



DATE: 21 NOVEMBER 2017

REPORT TO: COUNCIL

1. ITEM NUMBER **05/11/17**

2. SUBJECT

ALLEGATIONS OF MISCONDUCT AGAINST CITY MANAGER IN TERMS OF REGULATION 5(1): DISCIPLINARY REGULATIONS FOR SENIOR MANAGERS

3. DELEGATED AUTHORITY

In terms of delegation FOR DECISION BY COUNCIL

This report is

- Committee name :
- The Executive Mayor ito Delegated authority
- The Executive Mayor together with the Mayoral Committee (MAYCO)
- Council

4. DISCUSSION

In terms of Regulation 5(1) of the Local Government: Disciplinary Regulations for Senior Managers ("the Regulations"), any allegation of misconduct against a senior manager, which includes the City Manager, must be brought to the attention of the Council.

The Executive Director: Directorate of the Mayor, Craig Kesson ("ED: DOM"), served a copy of his complaints, against the City Manager, personally as well as emailed a copy thereof to the City Manager. Whilst the Regulations does make provision for this, the ED: DOM nonetheless elected to do the aforementioned.

The City Manager was therefore placed in a position to respond to the complaints made, and did so to the Executive Mayor. It is for this reason that the City Manager's response has been included in this report for consideration by Council.

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Submissions by ED: DOM:

It is submitted by the ED: DOM that:

Submission 1:

The City Manager, allegedly failed to ensure that the proper implementation of the City's contract with AEM and ICT Works concluded in 2012 for the provision of station management and related services for the MyCiti Integrated Rapid Transport System. It is alleged by the ED: DOM that this alleged failure amounts to misconduct by the City Manager.

City Manager's response:

It is important to mention, that a legal opinion was requested by the Probity Department and that a preliminary draft opinion was received on FSD291/15-16 ("FSD291"), from Cliffe Dekker Hofmeyr ("CDH"), who was briefed with FSD291 by the Probity Department. It is common cause that such investigation has to date not been finalized, a fact even accepted by CDH. This is evidenced by the recommendations contained in the forensic report itself (recommendations 901-903) and the additional services acquired through the authorized appointment of CDH as well as consultants, Pricewaterhouse Coopers ("PwC").

- a. I, within my delegated authority, authorised a forensic investigation into alleged unauthorised transactions relating to the cash management and payment component of the station management contract;*
- b. I furthermore actioned the recommendations resulting from such authorised forensic investigation, with reference FSD291;*
- c. Flowing from a presentation done to inter alia, myself and key staff, on FSD291, I directed that a consultant be appointed to determine the quantum of any loss, if any, suffered by the City. Furthermore, I instructed that a firm of attorneys be appointed to provide legal advice in respect of any civil remedies that the City may have and to provide legal advice in respect of evidentiary requirements related to the work performed by the consultants referred to above;*
- d. I am reliably informed that the appointed consultant, PwC, are at this point in time, still in the process of quantifying the alleged loss, if any, and that no final report has been submitted to the City in this regard, as yet;*
- e. Consequently, forensic report FSD291, remains an ongoing investigation, which can only be finalised and actioned upon receipt of the finalised PwC report and legal advice. This is clearly a work in progress;*



- f. *It follows therefore that it is only once PwC submits its report and findings that any consideration, legal or otherwise, can be had to whether there has been any breach of the Municipal Finance Management Act ("MFMA") and its Regulations by any municipal official.*

Flowing from the above, together with the fact that CDH reached the same conclusions as FSD291 relating to control weaknesses and the imperative for reliable quantification of alleged loss, it cannot be disputed that the unsigned preliminary draft opinion of CDH, is indeed merely a draft. As such, it is glaring that no reliance can be placed thereon. However, and notwithstanding this, the ED: DOM has selectively quoted such opinion to level allegations against me.

Had the ED: DOM fully appreciated the unsigned draft opinion of CDH, he would have realized that there has been no transgression of either the MFMA or any other legislation at this stage and to come to such conclusion is at best for the ED: DOM premature.

Submission 2:

The City Manager failed to properly consider and/or report to Council allegations against Melissa Whitehead, the then Commissioner: TCT ("the Commissioner") regarding an investigation into alleged irregular, fruitless and/or wasteful expenditure in the management of a contract related to the Rapid Transit Fare System.

