Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: J960/17

In the matter between:

IMATU OBO DANIEL MATWAKAZIWA HOBE — **Applicant**

and

MERAFONG CITY LOCAL MUNCIPALITY — **First Respondent**

THE ACTING MUNICIPAL MANAGER: MERAFONG CITY LOCAL MUNICIPALITY – MS ANTOINETTE RINKY NGWENYA — **Second Respondent**

THE EXECUTIVE MAYOR: MERAFONG CITY LOCAL MUNICIPALITY – COUNCILLOR MAPHEGO MOGALE-LESTSIE — **Third Respondent**

Heard: 09 May 2017

Delivered: 12 May 2017

Summary: (Urgent application – unlawful suspension – Regulations 5 and 6 of the Local Government: Disciplinary Regulations for Senior Managers – suspension unlawful – employee's representations not considered)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an urgent application launched on 2 May 2017 for a final interdict to declare the suspension of the applicant on 21 April 2017 unlawful. The Applicant is employed as the Executive Manager: Community Services. He is a Senior Manager for the purposes of the Local Government: Disciplinary Regulations for Senior Managers 2010 ("the regulations"). After his suspension, he did make one further attempt to try and persuade the respondent to uplift his suspension and when that was unsuccessful he brought this application. I am satisfied that he was not dilatory in coming to court and that he did so with the requisite degree of urgency.

[2] Arising out of perceived lack of progress in rehabilitation of a landfill site project which was behind schedule, a special municipal Council meeting on 30 March 2017 decided that the applicant and the acting municipal manager should be suspended and that they should be given letters advising them of the Council's intention to suspend them and giving them an opportunity to make representations why they should not be suspended for allegations regarding lack of progress on the site. Although the resolution appears to suggest that the decision to suspend the two managers had already been taken at that meeting, when that is read in the context of the notices of intention to suspend being issued and the opportunity to make representations been provided, I am satisfied that the Council was merely expressing its view at that stage that their suspension ought to be considered.

[3] It appears that the Council was alerted to the lack of progress by a notice being issued by the Gauteng Department of Agriculture and Rural

Development ("GDARD") regarding the applicant's non-compliance with permit conditions of the Rooipoort landfill site. Previously, on 24 November 2016 the council had taken a resolution in response to a pre-notice of non-compliance with the site permit conditions. That resolution acknowledged that budget provisions for the site had not been effected due to financial constraints and that provision of R10 million should be made in the 2016/2017 financial year "to effect payments for work done." The resolution further determined that payment must be made to maintain consistent operations and to avoid fruitless and wasteful expenditure and that the appropriation of funding had to be effected for capital funds for fencing, a leakage pond, drainage, manhole, boreholes and building repairs.

[4] Subsequent to the special council meeting, on 31 March the applicant was invited to make representations as to why he should not be suspended. The letter made it clear that an environmental audit report and a visit of the counsellors to the site indicated that no action had been taken to implement resolutions of the Council regarding the operation and management of the site. The letter also stated why it felt it was necessary to suspend the applicant as his presence might jeopardise further investigations into the alleged misconduct. Pertinent passages in the letter read:

> "The visit [of members of the portfolio committee tasked with integrated environmental management] revealed that there is no improvement in the management of the site, regardless of the R 10,000,000.00 which was allocated for the operation and maintenance of the site. The supervisor of Mykatrade [the contractor engaged to operate the site] who was on site on the date of the visit also confirmed that there was nothing happening on the site...
>
> In the contents of the Audit Report, GDARD remarked as follows: *"The Department is not pleased to see that there were no improvements on partial and non-compliance issues identified in the previous audit and that no actions have been undertaken by MCL M to address some of the partial compliance issues identified in the previous audit"*.

