REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NO: J 620/14

In the matter between:

IMATU	First Applicant
ABRAHAM GERHARDUS STRYDOM	Second Applicant

and

THE CITY OF MATLOSANA LOCAL MUNICIPALITY	First Respondent
E H LOUW *N.O.*	Second Respondent

Heard: 20 March 2014

Delivered: 10 April 2014

Summary: Dismissal of application on grounds of urgency not rendering final judgment; open to court to consider matter on merits. Quorum of

municipality not met and decision taken pursuant thereto invalid. Prerequisites of Protected Disclosures Act 26 of 2000 not met.

JUDGMENT

NGCUKAITOBI AJ

INTRODUCTION

1. The first applicant is the Independent Municipal and Allied Trade Union ("IMATU"). The second applicant is a member of IMATU. The applicants have brought this application to secure an interdict against a decision taken by the first respondent, the City of Matlosana Local Municipality ("the Municipality") to institute disciplinary proceedings against the second applicant. The second respondent, Mr E H Louw has been cited in his official capacity as the chairperson of the disciplinary enquiry which is the subject of this dispute. The second applicant is employed as the Director of Corporate Services by the Municipality, on a fixed term contract, which lapses in 2017.

2. There is a peculiar feature to this case. On 17 January 2014 the applicants brought an urgent application asking for the same relief, namely the interdict against the disciplinary enquiry on an interim basis pending a referral to arbitration of the issue of the lawfulness of the

charges against the second applicant, an aspect to which I revert below. Before the application for interim relief could be heard, the applicants amended their notice of motion to seek final relief on the same terms.

3. Both applications (the application for interim relief and the application for final relief) were heard on 6 February 2014. Lagrange J dismissed the application for interim relief on the basis that the applicants had not approached the chairperson before embarking upon this application before this court. The application for final relief, on the other hand, was dismissed for lack of urgency.

4. Subsequent to the dismissal of these applications, the applicants brought the present application. It came before me on an urgent basis. The relief is sought on an "*interim*" basis, pending the finalization of an application for leave to appeal and any consequent appeal to the Labour Appeal Court.

5. The substantive justification for the application is two-fold:-

   5.1 First, it is contended that the decision taken by the first respondent to institute disciplinary proceedings against the second applicant was invalid and of no force or effect, because

the Council which deliberated on the matter and took the relevant resolution lacked the requisite quorum.

5.2 Second, it is contended that the decision to charge the second applicant with misconduct constitutes an *"occupational detriment*" which is prohibited under the Protected Disclosures Act 26 of 2000.

6. The application is opposed on various grounds. At a procedural level, it is contended, on behalf of the Municipality, that the judgment of Lagrange J is not appealable and hence no interim order pending an appeal can be granted. At a substantive level, the allegations concerning protected disclosures are denied and it is contended that the relevant Council meeting was quorate. If the relevant meeting was not quorate, it was submitted that I must have regard to subsequent decisions of the Council where the disciplinary enquiry against the second applicant was discussed.

7. Because this case was heard in urgent court, amidst a number of other pressing matters, there was insufficient time to explore all its facets in the detail they deserved. The result is that it was only after oral argument during the preparation of the judgment that some of the issues, which should have been ventilated during argument began to crystallise. In this

regard, I invited the parties to make further submissions on two questions. The first was whether it would be permissible to regard the application brought by the applicants as a fresh application, bearing in mind that new facts, which were not before Lagrange J had been pleaded in the application before me. In this regard, the most important aspect on which Lagrange J's decision turned was the failure of the applicants to refer their complaint to the chairperson of the enquiry before coming to court. Now they have done so, as indicated in supplemented papers that were filed. The second issue was whether it would be permissible to grant final relief, given that it was not expressly asked for by the applicants.

8. The parties have made helpful submissions in response to my directions, which I will address below. Neither party asked for leave to supplement the pleadings, save that I have been furnished with a copy of the decisions by the chairperson, where he dismisses the objections of the second applicant.

9. In view of the submissions made by the parties, it is convenient to examine first the question of the finality of the decision of Lagrange J and the related question of whether the application should not be regarded as one for final relief.

IS THE DISMISSAL OF THE APPLICATION FOR FINAL RELIEF APPEALABLE?

10. There is no disagreement between the parties concerning the propriety of the dismissal of the interim relief application on the grounds of failure by the applicants to approach the second respondent, Mr Louw, before coming to court. The controversy surrounds the dismissal of the application for final relief. It is therefore necessary to consider the circumstances under which the dismissal took place.

11. On 17 January 2014 the applicants approached this court on an urgent basis seeking interim relief. They asked for an order interdicting the Municipality from proceeding with the disciplinary enquiry which was scheduled to proceed on 22 January 2014. At that stage, Mr Louw was not cited as a respondent in the application. The applicants sought an order – in the form of a *rule nisi* returnable on 4 March 2014 – interdicting the Municipality from proceeding with the disciplinary enquiry against the second applicant, until the dispute they had referred to arbitration was resolved.

