to be represented, wherein arguments may be made. The Municipal Manager or his authorized representative shall make a determination as to whether the employee concerned shall be suspended or not after having heard the representations.'

[40] The applicant submits that an employer is required to at least provide reasons as to why it, or the Municipal Manager, is of the opinion that it is detrimental to the interest of the employer if the employee remains in active service. The rationale

behind this is simply in order to allow the employee a proper opportunity to address those concerns, should the employee want to avoid being placed on precautionary suspension and/or if the employee is of the view that a precautionary is not justified. This will also equally allow the employer to make an informed decision and to establish as to whether a precautionary suspension would be justified.

[41] In *Lebu v Maquassi Hills Local Municipality*,[1] a matter that coincidentally involved the same Municipality, this Court confirmed the above approach and interpretation, the only difference being that the matter related to the suspension of a Senior Manager, which suspension is governed by the Local Government Disciplinary Regulations for Senior Managers, 2010.

[42] In the *Lebu* matter Van Niekerk J had to decide:

> 'What is at issue, as I have indicated, is whether the municipality was obliged, in terms of regulation 6, to provide justification for the applicant's suspension and to afford the applicant seven days within which to make representations regarding that justification before making any decision to suspend him.'[2]

[43] What Van Niekerk held in *Lebu*'s matter is that an interpretation, as set out in paragraph 40 above, is consistent with the principle of *audi alteram partem*, which the Regulation in this matter, the Collective Agreement, seeks to meet. He went on to say:

> 'Suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly. There appears to be a tendency, especially in the public sector, where suspension is applied as a measure of first resort and almost automatically imposed where any form of misconduct is alleged. The purpose of removing an employee from the workplace, even temporarily and on full pay, must be rational and reasonable, and must be conveyed to the employee concerned in sufficient detail to enable

[1] [2012] 33 ILJ 642 (LC),
[2] Ibid at para 13.

> the employee to compile the representations that he or she is invited to make in a meaningful way. Of course there are those instances where precautionary suspension is a necessary measure, and where the reasons to remove an employee from the workplace as a precautionary measure are compelling. But those cases will be the exception rather than the norm.'[3]

[44] In the case of *Vusi Mashiane v Department of Public Works*[4] this Court considered an employee's rights in terms of his or her conditions of employment, derived from a Collective Agreement or Regulation. Lagrange J said:

> 'Moreover, the respondent could not explain how an untrammelled right to suspend an employee without regard to the safeguards in clause 2.7 of the Handbook – and by necessary implication, of the provisions of clause 7.2 of resolution 1 of 1999 – would not permit the very mischief which that provision was intended to prevent.'[5]

[45] In considering whether an employee has a clear right, and in the context of suspension, Steenkamp J, in the matter of *Nothnagel v Karoo Hoogland Municipality and Others*[6] confirmed that:

> 'In terms of regulation 4(4) the municipality is enjoined to adhere to the principles of natural justice and fairness when instituting disciplinary steps and deciding on precautionary suspension.
>
> As far as regulation 6(1) is concerned, the respondents did set out almost verbatim the wording of that regulation in their letter of 4 May 2012. Was that proper compliance, or was it mere lip service, as Mr Engela argued?
>
> As this court pointed out in in *Maquassi Hills* (1):
>
> > "In terms of regulation 6(1), it is not sufficient for the Council to allege that the Senior Manager has committed an act of misconduct in order to suspend him; it must also have reason to believe that his presence may

[3] Ibid at para 14.
[4] (J1773/12) [2012] ZALCJHB 69 (18 July 2012).
[5] Ibid at para 22.
[6] (C 431/12) [2012] ZALCCT 19 (11 June 2012) at paras 24, 29 and 30.

> jeopardize the investigation, endanger the well-being or safety of any person or municipal property, be detrimental to stability in the Municipality; or that he may interfere with potential witnesses or commit further acts of misconduct."'

[46] The obligation of the respondents *in causa* to adhere to the principles of natural justice and fairness, with reference to what has been stated in *Nothnagel v Karoo Hoogland Municipality and Others*, are equally recorded under clauses 4 and 5 of the Collective Agreement. In the same matter the Court also held:

> 'In a judgment handed down just over a month ago, the Labour Appeal Court confirmed, in a slightly different context (pertaining to the SMS Handbook) that 'there must be an objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the misconduct. The Court added:
>
> > "As a general rule, a decision regarding the lawfulness of a suspension….will call for a preliminary finding on the allegations of serious misconduct as well as determination of the reasonableness of the employer's belief that the continued presence of the employee at the workplace might jeopardize any investigation etc.'[7]

[47] Equally in *Biyase v Sisonke District Municipality and Another*,[8] Steenkamp J also found that:

> 'But that does not detract from the applicant's claim based on regulation 6, as opposed to any implied right to fair dealing to be read into his contract of employment. As I recently pointed out in the similar case of *Lebu v Maquassi Hills Local Municipality:* (footnote omitted)
>
> > "It must also be borne in mind that the language of….the regulations is clear in this case. The employee has a contractual right to know what the reasons are for his intended suspension, and to make representations in regard thereto. <u>This is not a case where the employee's claim is based on</u>