> The GDARD Audit report and the visit from the relevant Councillors is an indication that no action has been taken to implement the resolutions taken by the Council regarding the operation and management of the Rooipoort Landfill site to avoid fruitless and wasteful expenditure.
>
> Due to the serious nature of the above alleged misconduct against you, your seniority and potential influence to employees of the municipality, Council has reason to believe that your daily presence in the municipality and its premises may jeopardise any further investigations into the above alleged misconduct against you, cause detriment to the stability of the municipality, interfere with the potential witnesses and lead you or any other employee to commit further acts of misconduct.
>
> It is with the above reasons that the municipality is considering to suspend you with full pay and benefits.
>
> In compliance with Regulation 6 of the local government: Disciplinary Regulations for Senior managers you are invited to make representations to the municipal council within 7 days from the date of receipt of this notice as to why you should not be suspended."

[5] The nub of the complaint of alleged misconduct appeared to be a perception that despite R 10 million being allocated for the operation and maintenance of the site, fruitless and wasteful expenditure must had been incurred in view of the fact that there was no improvement in the landfill site. Accordingly, he was invited to make representations within seven days in terms of Regulation 6 of the regulations.

[6] The applicant claims that he was unable to identify which resolutions of the Council had not been implemented and accordingly was unable to state whether or not resolutions have been implemented or how they had been implemented. Therefore, on 4 April he requested documents enabling him to respond to the letter of suspension including signed minutes of the portfolio committee meeting held on 29 March and the items submitted to the Council to motivate for his suspension.

[7] On 12 April the applicant received a letter accompanied by unsigned draft minutes and the item that was presented to the Council on 30 March to motivate for his suspension. Reading that documentation, the applicant surmised that the call for his suspension was based on the

misapprehension that the R10 million allocated had in fact been spent without any sign of any improvements.

[8] On 19 April, the applicant's union submitted a letter on his behalf addressing the issue of his intended suspension. Although the letter requested further information and documentation and raised concerns that the regulations 5 (1) and (2) had not been complied with, it did make representations on whether there was any reason to believe he had committed misconduct and why he should not be denied access to the workplace. This was expressed in the following terms:

> "9. We submit there is no justifiable reason to believe, even on a *prima facie* basis that Mr Hobe has committed misconduct. In terms of the letter of intention to suspend, it is alleged that an amount of R10m was allocated for the operation and maintenance of the Rooipoort landfill site and that despite such allocation no operational and management action was taken to avoid fruitless and wasteful expenditure in connection with that site. Mr Hobe's response is that he has not been able to access the allocated R 10m to pay the contractor who has been appointed to conduct operation and maintenance of the landfill site because the municipality's cash-strapped. In other words, the municipality simply does not have money to pay the contractor, which is led to a cessation of work by the contractor and the demand of payment for work done. The Chief Financial Officer and Municipal Manager signed off on written authorisations for the contractor to be paid, but the contract could not be paid because of insufficient funds. Both the CFO and the municipal manager are aware of these facts.
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> ...
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> 10....
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> 11. It is clear that the work stoppage and the failure to operate and maintain the landfill site was through no fault of Mr Hobe. It was rather the fault of the municipality's cash-strapped situation. The allegations against Mr Hobe are, therefore, without any basis in the simply no justifiable reason to believe that Mr Hobe has committed misconduct in this regard.
>
> 12. We submit that there is no justifiable reason to deny Mr Hobe access to the workplace. The Municipal Manager and CFO are already in possession of all documents that are relevant to the Rooipoort landfill project. Mr Hobe cannot intimidate the municipal manager or the CFO because these are

> senior official[s]. Mr Hobe could also not intimidate the contractor who was appointed through a fair bidding process, has a binding contract with the municipality and is independent. It is unthinkable that Mr Hobe and the contract would collude together to frustrate any investigation as this would be unethical and there does not seem to be any suggestion that Mr Hobe or the contract to have behaved in a fraudulent or corrupt or generally unethical manner. The allegations against Mr Hobe , unfounded though they are, do not paint such a picture of suspected impropriety."

[9] In the minute of the 20 April meeting where the discussion of the two managers' proposed suspension took place, the following is recorded *inter alia*:

> "A letter dated 20 April 2017 was received from IMATU acting on behalf of the [applicant] stating that they intend to respond to the letter of intention to suspend but they require further information. A copy of the letter is attached hereto. The acting municipal manager has also not responded with reasons not to suspend him but still require further information.

The minute then cites Regulation 6 in full and continues....