12. Before the matter could be heard, the notice of motion was amended. In terms of the amended notice of motion the applicants, now having joined

Mr Louw as the second respondent, sought a final order on the same terms. The amendment was made on 5 February 2014 and the matter was argued on 6 February 2014.

13. Lagrange J delivered his judgment on 26 February 2014. He addressed, in full, the question of interim relief. After criticizing the applicants for their failure to approach the chairperson before coming to court, Lagrange J concluded:-

> "Had the chairperson's action on that occasion halted the proceedings, pending the resolution of one or more of the in limine objections, the applicants would have achieved substantially the same relief they sought by way of an interim interdict, without incurring the same costs. If he refused to discontinue the proceedings and insisted on them resuming then the applicants might well have considered at that point launching these proceedings at least insofar as they raise issues going to the very lawfulness of the enquiry."[1]

14. After making these remarks, Lagrange J turned to the question of the application for final relief. He said that the application had been brought on "wholly insufficient notice" and as a result should be dismissed for lack of urgency. It was on this account that the application for final relief was dismissed.

15. The applicants then brought an application for leave to appeal. When the matter came before me, the application for leave to appeal was still pending. Considerable time was spent during argument on the effect of the decision to dismiss the application for want of urgency. The first respondent took the stance that the application for final relief was pending before this court and no issue of interim relief pending any appeal could arise. On the other hand, the applicants submitted that since the application had been dismissed, as opposed to being struck off the roll for lack of urgency, they were entitled to apply for leave to appeal.

16. It is not the first time that a procedural issue of this nature has arisen. Courts have attempted to develop a practical method of dealing with instances where an application is dismissed, not on the merits, but for want of urgency. It is worth restating the principles. The leading case on the subject is the decision of the Supreme Court of Appeal in *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership & Others*.[2] In that case, after two days of hearing an application and reserving judgment for some time, the High

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[1] *IMATU & Another v The City of Matlosana Local Municipality & Another* (J82/14 delivered on 26 February 2014) at para 8.

Court dismissed the application on urgency. When the matter went to the Supreme Court of Appeal, Cameron JA (as he then was) clarified the appropriate order where a court decides a case on urgency:-

> "One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the time and forms the rules prescribe. It relates to form, not substance, and is not a pre-requisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules which must 'as far as practicable be in accordance with' the rules. Where the applicant lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."[3]

17. Although it is clear that Cameron JA was addressing the Uniform Rules of Court applicable in the High Court, his observations are equally applicable in respect of urgent proceedings brought under Rule 8 of the

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[2] 2006 (4) SA 292 (SCA).

[3] At para 9, footnotes excluded.

Rules of the Labour Court. The essence of Rule 8 of this Court's rules is the abridgement of the time periods prescribed in the rules for the institution of urgent applications. By the exercise of its power under Rule 8, this Court can allow an applicant who satisfies the requirements stipulated by Rule 8 to "*jump the queue*" and get their matter heard without complying with the rules as would ordinarily be required. A decision on urgency does not ordinarily implicate the merits of the case. The merits would remain to be dealt with, either in the urgent proceedings or at an application in due course.

18. In the case of *Vena & Another v Vena & Others* 2010 (2) SA 248 (ECP) the court considered the implications of the *Hawker* decision. What had happened is this. In the course of proceedings concerning the division of a joint estate after a divorce, an urgent application for interim relief was brought (pending a trial) concerning a clause in the settlement agreement which had been concluded between the parties. The application for interim relief was dismissed for lack of urgency. The losing party brought an application for leave to appeal, relying on the *Hawker* decision. It was contended that the order dismissing the application for lack of urgency was erroneous and on that account leave to appeal should be granted. Jones J dismissed the application for leave to appeal. In doing so, he noted (without deciding) that it was doubtful that the *Hawker* decision was

intended to cover instances where a court dismissed an application because the urgent procedure itself had been a subject of abuse. However, as matters turned out, this issue became a moot point because he dismissed the leave to appeal on the merits – finding that there was no prospect that another court could come to a different outcome on the merits.[4] *Vena*'s decision is therefore of limited assistance in situations such as the present, where an application is dismissed for lack of urgency.

19. More recently in *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*,[5] the Labour Appeal Court considered the issue of dismissal of applications on the grounds of urgency in a context similar to the present. After exploring the *dicta* in *Hawker* and *Vena* Musi AJA concluded:-

> "Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word 'dismissed' is used it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits then the order is final. If not, then it is not final. A finding that a matter is not

[4] See *Vena* at paras 7 and 8.

[5] (2013) 34 ILJ 1138 (LAC).