City Manager's response:

*Forensic report, under reference FSD356/13-14 ("FSD356") dated **24 March 2016**, to which this submission relates, was neither issued by Forensic Services nor delivered to me. This is evidenced by the contents of the registers of Forensic Services, and furthermore that it does not appear in the registers of my office. It is additionally evidenced by the fact that it was verbally brought to the attention of the Portfolio Manager: Probity, as early as 27 July 2017, that FSD356 dated **24 March 2016**, whilst signed, was never issued by Forensic Services. Such verbal advices were confirmed in a memorandum dated 28 July 2017, addressed and delivered to the Portfolio Manager: Probity.*

*It goes without saying that I cannot be held to account for a forensic report which to date, has not been brought to my attention save for the extracts reflected in the subject submission of the ED: DOM. It is concerning that the ED: DOM has not furnished supporting documents to evidence his assertion that FSD356, dated **24 March 2016**, was at the very least brought to my attention let alone issued by*

Forensic Services and delivered to me. The ED: DOM also never had the courtesy to discuss this matter with me.

However, I can confirm that FSD356, dated **30 March 2016**, was in contrast issued by Forensic Services and delivered to me as borne out by the relevant registers. FSD356, dated **30 March 2016**, was actioned by me as follows:

- a) a written annotation to my erstwhile strategic advisor, dated 30 March 2016, relating to recommendation 902; and
- b) an instruction to the Commissioner: TCT, dated 01 April 2016, specifically to action recommendations 901 and 903 and report to Forensic Services within 30 days with confirmation of implementation; and
- c) an instruction to the Chief Financial Officer, dated 01 April 2016, specifically to action recommendation 903 and report to Forensic Services within 30 days with confirmation of implementation.

The Portfolio Manager: Probity as stated above, had full knowledge of the facts relating to both the **issued** and **unissued** forensic report FSD356. Considering that the ED: DOM is her direct reporting line, it is strange that the second report allegedly only "recently came to light". Therefore, the only conclusion that one can draw, is that when the ED: DOM lodged his submission, he had full knowledge that the actual forensic report (FSD356, dated **30 March 2016**), was indeed issued and delivered to my office.

He also knew full well that FSD356, dated 24 March 2016 (**unissued**) was never issued neither was it delivered to the City Manager's office or received by me. Notwithstanding this the ED: DOM, chose to place reliance on the incorrect report to level frivolous allegations against me.

[Please note that this response must be read together with my response under Submission 5 herein below]

Submission 3:

Further to the above, it is alleged that the City Manager played a role in the alteration of a report dated 30 March 2016 regarding the same investigation into the management of the Rapid Transit Fare System contract.

City Manager's response:

I wish to re-iterate that I did not receive FSD356, dated **24 March 2016**. However, I can confirm once again receiving FSD 356, dated **30 March 2016** and that I actioned this report as set out herein above. I can emphatically state that I did not



alter, amend, change or in any way influence the change of any forensic report, including FSD356.

*Additionally, there is absolutely no evidence whatsoever that I played any role in the determination of the recommendations contained in the forensic report 24 March 2016 (**unissued**) and/or 30 March 2016 (**issued**). Therefore, it is defamatory, willful and malicious of the ED: DOM to level the allegations which he has in this instance.*

[Please note that this response must be read together with my response under Submission 5 herein below]

Submission 4:

The City Manager failed to report to Council on the allegation of misconduct on the part of the Commissioner pertaining to a forensic investigation into alleged irregularities involving payments to Volvo for Volvo bus chassis.

City Manager's response:

In a letter dated 02 December 2016, addressed to the erstwhile Chief: Forensics, Ethics and Integrity Officer ("Chief: Forensics"), I set out the manner in which the Volvo matter was dealt with and finalized. It is perhaps prudent for me to point out that the forensic report, FSD049/14-15 ("FSD049"), was submitted by me to the Executive Mayor for consideration. Flowing from a number of discussions with the Executive Mayor, which included inter alia the City Manager, Chief Financial Officer and erstwhile Executive Director: Corporate Services and Compliance ("ED: CorC"), such report could not be processed further based on the advice of the ED: CorC, who differed substantially with the interpretation of the evidence contained in the forensic report.

It is noteworthy, that this matter was dealt with in 2015.

Had the ED: DOM merely taken the time to consult with me on this matter, as would have been expected of a senior manager in his position, I would have informed him of my actions taken to date. In this regard, I can confirm that the ED: DOM to date had not requested a copy of such forensic report, FSD049, from me, neither did he have the courtesy to engage me on the matter.

Submission 5:

On 12 September 2017, the City Manager summoned the ED: DOM to a meeting in his office where he informed the ED: DOM that he was removing the whole Probity

function from the ED: DOM with immediate effect. The ED: DOM alleges that this actions by the City Manager was as a result of the ED: DOM's instruction to the Portfolio Manager: Probity, on 7 September 2017, to seize all forensic reports for the past 5 years.