> "The Municipality has a set procedure in terms of financial delegations and reporting procedure. This investigation is based on the mismanagement of the waste disposal site, with the potential detrimental effects that a possible suspension of the site license could have on the Municipality.
>
> It is essential that the management of the site gets back on track. In view of the direct influence that the senior managers have on the daily execution work done, in terms of financial delegations and approval of work done, as well as decisions to be taken to submitted that they be suspended as a precautionary matter.
>
> The municipality has also not received any constructive reasons from the which is why they should not be suspended."
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> (Emphasis added)

[10] The letter of suspension issued to the applicant the day after Council meeting replicates the content of the letter of intention to suspend and includes the last mentioned paragraphs of the minute of the Council meeting set out above. The applicant alleges that the letter did not respond to his representations whether there were justifiable reasons to

believe that misconduct had been committed in view of the R10 million that was allocated not being available. He also claims that it did not respond to his representation as to why there was no justifiable reason to deny him access to the workplace. In answer to this claim, the respondent argued that access to the workplace was not one of the criteria included in Regulation 6 and that the applicant had been requested to respond to the reasons referred to in regulation 6 (1)(a) (i) and (iii) and 6(1)(b)(i) and (ii) but he did not address these.

[11] On 26 April, a further letter was sent to the council by the union reiterating the request for a Council resolution inviting the applicant to make representations why he should not be suspended and the documents which the Council considered. It further called upon the Council to revoke the suspension on the basis that it had not complied with regulation 5 in the course of implementing his suspension failing which it would approach the court on an urgent basis. In a letter of reply, the Acting Municipal Manager claimed that the council had taken account of both regulations 5 and 6 in suspending the applicant.

Breach of a clear right?

[12] The applicant claims that his suspension was unlawful for a number of reasons. In brief these are:

12.1 The allegations in the letter notifying him of the council's intention to suspend him were vague in the absence of the inspection report of the landfill.

12.2 There was no reasonable basis to believe that he had committed misconduct before a decision was taken to suspend him as required by regulation 6(1) and regulation 5(3) of the regulations because it was stated in the union's submissions that the inability to improve the landfill site was because of the unavailability of the R 10 million which had been allocated since the funds were approved on 24 November 2 016.

12.3 In the absence of an independent investigator being appointed by Regulation 5 (3) he could not be suspended.

[13] Furthermore, the applicant claims that his suspension was in breach of regulations 6(3) and (4) because even though his submissions were presented to the Council before he was suspended those submissions could not have been considered when one has regard to the reasons for his suspension given by the Council. His submissions made it clear that there was no not even a *prima facie* basis for believing he was guilty of misconduct or that there was a reason to deny him access to the workplace.

[14] Regulations 5 and 6 read:

> **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
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> (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 subregulation

(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) authorise 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."

[15] The applicant had contended that the suspension should have been preceded by an investigation contemplated in Regulation 5 or that certain steps should have been taken under that regulation before his suspension. Although the two procedures appear consecutively, there is nothing in Regulation 6 to suggest a precautionary suspension may only be implemented after an investigation under Regulation 5. As a matter of logic, it stands to reason that it may be necessary to suspend an employee while such an investigation is being conducted.

[16] I also agree with the respondent in its reliance on the decision of the Labour Appeal Court in *Member of the Executive Council for Education,*

North West Provincial Government v Gradwell.[1]In that case, the court was concerned with the interpretation of Chapter 7 of the SMS Handbook, including paragraph 2.7(2) which provided as follows:

> "(2) Precautionary suspension or transfer
>
> (a) The employer may suspend or transfer a member on full pay if –
>
> • the member is alleged to have committed a serious offence; and
>
> • the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or State property.
>
> (b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.
>
> (c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The Chair of the hearing must then decide on any further postponement."

[17] The LAC found that the reference to an investigation into the alleged misconduct in the above provision did not mean that an investigation necessarily had to be underway, though in that case too, as a matter of fact, there had in fact been a decision taken to initiate an investigation when the suspension was contemplated.[2] In this case, having regard to the wording of Regulation 6, which does not even make a single reference to an investigation under regulation 5 or to any of the steps in regulation 5, there is even more reason to interpret regulation 6 as a measure which can be implemented quite independently of regulation 5, even if common sense dictates that they probably ought to proceed in tandem. Accordingly, I cannot agree with the applicant that his suspension was unlawful because it should have been preceded by the appointment of an independent investigator or any other steps under regulation 5. In this case, the council had taken a decision that an investigator should be appointed, but the appointment had not yet been made by that the time.