> urgent does not mean that there are no merits in the applicant's case. Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance."[6]

20. It seems therefore that the decisions of *Hawker* and *PT Operational Services* suggest that I am not bound by the use of the word "dismissed" in the order by Lagrange J in relation to the application for final relief. I am required to ask whether or not he dismissed the application on its merits. If he did not dismiss the application on the merits, it is open for me to consider the merits. A contrary approach would elevate form above substance.

21. When examining the judgment of Lagrange J, it is clear that he did not intend to deal with the application on its merits. He indicated that the two applications were being dismissed because the applicant had not approached the chairperson of the disciplinary enquiry for relief before coming to court and the amended application for final relief was in any event not urgent. He also stated that after the applicant had approached the chairperson for an appropriate order, he could come to court for relief.

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[6] *PT Operational Services* at para 35.

22. What Lagrange J wanted, in essence, was for the parties to explore internal remedies before coming to court. He was not trying to close the door of this Court to the merits of the application. It would be inappropriate and contrary to section 34 of the Constitution to read the judgment of Lagrange J as effectively refusing the applicants the opportunity of having the merits of their case considered by this Court. It is so that the applicants have brought an application for leave to appeal. But I cannot see that the application for leave to appeal has any merit. If granted, it would mean that the Labour Appeal Court is required to consider an appeal without any pronouncement being made by this Court on the merits of the applicants' complaint. This would render the Labour Appeal Court the court of first and last instance in respect of the merits of the case.

23. I am accordingly satisfied that the applicants are entitled to bring their application for determination of the merits and to do so on urgent grounds before this Court.

24. At this stage, it is important to observe that the applicants have since approached the chairperson, who dismissed their objections to the disciplinary enquiry. One of the issues raised by the applicants goes to

the very heart of the chairperson's jurisdiction. It is doubtful whether Mr Louw could pronounce upon his own jurisdiction.[7]

25. Accordingly, I propose allowing the applicants to bring their application as one of urgency and will accordingly abridge the time periods which are prescribed by the rules. But there is a further procedural issue to deal with, which is whether final relief should be granted.

SHOULD FINAL RELIEF BE GRANTED?

26. Since the application was approached principally as one for interim relief, I requested the parties to address me on whether I could grant final relief if I took the view that it was open for the applicants to come to court on the same papers, properly supplemented. The parties have addressed the issue. Their submissions are, perhaps not surprisingly, divergent. The applicants take the view that final relief would be permissible and that they have in fact sought a final order in their notice of motion, under the heading "*further and /or alternative relief*". While the respondents deny

[7] See the decisions of *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) at para 40 and *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs N.O. & Others* (1994) 15 ILJ 801 (LAC) at 804C-D.

the propriety of the relief now sought by the applicants, they have not sought (upon my invitation) to file additional evidence, and have argued the matter on the papers as they stand.

27. The question whether a court can grant an order on a final basis where it has not been specifically prayed for, came up for consideration before the Labour Appeal Court in *MEC of the Department of Education, Eastern Cape v Gqebe*.[8] Khampepe ADJP (as she then was) noted that it is not desirable for courts to decide important aspects of cases without affording the parties an opportunity to deal with the issues, particularly where they arise after the hearing.

28. The court distilled the applicable principles to the following. A court can grant an order under the rubric of *"further and/or alternative relief"* where:-

    1. A basis has been laid for such relief in the founding affidavit and the papers read as a whole; and

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[8] (2009) 30 *ILJ* 2388 (LAC).

2. The order sought is not inconsistent with the substantive relief claimed.[9]

29. I am satisfied that, on these papers, it is open for the applicants to ask for final relief. A basis for the relief sought is made out on the papers. The final relief, which they now seek, is not incongruent with the interim relief which was sought. In addition to the factors identified by Khampepe ADJP, I would add that a court must also be satisfied that no undue prejudice would be suffered by the opposing party if relief not specifically asked for is granted under the prayer of further and/or alternative relief. In this case no undue prejudice would be suffered by the Municipality should I take this approach. Its case has been fully pleaded. It has not indicated, in response to my directions, any intention of making additional factual averments. In any event, in an application for final relief where there are disputes of fact I am required to prefer the version of the respondents.

30. I now turn to the merits of the case.

THE AUTHORITY TO INSTITUTE DISCIPLINARY CHARGES AGAINST THE APPLICANT

[9] See paras 27 to 29 of the *Gqebe* decision.

31. The second applicant has stated that in terms of his *"conditions of employment*", the Municipality can only charge him with misconduct and proceed with any disciplinary proceedings against him if the Council of the Municipality resolves to do so. Although this has been "*noted*" by the Municipality, it has not been denied.

32. I must accordingly consider whether a lawful resolution was passed by the Council to charge the second applicant with misconduct. The relevant resolution was taken on 11 December 2013.