[7] Ibid at para 36.
[8] (2012) 33 ILJ 598 (LC) at para 22.

an implied right to fairness. In *South African Maritime Safety Authority v Mckenzie* the Supreme Court of Appeal has now held that no such implied right can be read into the contracts of employment generally. Therefore, La Grange J said in *Mahlalela v Pensions Fund Adjudicator*, with reference to the earlier judgment in *Mogothle v Premier of the North West Province and Others*:

> "In that case the Court held that a trio of decisions by the Supreme Court of Appeal had established an employee's contractual right to fair dealing that can be enforced by the Labour Court under the provisions of s 75 of 1997, which exists independently of any statutory rights against unfair labour practices…." (my emphasis).

But as I have pointed out, the applicant in this case has a clear contractual right, there is no need to read such a general implied term into his contract of employment. There is a specific provision in the contract - and in regulation 6 – dealing with the employee's rights prior to suspension.

The sentiments expressed by Van Niekerk J in Mogothle are therefore still applicable to the case before me, even if no general right to fair dealing can be implied in the contract of employment. In this case, the contractual rights pertaining to the reasons for suspension are set out in the applicant's contract of employment and in the Regulations.

And, as Nugent JA recently pointed out in *Manama v King Sabata Dalindyebo Municipality*:

> "The evidence in this case establishes the existence of a contract of employment between the municipality and [the applicant]. And he wishes to enforce the contract…. That he might have been entitled to other relief under the remedies provided for under the Labour Relations Act does not somehow extinguish his contractual rights." (my emphasis)

[48] I, therefore, find that the respondents have failed to provide any justification for its intent to suspend the Applicant, which is not only in breach of the Collective Agreement, but also barred the applicant from her rightful entitlement to provide the respondents with substantive representations why she ought not be placed on precautionary suspension.

[49] It is common cause that the mandatory enquiry which had to be held within 48 hours was never held, instead the respondents submitted that:

> 'It will be contended at the hearing of this application that the applicant relinquished her right to an enquiry by:
>
> 23.3.1 Not appearing before me within the period of 48 hours and to make arguments; when she was afforded the opportunity to appear;
>
> 23.3.2 Accepting that an inquiry will not change anything, since her suspension, is nothing else but a foregone conclusion.'

[50] The aforementioned contention is fatally flawed, *inter alia*, for the following reasons:

50.1 It is clear from clause 14.2 of the Collective Agreement that the Municipal Manager is intended to be the initiator of the suspension process and that it is therefore incumbent upon the second respondent to have called the applicant to such an enquiry, within 48 hours of notifying the applicant of its intention to suspend her. This he never did.

50.2 The second respondent did not call for such an enquiry and it was not up to the applicant to present herself to the respondents seeking to be entertained;

50.3 The contention that the applicant "relinquished her right to an enquiry" in itself confirms the applicant's entitlement to that enquiry, but does not make sense, taking into account the following:

50.3.1 There would have been no reason for the applicant to approach the second respondent seeking an enquiry, as the applicant would have waited for the second respondent to notify her of such an enquiry, dependent on the second respondent's availability;

50.3.2 The allegation that the applicant accepted that the enquiry would not have changed anything does not again make sense as the applicant had made substantive submissions in answer to the information provided to her. The enquiry would obviously have afforded the applicant an opportunity to elaborate thereon and pursuant to seeking further particulars in respect of the precautionary suspension.

50.3.3 Furthermore the refusal and or failure to hold an enquiry resulted in the applicant losing her fundamental right to legal representation, incorporated in the Collective Agreement, which might also have gone far to prevent the suspension.

50.3.4 Lastly, clause 14.6 makes it crystal clear that a suspension "shall be for a fixed and predetermined period". (my emphasis). It is evident from the notice of suspension (see respondent's answering Affidavit annexure "MMC8" p 340 indexed bundle), that the applicant's suspension is *"*pending further investigation into alleged misconduct.*"*

Authority and appointment of second respondent

[51] It is submitted that the resolutions of the first and second respondents, taken at the meeting of 14 August 2012, are unlawful and therefore stand to be reviewed and set aside, *inter alia*, as a result of these decisions being in contravention of the Local Government: Municipal Structures Act 117 1998; the Local Government: Municipal Systems Act 32 of 2000 and the first respondent's Rules

of Order By-Law 1 of 2010, which sets out the rules of order insofar as Council Meetings are concerned.

[52] Section 29 of the Local Government: Municipal Structures Act ("the Structures Act") determines the manner in which Council Meetings are called. Section 29 determines the following:

> '(1) The Speaker of a Municipal Council decides when and where the Council meets subject to section 18(2), but if a majority of the councilors requests the Speaker in writing to convene a Council Meeting, the Speaker must convene a meeting at a time set out in the request.
>
> (2) The Municipal Manager of a Municipality or, in the absence of the Municipal Manager, a person designated by the MEC for Local Government in the Province, must call the first meeting of the Council of that Municipality within 14 days after Council has been declared elected, or, if it is a District Council, after all the members to be appointed by local councils, have been appointed.'