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[1] [2012] 8 BLLR 747 (LAC)

[2] At 755-756, paras [24] – [27].

[18] I am also satisfied that for the purposes of addressing a *prima facie* case of alleged misconduct, the gravamen of the complaint was clear: despite the allocation of significant funds pursuant to the Council resolution in November 2016, none of the expected progress had been made and as an accountable official, the failure was at least partly his responsibility. It is clear from the applicant's letter quoted above that he directly addressed this issue, even though he was requesting further information. He even went to the extent of providing supporting documentation about delays in paying the contractor and to demonstrate that nothing like the amount allocated had been spent. All of this showed that he understood the nature of the complaint well enough to put a *prima facie* case rebutting the claim that it was his fault.

[19] Much reliance was placed by the respondent on the judgement in *Tsietsi v City of Matlosana Local Municipality and another*[3] in which the court cautioned against imposing too onerous a duty on a municipality wishing to suspend a senior manager. The discussion by the court proceeded as follows:

> "[10] Applicant placed reliance, *inter alia*, on the case of *Lebu v Maquassi Hills Local Municipality and others* (*2*).[4] In that case Van Niekerk J had this to say about regulation 6:
>
> > "[16] The procedure relevant to the suspension of a senior manager in terms of regulation 6 can be summarised as follows:
> >
> > (a) A municipality is entitled to suspend a senior manager on full pay, if it reasonably believes that a senior manager has committed an act of serious misconduct.
> >
> > (b) The municipality must have reason to believe that the continued presence of the senior manager at the workplace will either jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or municipal property. It will also be sufficient that the municipality believes that the manager's continued presence in the workplace will be detrimental to stability in the municipality, or that the manager may interfere with potential witnesses, or commit further acts of misconduct. The purpose of any

[3] [2015] 7 BLLR 749 (LC)

[4] (2012) 33 ILJ 653) (LC)

suspension must be rational, and a municipality must be in a position to establish the reasonableness of its belief.

(c) A municipality may do no more than take a decision in principle, before affording the affected senior manager at least seven days' notice of its intention to suspend him or her. The notice must contain at least a description of the misconduct that the manager is alleged to have committed, and the council's justification for its in-principle decision, and invite representations in relation to both. Both the nature of the misconduct alleged and the purpose of the proposed suspension must be set out in terms that are sufficiently particular so as to enable the senior manager to make meaningful representations in response to the proposed suspension . . ."

[11] Reference was also made to an unreported judgment in which Steenkamp J stated that in explaining the municipality's apprehension that an employee might jeopardise an investigation that repetition of the words of the Regulation is not enough but that a basis for these fears has to be set out "ie why they had reason to believe that the applicant's presence at the workplace may lead to any of these consequences"[5]

[12] In my judgment, the above authorities on which applicant relies, should *not* be understood to amount to the following two propositions:

12.1 that the particularity of the allegations of misconduct must be of such detail as to allow for the setting out of a defence in response thereto in the applicable representations in terms of regulation 6. Or as applicant averred to: "show that the allegations have no prospects." This is because the suspension in terms of the Regulation is precautionary, and resorted to in order for an investigation to take place as to whether charges should follow, and not a disciplinary sanction in its own terms.

12.2 that a municipality must set forth *evidence* to show that the person involved may interfere in the conduct of the investigation against him or herself. Reference to the position of the senior official and the attendant powers and responsibilities that he or she has, read with the allegations of misconduct as set out in the pre-suspension letter, should suffice.