33. It is common cause that the Council of the Municipality consists of seventy (70) councillors. The second applicant contends that the quorum is the majority of councillors (thirty-seven (37)) or, as it is put in the founding affidavit, "*50% plus one of councillors present*". In the answering affidavit, the Municipality denies this and alleges that the quorum for "*a validly constituted council meeting*" is thirty-six (36) members. I will accept that the quorum is 36 members, as is suggested by the Municipality.

34. On the day in question, 11 December 2013, at the commencement of the meeting 36 members of the Council were present and signed the attendance register. When the item pertaining to the proposed disciplinary steps against the second applicant came up for debate, Mr Hart, a councillor representing the Democratic Alliance, noticed that there

were fewer than 36 members of Council present. He informed the speaker of this fact.

35. The speaker caused a count of the remaining councillors. Subsequently, he ruled that since at the commencement of the meeting 36 members of council were present, it did not make a difference that at the time of the vote being taken the meeting was no longer quorate. The speaker then directed that the item be debated and voted upon. Mr Hart, who has deposed to an affidavit in these proceedings, thereafter left the meeting together with nine other councillors, two of whom were members of the Freedom Front Plus and the other seven, members of the Democratic Alliance. At the time that Mr Hart and the nine other councillors left the meeting, the debate about the taking of disciplinary steps against the second applicant had not yet commenced.

36. There is no dispute about these facts in the answering affidavit. The case of the Municipality is that since the meeting was quorate at the time of its commencement (with 36 members present), it remained quorate throughout. It made no difference that certain of these members left the meeting before the vote at issue was taken. It is common cause that at the time that vote was taken, there were no more than twenty-six (26)

councillors present. The decision that was taken by the remaining 26 councillors is the following:-

> "RESOLVED
>
> *(a)* That disciplinary proceedings be instituted against Mr A G Strydom pursuant to considering the report by Mr W P Scholtz dated 6 December 2013.
>
> *(b)* That allegations of misconduct against Mr A G Strydom constitute misconduct of a serious nature.
>
> *(c)* That the municipal manager be authorized to appoint and sign the letters of appointment of –
>
> *(1)* An independent and external presiding offer; and
>
> *(2)* An officer to lead evidence."

37. Having taken the decision to institute disciplinary proceedings against the second applicant, further decisions were taken to implement it. Mr Louw was appointed to chair the disciplinary enquiry; Mr Scholtz was appointed to lead evidence on behalf of the Municipality; and the second applicant was invited to attend the disciplinary enquiry. Because of the court challenges described above, the disciplinary proceedings against the second applicant have not yet commenced.

38. Unlike the case of *De Vries & Others v Eden District Municipality & Others*[10] this case does not concern the question of whether a quorum refers to the total number of councillors prescribed by legislation or actual incumbents. In this matter, I have found on the evidence that the quorum is 36. The only issue is whether this is a quorum required for convening a meeting or for the taking of a vote on a particular matter.

39. The starting point is the Constitution. The quorum debate must take place in the context of the broader constitutional framework about the place of local government in the Constitution. Under section 40 of the Constitution, 1996, there are three spheres of government. They are national, provincial and local. The spheres are "*distinctive, interdependent and inter-related*" (section 40(1) of the Constitution).

40. Section 151 provides for the establishment of municipalities to which the legislative and executive authority of the local sphere of government vests (section 151(2) of the Constitution).

41. The autonomy of municipalities is entrenched by sections 151(3) and (4) of the Constitution. These sections give the municipalities the right to

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[10] [2009] ZAWCHC 94 (17 June 2009).

govern the local government affairs of the community, subject to provincial and national legislation, and to prevent the national and provincial spheres from compromising or impeding the ability of municipalities to govern themselves.

42. The objects of local government include:-

42.1 the provision of democratic and accountable government for local communities;

42.2 the provision of services to communities; and

42.3 the promotion of social and economic development (section 152(1) of the Constitution).

43. The Constitution requires legislation to be passed dealing with the establishment of the different categories of municipalities and their functions (section 143 of the Constitution).

44. The Municipal Structures Act 117 of 1998 (the Structures Act) has been passed pursuant to section 154 of the Constitution. The Structures Act deals with a host of issues relevant to the structure of municipalities. This includes the term of office of municipal councils, the filling of vacancies by

way of by-elections, the terms of office of councillors, procedures for the vacation of office, meetings of councils, quorums and decision making. Section 30(1) provides that "*a majority of the councillors must be present at a meeting of the council before a vote may be taken on any matter.*"

45. Section 30(1) of the Structures Act, it will be observed, echoes the provisions of section 160(3) of the Constitution, which says:-

> "A majority of the members of a municipal council must be present before a vote may be taken on any matter."

46. As noted above, the version of the first respondent is that the "*majority*" contemplated by these sections is 36 members. The dispute is whether that majority of 36 must be present for convening a meeting or the taking of a vote on a particular matter.