[53] It is apparent from the Speaker's memorandum, dated 13 August 2012, that the Speaker did not call a meeting in terms of section 29 of the Structures Act, but instead requested the first respondent's Council to attend a briefing session with the following purpose:

> 'To inform Council about the Hon MEC of Local Government and Traditional Affairs' decision to second Mr T.I. Mokwena as Acting Municipal Manager to Maquassi Hills Local Municipality for a period not exceeding 3 months.'

Accordingly, the majority of councillors did not request the Speaker in writing to convene a Council Meeting under section 29 of the Structures Act. Therefore, the proceedings of 14 August 2012 could not be anything but a briefing session by the Speaker.

[54] Section 54A(4) Local Government: Municipal Systems Act ("the Systems Act") determines that:

'(4) If the post of Municipal Manager becomes vacant, the Municipality must:

(a) Advertise the post nationally to attract a pool of candidates nationwide; and

(b) Select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.'

[55] Section 54A(3) determines the following:

'(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if:

(a) The person appointed does not have the prescribed skills, expertise, competencies or qualifications; or

(b) The appointment was otherwise made in contravention of this Act.'

55.1 The purpose of advertising the post is to attract a pool of candidates from far and wide so as to select a suitable person who complies with the prescribed requirements as set out in section 54A(4)(a)(b), *supra*.

55.2 Even the agenda of the disputed council meeting of 14 August 2012 does not contain a *curriculum vitae* of R.I. Jonas or of any other candidates for that matter nor do the minutes of that meeting reflect any discussion about his "…his prescribed skills, expertise, competencies or qualifications; as required under section 54A(3)(a) of the Act.

Accordingly, in terms of sub-sections (3)(a) of the Act the decision to appoint him is null and void, *ab initio*.

[56] Item 2A of Schedule 1 to the Local Government: Municipal Systems Amendment Act, 2011 provides as follows:

> 'A councillor may not vote in favour of or agree to a resolution which is before the council or a committee of the council which conflicts with any legislation applicable to local government.'

[57] The minority of councillors who voted in favour of the resolutions at the disputed council meeting of 14 August 2012 were in contravention of this item.

[58] *In casu,* there have been many instances where the first and second respondents terminate the applicant's employment contract, only to resile from that decision at the last moment before the matter is heard. See for examples paragraphs 14 – 18, *supra*. Paragraph 20, the 10 July 2012 memorandum from the first respondent's Mayor notifying her that the Executive Committee had resolved that she be relieved from her position. Only for the first respondent's Mayor to notify her that the Executive Committee had on the 23 July 2012 rescinded that resolution and tendered costs. This was after an urgent application to declare the applicant's suspension to be invalid, unlawful and of no legal force and effect and setting aside the same, alternatively uplifting the applicant's suspension with immediate effect or directing the respondents to reinstate the applicant and to forthwith comply with the applicant' contract of employment and conditions of service.

[59] In paragraph 18 of his judgment in *Lebu (2),* Van Niekerk had this to say about the behavior of the first and second respondents: "[t]here is also a sense in which the temporal coincidences relevant to the municipality's decision making suggest that the municipality has conducted itself in Machiavellian fashion, concluding settlement agreements on a return to work and withdrawing its opposition to the litigation initiated by the applicant, all the while remaining intent on removing him from the workplace. My only regret is that the costs order that intend to make will be met ultimately, no doubt, by the municipality's ratepayers. Had the individual respondents been put on notice that they would be called upon to show cause why they should not pay the costs of the application from their own pockets, I would have considered a motion to that effect."

In my view, the above remarks of the Learned Judge are equally applicable to the case *in casu*.

[60] In the light of the above submissions by the applicant on the jurisdiction of this court to determine the forum where the applicant should have initiated her application for reinstatement, I am satisfied that the Labour Court has jurisdiction and the power to review and set aside.

[61] I am also satisfied that the applicant is suffering harm in that she does not know why she should be suspended and she has not had an opportunity to address those purported reasons.

[62] The applicant is employed in a high-profile and politically sensitive position as first respondent's Director: Corporate Services. It may well be that she has committed serious misconduct but she is suffering irreparable harm to her dignity and reputation as she has set out in her founding papers, contrary to the clear provisions of her contract of employment, the Constitution and the regulations.

[63] The applicant launched her urgent application to be reinstated within 10 days after receiving the notice of suspension. I am satisfied that the applicant did so expeditiously given the circumstances of her case.

[64] Accordingly, I make the following order:

1 The application to reinstate the applicant to her position is granted.

2 The first and second respondents are to pay personally the applicant's costs on an attorney and client scale, jointly and severally, one paying the other to be absolved.

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Kumalo AJ

Acting Judge of the Labour Court

Appearances:

Attorney FW P Scholtz appeared for the applicant

Adv A T Ncongwane SC appeared for the first and second respondents