City Manager's response:

It must be stated upfront that this submission by the ED: DOM is reflective of his lack of understanding of the regulatory framework and processes governing the City.

Probity Function:

In so far as shifting the probity function from the Directorate of the Mayor, I must in terms of Regulation 4(3) of the GN 21 of 17 January 2014: Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers (Government Gazette No. 37245), review the Staff Establishment within 12 months of the Election of a new Municipal Council. The Regulations further requires the City Manager to take into account the Strategic Objectives as well as the Core and Support functions of the Organisation. I complied with such Regulation in August 2016 (Council resolution C05/08/16), when the report titled "THE ORGANISATIONAL DEVELOPMENT AND TRANSFORMATION PLAN ("ODTP"), THE MACRO ORGANISATIONAL STRUCTURE & THE FILLING OF SECTION 57 POSITIONS" was tabled. As part of such resolution, I was authorised to:

- “ ...
- q) The further realignment of the entire Staff Establishment **be dealt with by the City Manager in terms of existing delegated authority** and in order to ensure operational efficiency, **the City Manager be authorised to deviate from the Policy Framework for Organisational Structure and Design as far as necessary and practically implementable;**
- r) The macro structure contains functional areas which **may be adapted or changed in the micro design process, to be led by the City Manager;**
- ...” [writer's own emphasis]

It is therefore clear from the aforesaid, that both the legislative and policy framework empowers me, in my capacity as the City Manager, to approve any changes in functions or reporting lines.

Again this is illustrative of the ED: DOMs lack of knowledge, understanding and/or appreciation of how municipalities function within the prescribed legislative and



policy framework. It objectively evidences that the ED: DOM lacks the necessary capacity and professionalism to function in the position he occupies.


Seizure of Forensic Reports:

It is very concerning that the ED: DOM does not appreciate the implications of his instruction of 07 September 2017 relating to the seizure of forensic reports, undertaken on 14 September 2017. In this fashion he took possession of what amounts to approximately one thousand (1000) confidential forensic investigation reports. These forensic investigation reports included reports relating to **councillors and officials** of the City of Cape Town municipality, without the requisite authority.

At no stage did the ED: DOM or the Portfolio Manager: Probity, who was also the acting Chief: Forensics at the time, obtain the authority of myself or the Speaker, as the delegated authorities, to seize such forensic reports. I understand that these forensic reports were scanned and uploaded on a number of external storage devices and subsequently distributed to inter alia the Manager: Support Services of the ED: DOM and the Portfolio Manager: Probity at approximately 22h30 on the evening of 14 September 2017.

The delegations and functions of myself and the ED: DOM in respect of forensics are distinguished as follows:

- a. Council delegated the authority to **authorise** forensic investigations to me, in my capacity as City Manager, whilst the ED: DOM may only undertake **preliminary enquiries/assessments** prior to recommending to me. The authorization that triggers the other delegations of the ED: DOM therefore lies solely with me in my capacity as City Manager. Accordingly, in the absence of any authorisation by me, of a forensic investigation, none of the other delegations are triggered or comes into force or effect.
This is and has always been the procedure and practice for over a decade whilst I have been City Manager and for as long as the Speaker has held his position.
- b. Delegation 6(3)(b) of Part 29, does indeed empower the ED: DOM to inter alia have access to and/or seize documents, etc. However, this delegation is subject to the condition that it must be in relation to the **performance of his functions and must be in respect of an authorised investigation**. The ED: DOM confirmed in his submission that the purpose for such seizure was to conduct a due diligence exercise, and he specifically states: "On 7



September 2017, the ED: DOM requested that the PMP provide him with a record of all forensic reports and actions from the past 5 years, **to conduct a due diligence exercise.** [writer's own emphasis]. It is thus clear that his action in this regard, was not in relation to the performance of his official functions in as far as it relates to Forensics.

- c. Furthermore, I am the only official authorised by Council to issue appropriate executive instructions in respect of any Forensics activity, as per delegation 12(1)(a) of Part 27. This delegation implies that I, as City Manager, must firstly apply my mind to the matter in order to determine whether or not an instruction is deemed to be appropriate or not. It further implies that the issuing of such executive instruction is not a decision to be taken lightly and must be exercised with the necessary caution due to the nature of forensic activities. The ED: DOM however assumed this authority by requesting a record of all forensic reports and actions relating to the past 5 years, from the Portfolio Manager: Probity, to be provided to him. Not only does this amount to an executive instruction in respect of forensic activities, but it also falls outside the ambit of his delegations as it is unrelated to his official functions.