47. The interpretation favoured by the Municipality was argued to flow from the provisions of the rules and orders of the first respondent. These rules were passed by the Municipality on 17 October 2006 as Local Authority Notice 315 and constitute binding by-laws of the Municipality. Some salient provisions must be mentioned.

47.1 In terms of clause 2.1 of the rules, the speaker is obliged to convene ordinary meetings of the Council, which must be held

every month excluding December. However, if "*a majority of councillors*" request the speaker to convene a special council meeting the speaker is under an obligation to convene such meeting.

47.2 The quorum to "*constitute a meeting of the council*" is "*at least 50% plus one*" of members, excluding the speaker in terms of clause 3.1.

47.3 In terms of clause 4.1 if, during any meeting, the attention of the speaker is drawn to the issue of the number of members present, such members shall be counted and if it is established that there is no quorum "*the speaker shall cause the call bell to ring for at least one minute and after an interval of five minutes there is still no quorum, the speaker shall forthwith adjourn the meeting*."

47.4 The quorum referred to in clause 4.1 of the rules is clearly the quorum mentioned in clause 3.1, namely, the quorum for the convening of a meeting. In other words, the rules envisage that there must always be at least 50% plus one members throughout the meetings of the Council.

48. In my view therefore, it is clear that the quorum referred to in the rules of the first respondent, is not limited to the quorum at the commencement of a meeting *per se*. Had that been the case, the provisions of clause 4.1 would have been redundant. There would have been no need to adjourn the meeting if it is established that a council meeting is no longer quorate. The only enquiry would have been whether at the commencement of the meeting there was a quorum.

49. In any event, to the extent that there is any inconsistency between the rules and the applicable legislation or the Constitution, the latter must take precedence. It is clear from the provisions of section 30(1) of the Structures Act and section 160(3) of the Constitution that the quorum refers to the quorum before "a vote may be taken on any matter". Therefore, should there be any lack of clarity in relation to the quorum requirements as prescribed by the rules and orders of the Council, that question is answered by the Structures Act and the Constitution.

50. It was argued on behalf of the Municipality that the quorum requirement urged upon me by the applicants could produce the undesirable consequences of frustrating the functioning of municipal councils by acts such as deliberate absenteeism on the part of some councillors. It was also said that account should be taken of the fact that it was

representatives of the Democratic Alliance and the Freedom Front Plus who left the council meeting before the vote was taken. I have great difficulty accepting this submission. If the quorum is set at 36, as the municipality argues, I cannot declare it as being a different number simply to accommodate the hard politics at play within the Municipality.

51. Moreover, on the facts of this case, the functioning of the Municipality has not been frustrated by acts of absenteeism on the part of councillors. Nor has it been frustrated by the failure to achieve required majorities. The version of the Municipality is that it was able to secure the necessary quorum and the required majority in two meetings held before the decision to charge the second applicant. In addition, subsequent to the meeting of 11 December 2013, there was another meeting held where there were no difficulties with quorum and majority. There is accordingly no foundation for this submission.

52. The Municipality has also asked me to take into account the resolutions of 15 October 2013 and 1 November 2013. It has been submitted that these resolutions show that the Municipality "intended" to institute disciplinary proceedings against the second applicant. Furthermore, I have been referred to the meeting of 31 January 2014 where the Municipality

resolved to "*unanimously take cognizance of the progress report*" in the disciplinary proceedings against the second applicant.

53. The difficulty facing the Municipality in relation to these submissions is that there is not a single meeting where the decision taken on 11 December 2013 was ratified or approved by a duly constituted meeting of the Council. The fact that they intended to take disciplinary actions against the second applicant in October and November 2013, does not answer the question whether, when the decision was in fact taken at the meeting of 11 December 2013, such meeting was quorate. Similarly, the meeting on 31 January 2014 simply noted the progress report without expressing itself at all as to whether the decision was being ratified or approved. It is not clear to me that the decision is in any event capable of ratification. However, since no argument was made on that score, I prefer to leave that issue open.

54. The fact of the matter is that if the Municipality wishes to take a decision, it must do so lawfully and in compliance with its rules and the applicable legislation. This is in keeping with the salutary principle of legality. Legality is a key aspect of the rule of law, which is mentioned in section 1 of the Constitution as constituting a founding value of our constitutional democracy. Municipalities and their councils must also act in conformity

with the principle of legality.[11] Where rules are set, they must be scrupulously observed. They cannot be dispensed with for political expedience. That compliance may prove challenging in a particular case, because of obstructionist conduct of politicians, is not a justification to jettison the rules. It is particularly important that a municipal council, the highest political organ at local government level, should comply with the law. If it breaches the law, it will lose political legitimacy. A political system without legitimacy can only survive by authoritarian methods, which are in conflict with the foundations of the Constitution.