[13] In dealing with regulation 6(1) it is important not to lose sight of the principle that the suspension is precautionary and not punitive, and it contains a safeguard that the suspension may not be extended indefinitely. In this regard the LAC judgment in *Member of the Executive Council for*

[5] *Nothnagel v Karoo Hoogland Municipality and Others* (2014) 35 ILJ 758 (LC)

Education, North West Provincial Government v Gradwell is instructive. That matter dealt with precautionary suspension in terms of the SMS Handbook in the Public Service. The court *per* Murphy AJA stated that:

> "[44] The proposition that all suspensions should be procedurally fair to avoid the stigma of an unfair labour practice, on the other hand, requires some qualification. Fairness by its nature is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimised. Secondly, the period of suspension often will be (or at least should be) for a limited duration. The SMS Handbook for example imposes a 60-day limitation. And, thirdly, the purpose of the suspension – the protection of the integrity of the investigation into the alleged misconduct – risks being undermined by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness."

[14] In this application, the case made for the applicant seeks to have allegations of misconduct contained in the precautionary suspension letter presented in such detail so that he can virtually plead in relation thereto. As the second respondent pointed out, the nature of the information sought by applicant through his attorney's request for further particulars, in order to make his representations, may actually prejudice the investigation if provided.

[15] In view of the above, I am quite satisfied that the precautionary suspension letter recorded above meets the requirements of section 6(1) of the Regulations. The LAC *Gradwell* judgment cautions us not to forget the purpose of precautionary suspension nor overlook safeguards contained in prescripts such as regulation 6. The jurisprudence of this Court in these

matters should not be read as setting the bar so high that the duty to investigate alleged financial irregularities by accounting officers in municipalities is rendered near impossible to carry out.

[20] The cautionary note sounded by the court in paragraphs [12] and [13] of the extract from *Tsietsi* has been endorsed in other judgements of the Labour Court.[6] The respondent also emphasised the following principle highlighted in *Mere's* case (in the underlined portion of the extract below):

> In Mojaki v Ngaka Modiri Molema District Municipality and others the court held as follows:
>
> "The object of regulation 6 of the regulations is to afford an employee a hearing before the decision to suspend him or her is taken. That object is achieved by calling on the employee to show cause why he or she should not be suspended pending an investigation or disciplinary hearing . . ."
>
> [37] Regulation 6 thus contemplates the opportunity to make representations before the final decision is taken to suspend a senior manager. That means that the senior manager must at least be placed in a position where he or she is able to make such representations. It is for this reason that the Municipality must give the senior manager notice of intention to retrench, and in such notice call upon the senior manager to make representations. In Lebu v Maquassi Hills Local Municipality and others (2)[7] the court held as follows insofar as it concerns this notice:
>
> "The notice must contain at least a description of the misconduct that the manager is alleged to have committed, and the council's justification for its in-principle decision, and invite representations in relation to both. Both the nature of the misconduct alleged and the purpose of the proposed suspension must be set out in terms that are sufficiently particular so as to enable the senior manager to make meaningful representations in response to the proposed suspension . . ."
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> [38] A similar approach was followed in Retlaobaka v Lekwa Local Municipality and another[8] where the court said:

[6] See e.g *Mere v Tswaing Local Municipality and another* [2015] 10 BLLR 1035 (LC) at 1046, paras [39] – [40] and *Barnard v Kannaland Municipality and Others* (C714/2016) [2016] ZALCCT 52 (23 November 2016) at [23].

[7] (2012) 33 ILJ 653 (LC) at para [16]

[8] (2013) 34 ILJ 2320 (LC) at para [8]

> "The whole object of inviting representations from the employee on whether he or she should be suspended would be rendered nugatory if the employee is in the dark as to why the employer believes he or she should not be at the workplace until the disciplinary proceedings are concluded. Without knowing the employer's reasons, the employee could only guess what they might be and his or her response would be mostly superfluous and speculative answers to unknown propositions. I accept that before taking the decision to suspend the employee the council only needs to have reason to believe it would be desirable for one or more of the reasons mentioned based on the information it has before it, but that information also includes the employer's representations on the purpose of the proposed suspension, which clearly must be made known to the employee for those representations to be meaningful."[9]

[21] The cautionary principles stated above against turning the procedure of a precautionary suspension into a preliminary hearing are points well made. In the main, they are concerned that an employer contemplating suspending an employee need not demonstrate with any degree of certainty that the employee is guilty of misconduct or that the employee probably will interfere with the investigation of the alleged misconduct. Obviously, it is not necessary for the employer to place evidence before the employee but simply to outline the allegations of misconduct that will be investigated. In relation to the reasons why the employer believes the employee's continued presence in the workplace pending the investigation would be a problem. Regulation 6 is very explicit about what must be set out.