55. I have found that the interpretation proposed by the Municipality in regard to the quorum requirement is wrong. At the time the decision was taken to institute disciplinary proceedings against the second respondent, it did not comply with the rules of the Municipality, the Structures Act and the Constitution. This renders the decision unconstitutional and invalid.

56. In reaching this conclusion, I am, at least in part, influenced not simply by the text, which I have dealt with above, but also by principle. In South Africa, the legal position as enunciated by Lawrence Baxter in *Administrative Law* (1984) 429 is that unless a quorum is specified in

[11] *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) at para 21.

legislation, decisions of a board such as the present must be taken by all members. This is because *"the qualifications and number of members have been selected for a purpose and that purpose would be defeated if the body were to be deprived of the services of one or more of its members."*[12]

57. This principle emanates from the decision of *Schierhout v Union Government (Minister of Justice)* 1919 AD 30.[13] It has recently been endorsed by the Supreme Court of Appeal in the context of the Judicial Service Commission Act 9 of 1994. The question was whether a body like the Judicial Service Commission was properly constituted in the absence of one of the members, in that case,the Premier of a province. The Act did not specify a quorum. In *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA), it was held that the Judicial Service Commission had not been properly constituted and therefore its decisions were unlawful in the absence of the Premier.

[12] Baxter, p. 429.

[13] *Schierhout* was followed in *Yates v University of Bophutatswana* 1994 (3) SA 815 (B).

58. The import of these decisions is that the failure to reach a quorum means that no lawful decisions can be taken. The Council is not properly constituted. Section 35(1) of the Structures Act also shows the premium which the legislature places on the quorum requirement. It says that where a municipality does not have enough members to form a quorum for a meeting, the MEC for local government "must" appoint an administrator, either until elections are held or until the required quorum can be met.

59. Since the decision taken on 11 December 2013 to take disciplinary measures against the second applicant was invalid for breach of the Constitution, it cannot be allowed to stand. I shall make a final order in this respect. It is not difficult to work out what should have happened in order for the decision to be lawfully taken. Once Mr Hart drew the speaker's attention to the issue of the quorum, the speaker should have caused a call bell for at least one minute. If, after five minutes there was still no quorum, the speaker should have adjourned the meeting. I cannot say what would have happened at the next meeting, but it is significant that there seems to have been no difficulties with the quorum at the next meeting of the Council, notwithstanding the fact that one of the items discussed was the progress report in the disciplinary enquiry against the second applicant.

60. Argument was also raised in the founding affidavit and heads of argument pertaining to the violation of the Protected Disclosures Act by the Municipality. I wish to turn to that issue briefly.

THE PROTECTED DISCLOSURES ACT

61. The case of the second applicant in this regard is that during the course of the first half of 2013, he was assisting a Warrant Officer Jaco van den Berg (who is part of the Commercial Crime Investigating Unit or the Hawks at the South African Police Service) to investigate allegations of tender fraud at the Municipality. In about May 2013, the Municipality's Director of Infrastructure, Mr R Mukondelili, informed the second applicant that the Municipal Manager of the first respondent, Mr Elias Tsietsi Motsemme, had tried to influence him to include a tender submission received after the closing date of the tender process. That tender relates to "*NEP Consultants*".

62. The second applicant also stated that Mr Mukondelili had told him that Mr Motsemme threatened Mr Mukondelili with dismissal if he did not carry out his instructions of including a tender after the closing date. As matters turned out, the tender was not included. The second applicant conveyed this message to Mr van den Berg. Furthermore, the second applicant says that he was contacted telephonically on four occasions by Mr

Motsemme enquiring about the validity of the tender process. On 6 May 2013 there was a further attempt on the part of Mr Motsemme to contact the second applicant concerning the tender. As a result of these conversations the second applicant made another disclosure to Mr van den Berg and also told Mr van den Berg about Mr Motsemme's motor vehicles. The allegation is that Mr Motsemme owned a Maserati M139 Quatroport, BMW 3 Series 303 ICA, BMW DBX 462, BMW X5, and a Mercedes Benz R171, all of which were "*highly expensive vehicles*". (Mr Motsemme does not deny owning any of these vehicles, but he says he was able to finance them using his own resources.)

63. It seems common cause on the papers that Motsemme became aware of the communication between the second applicant and Mr van den Berg. There was contact between the second applicant and Mr Motsemme, during which Mr Motsemme informed the second applicant that he was aware of his communication with Mr van den Berg.

64. The second applicant then says he became aware in September or October 2013 that he was under investigation by the Municipality's Chief Audit Executive who, it is alleged, had been asked by Mr Motsemme to conduct the investigation.

65. This allegation is strongly denied by the Municipality. The documents that have been produced as part of the answering affidavit of the Municipality show that the decision to conduct an investigation into the second applicant's department was not taken by Mr Motsemme, but by Councillor L T Mabunda, in his capacity as chairperson of the Municipal Public Accounts Committee. That decision was taken on 2 August 2013. It was in the form of a written instruction to Mr Motsemme to conduct an investigation into expenditure on legal fees for the 2006 to 2009 financial years. It appears that the scope of the investigation was subsequently extended to include the years 2010, 2011 and 2012.