[22] The principles enunciated above only address the extent to which an employee must be given an opportunity to address the municipal employer before a decision is taken to suspend them. Before taking the decision, the municipality must then consider its reasons and the representations of the employee as to why they should not be suspended. The municipal council must at least apply its mind to its reasons and the employee's representations. The decision to suspend the employee is not legally validated just because the employer goes through the motions of giving

[9] At 1045-6.

the employee an opportunity to make representations and tabling those representations before the Council.

[23] It must at least consider whether the representations of the employee allay any of the concerns it had which motivated it to consider the suspension. In *Gradwell* the LAC also held 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 seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable."

[24] In this case, the applicant does not dispute that the anticipated work on the landfill site had not been done but advances a simple explanation namely that the financial resources necessary to do the work were simply not available. This claim ought to have been an elementary issue for the council to verify with the Acting Municipal Manager or the Chief Financial Officer. The letter containing these representations was tabled at the Council meeting which resolved to suspend him, but remarkably the Council expressed the view that he had made no representations why he should not be suspended. Whether because of an oversight or some other reason, it appears that the meeting did not actually consider these representations because the minute only mentions his request for additional information.

[25] Similarly, when it comes to considering whether his exclusion from the workplace was justifiable, there is also nothing to indicate that his representations about the improbability of him being able to influence anybody involved in the management of the landfill project were considered. It is interesting in this regard that in the council minutes and the answering affidavit, the Council went so far as to suggest that because he had not made representations expressly in terms of the provisions of regulation 6(1), he had not made any representations as required. Firstly, he was not required to follow the specific format regulation 6 (1). All that

he was required to do to in order to have his representations considered was to make written representations ‘why he or she should not be suspended”. This he did and his representations should have been considered.

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

[27] I note in passing that, given the nature of the alleged misconduct and his response which at least raised a material doubt about whether wasteful or fruitless expenditure might actually have been incurred at all, that ought to have been a material consideration in deciding whether his exclusion from the workplace was justifiable. During the argument of the matter, I commented on the fact that to date the respondent has not addressed the applicant’s contention that the allocated funds were not made available at all. If it had considered this simple response to its allegation of misconduct, it is telling that it makes no attempt to explain why this representation would not have made any difference to its decision to suspend the applicant.

Lack of alternative remedy

[28] As his claim is based on unlawfulness and other forums such as the bargaining Council’s or CCMA’s lack of jurisdiction to deal with such a claim, he has no alternative remedy. The restoration of normal employment status that comes with the lifting of suspension is the most complete remedy to an unlawful suspension. I appreciate that the applicant may have a claim for unfair suspension, but that does not disentitle him to challenge its unlawfulness and obtain the normal remedy which flows from a declaration of unlawfulness.

Balance of convenience

[29] It is true that the applicant is on a fixed term contract which is due to expire soon. However, in the absence of the respondent advancing reasons why the applicants answer to its motivation for suspending him should be rejected, the prejudice the respondent might suffer compared to the prejudice to the applicant's standing to end his contract under suspension outweighs any inconvenience his return to work might cause the respondent.

Costs

[30] The applicant was represented by a union official and the union did not press the issue of costs, which I would otherwise have granted.

Order

[1] The application is dealt with as one of urgency and the normal rules for the conduct of motion proceedings in the Labour Court relating to service and time periods are dispensed with.

[2] The first respondent's suspension of the applicant, affected through a letter issued by the third respondent dated 21 April 2017 is declared unlawful.

[3] The first respondent's suspension of the applicant is set aside and the respondents must allow the applicant to return to work and resume his duties with immediate effect.

[4] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	V G Mkwibiso of IMATU
RESPONDENTS:	ESJ Van Graan SC instructed by De Swart, Vogel & Myambo.