66. That issue was again discussed by the Municipal Public Accounts Committee at its meeting of 8 October 2013, where it appears to have been noted that an investigation was under way.

67. The report of the investigation was tabled on 15 October 2013 to the full Municipal Council. It is notable that the report is of a generic nature, referring simply to "*fruitless and wasteful expenditure*" in the second applicant's department. Furthermore, the recommendation by the Municipal Public Accounts Committee to the full Council was that two employees, the second applicant and the Assistant Director of Labour

Relations should be placed on “administrative leave” so that the outcomes of the report which implicated them should be investigated.

68. There are 13 charges against the second applicant. None of these charges concerns the fact that the second applicant contacted Mr Van den Berg. It is said that some of the charges emanate from the report of the Municipal Public Accounts Committee. I do not think it is appropriate to dwell on these charges at this stage because they may well be considered at a properly constituted disciplinary tribunal should the Municipality elect to proceed with the enquiry.

69. Against this background I must consider whether there is any basis for the claim that the Municipality has committed an occupational detriment by instituting disciplinary charges against the second applicant. The starting point is section 3 of the Protected Disclosures Act (“the Act”). It says that no employee may be subjected to any “*occupational detriment*” by his or her employer on account, or partly on account, of having made a protected disclosure. An occupational detriment as defined by section 1 includes a suspension and the taking of disciplinary action against an employee. A protected disclosure also includes a disclosure made to one’s employer or any other person or body in accordance with the provisions of sections 8 and 9 of the Act.

70. In terms of section 4 of the Act, a person who is subject to an occupational detriment in violation of section 3 may approach any court having jurisdiction, including the Labour Court, for appropriate relief or may pursue any other procedures allowed or prescribed by law.

71. For a disclosure to be protected, it must first qualify as a disclosure. A disclosure is a "*disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more*" of certain improprieties. These *"improprieties"* include the allegation that a person has failed or is failing or is likely to fail to comply with any legal obligation to which that person is subject. It is important to note that the disclosures must relate to *"information"*, not *"subjectively held opinions"* or accusations.[14]

72. Mr Motsemme has denied the allegations made against him. But these denials are not material for present purposes. The Act does not require the information to be true. It simply requires that the person making the

[14] *Communication Workers' Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC) at para 22; *Van Alphen v Rheinmetal Denel Munition (Pty) Ltd* [2013] 10 BLLR 1043 (LC) at para 39.

disclosure must have "*reason to believe*" that an impropriety is being committed.[15]

73. In my view, the information conveyed to Mr van den Berg by the second applicant constituted a disclosure within the definition of the Act. The impropriety was that Mr Motsemme was trying to improperly influence a tender outcome, which if true, would be a breach of the Municipal Finance Management Act 56 of 2003. In addition the disclosure was that Mr Motsemme's wealth and lifestyle appeared at variance with his earnings from the municipality. It is legitimate for an employee to make these disclosures so that they can be investigated by the appropriate authorities. But the question in this case is whether the disciplinary enquiry is being pressed against the second applicant "on account of" or "partly on account of" making the disclosure.

74. Several cases have examined various facets of the Act. These include the decision of *Minister for Justice & Constitutional Development & Another v Tshishonga* (2009) 30 ILJ 1799 (LAC); *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & Another*

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[15] *Radebe & Another v Premier, Free State & Others* (2012) 33 ILJ 2353 (LAC) at para 33.

(2010) 31 ILJ 322 (SCA); *State Information Technology Agency Ltd. v Sekgobela* (2012) 33 *ILJ* 2374 (LAC) and *Tshishonga v Minister of Justice & Constitutional Development* [2007] 6 BLLR 327 (LC).

75. It seems, however, that in those decisions there was no controversy that employees were being disciplined specifically for making disclosures. So, for example, in *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & Another*, the charge against the employee was that he wrote a letter to the Department of Labour complaining about the appointment of system operators at the City of Tshwane. That letter, for which the employee was being charged, was itself a protected disclosure. In these circumstances the SCA concluded that the disciplinary action against the employee was an occupational detriment as defined by the Act. Similarly, in *Radebe v Premier, Free State & Others*, the employees had written a critical letter about the MEC for Education as well as the Minister for Education. The charge of misconduct against them was that they had written the letter in question. The Labour Appeal Court prevented the employer from taking disciplinary action against the employees. The *Tshishonga* decision is also along the same lines: There was no dispute that the charge against the employee was that he had

made disparaging remarks against the Minister publicly. The *"disparaging remarks"* were the allegations of an improper relationship between the Minister and one of the liquidators, Mr Enver Motala.

76. But the present case seems to stand on a different footing. The second applicant is not being charged for communicating with Mr van den Berg. Instead, what has happened is that after his communication with Mr van den Berg, certain investigations were conducted which uncovered alleged acts of serious misconduct by the second applicant. The question therefore pertains to whether the disciplinary action is on account of or partly on account of the disclosure. This requires an examination of the degree of nexus between the decision to charge the second applicant and the disclosures made to Mr van den Berg. This issue has been considered by Van Niekerk J in *Matteus v Octagon Marketing (Pty) Ltd.*[16] He stated that:

> "Of course, there must always be a nexus between the occupational detriment claimed and the disclosure – that nexus is established by s 3 of the PDA. Section 3 prohibits employers from subjecting employees to

[16] [2013] ZALCJHB 317 (17 September 2013, as yet unreported). See too a decision delivered a few days before the handing down of this judgment: *Ngobeni v Minister*

> occupational detriments 'on account, or partly on account' of having made a protected disclosure. What is required to establish the necessary link is to determine whether the disclosure is the proximate cause, even partially, of the occupational detriment, be it a disciplinary hearing, a suspension a transfer or any other act contemplated by the PDA. Put another way, it is sufficient for an applicant to show, on balance, that the prejudice suffered by him or her is wholly or partially attributable to the protected disclosure made. This will ordinarily require an examination of the degree of temporal proximity between the disclosure and the detriment, the reasons proffered for the occupational detriment, and the like."[17]

77. Thus, what I am required to establish is the "proximate cause" of the disciplinary enquiry. It is clear that a disciplinary enquiry against an employee need not necessarily be the direct result of a disclosure. I propose that a useful and practical approach is to consider factors such as (i) the timing of the disciplinary enquiry; (ii) the reasons given by the employer for taking the disciplinary steps; (iii) the nature of the disclosure; (iv) and the persons responsible within the employer for taking the decisions to institute charges. I do not propose to cast these factors in

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of Communications and Another (J08/14) [2014] ZALCJHB 96 (3 April 2014, as yet unreported).

iron, but they seem to be practical pointers towards unpacking the substantive content of the test of "proximate cause" posited by Van Niekerk J.

78. With this framework, I consider the facts. The Municipality denies that there is any nexus between its decision to charge the second applicant with misconduct and the disclosures made to Mr van den Berg. It has explained by reference to documents how the decision to charge the second applicant was arrived at. I must accept the version of the Municipality in this regard. Not only am I bound by legal principle, but the version has credence. It is significant that the decision to charge the second applicant was not taken by Mr Motsemme but by the Municipal Public Accounts Committee, a sub-committee of the Council. It was that committee which decided to institute a widespread investigation, not specifically targeted at the second applicant, concerning expenditure on legal fees. Once that investigation was completed, it is not reasonable to expect that it would not be acted upon.

79. The second applicant has alleged that the entire methodology of the investigations and subsequent resolutions by the council is consistent

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[17] *Matteus* at para 12.

with Mr Motsemme's "*modus operandi*". The allegation is that Mr Motsemme is something of a schemer – he apparently goes around lobbying councillors to secure their vote towards a particular outcome favourable to him. This again is disputed and I cannot say, on these facts, that the disciplinary enquiry was orchestrated by Mr Motsemme consequent upon being aware of the disclosures made to Mr Van den Berg.

80. I am therefore not able to find that the disciplinary actions against the second applicant were on account of, or partly on account of his having made the disclosures to Mr van den Berg. That being said, the facts show that Mr Motsemme may well have a case to answer. I would imagine that it is in the interests of the Municipality to take appropriate action to ensure that the allegations against Mr Motsemme are properly investigated and, if there is any substance to them, properly dealt with. But that is not for me to decide in these proceedings. I have concluded that the charges against the applicant do not constitute an occupational detriment in terms of the Protected Disclosures Act.

ORDER

81. In the above circumstances I make the following order:-

(1) The application brought by the applicants will be dealt with as one of urgency and the rules of court and the forms of service will be abridged accordingly.

(2) The decision of the first respondent taken on 11 December 2013 to charge the second applicant with misconduct and to take the related steps is declared to be unconstitutional, unlawful and invalid.

(3) The first respondent is interdicted from proceeding with the present charges of misconduct against the second applicant, unless the Council, properly constituted, resolves otherwise.

(4) The disciplinary proceedings against the second applicant do not constitute an occupational detriment in terms of the Protected Disclosures Act.

(5) The first respondent is ordered to pay the costs of the applicants in this application.

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TEMBEKA NGCUKAITOBI
ACTING JUDGE OF
THE LABOUR COURT OF SOUTH AFRICA

APPEARANCES

For Applicants:	Mr M van Staden (Savage, Jooste & Adams)
For the first respondent:	Mr C Scholtz (Scholtz Attorneys)