Should authority have been requested from myself and/or the Speaker, I (and I am sure the Speaker would concur) would have considered a number of factors including the risk to the City and the manner in which such process ought to have been undertaken. Based on the aforesaid, I would not have given authority, as such seizure actually occurred in an unprofessional and haphazard manner, with great risk to the City.

This risk has now indeed materialised as a Democratic Alliance ("DA") member of Parliament, who is not a member of this Council, telephonically contacted a staff member of the municipality, specifically enquiring about a forensic report, with reference FSD356/13-14 ("FSD356"). It is clear from such discussion that the said member of the DA was in possession of forensic reports and at the very least in possession of the two forensic reports, with reference number FSD356 but dated 24 March 2016 (**unissued**) and 30 March 2016 (**issued**) respectively. Specifically, the DA member was able to stipulate the following:

- a. That the one forensic report consisted of 49 pages and the other 48 pages;
 b. That the same official signed both forensic reports;
 c. That the DA member was aware that there were differences in the recommendations of aforementioned forensic reports; and

d. The DA member enquired about the background to the two signed forensic reports.

In this regard, it can be confirmed that neither the City Manager nor the Speaker authorised the disclosure of such information.

Additionally, the aforesaid calls into question the purpose of the exercise undertaken by the ED: DOM and whether same was indeed to conduct a due diligence exercise. From my response herein above, together with the content of the submission received from the ED: DOM, it is clear that the purpose of this exercise was to disseminate such forensic reports to unauthorized persons, to investigate me and a senior manager, which action by its very nature is unlawful.

It should be emphasized that authority to investigate section 56 staff, such as the City Manager and any other Executive Director, is a decision which should be expressly taken by the full Council, in terms of the applicable Regulations.

Submission 6:

The City Manager failed to report to Council the alleged conduct of the Commissioner: TDA in respect of tender 007C/2016/17: Requests for Proposals for the Development of the City of Cape Town Foreshore Freeway Precinct.

City Manager's response:

That ED: DOM ought to know of the process dealing with allegations against senior managers as contained in the Regulations of the Disciplinary Regulations for Senior Managers ("the Disciplinary Regulations") to the Systems Act. In this regard, I confirm that I complied with my obligations in respect of the Foreshore Freeway Project.

The Independent Assurance Providers to the BEC, submitted a report which contained concerns on the composition and functioning of the BEC. Such report did not however contain any direct allegation of misconduct against the Commissioner. I obtained external legal advice from SC QC, who advised that the BEC must be reconstituted, which advice I duly implemented.

A full dossier including a report destined for Council was submitted to the Executive Mayor. After applying her mind and considering the report, especially as there was no direct allegation of misconduct made against the Commissioner,

it was determined that there was no need for a submission to Council as required by the Regulations.

Had the ED: DOM merely taken the time to consult with me on this matter, as would have been expected of a senior manager such as him, I would have informed him of my actions taken to date.

His failure to do so is indicative of poor judgement, a lack of understanding and appreciation of the workings of a municipality and that of the office of the City Manager.

PRECAUTIONARY SUSPENSION:

The Disciplinary Regulations ("the Regulations") requires that Council can only consider precautionary suspension if it authorises an investigation into any alleged misconduct. Additionally, it may only authorise a precautionary suspension if the requirements of regulation 6 of the Regulations are met.

In this regard, from an objective assessment of all information at the disposal of Council, there are no reasons which warrants an investigation into any conduct on the part of the City Manager. It therefore follows that there can be no precautionary suspension. In any event, even if Council authorises an independent investigation, there remains no reason to place the City Manager on precautionary suspension.

The Regulations require Council to consider the following criteria when making a decision on precautionary suspension of a senior manager:

a. Jeopardise any investigation into the alleged misconduct;

Neither conduct of the City Manager to date nor his track record of almost 40 years, hints at the possibility of him jeopardising any investigation into his conduct or that of any other official. In fact, his cumulative track record, together with his actions relating to the specific matters at hand, is indicative of the contrary.

b. Endanger the wellbeing or safety of any person or municipal property;

The conduct of the City Manager to date, based on his track record of almost 40 years, does not hint at the possibility of him endangering the wellbeing or safety of any person or municipal property.

c. *Be detrimental to stability in the municipality;*

The City Manager's potential precautionary suspension will in all likelihood, impact on the stability of the City and its leadership. His continuous presence, in fact adds to the stability and confidence in the administration. It is therefore in the best interest of the City that he remains in his position.

Such drastic action as precautionary suspension, will have a direct impact on his reputation as the City Manager as well as that of the City. It may also raise serious questions as to the governance of the City.

d. *May interfere with potential witnesses;*

There is no risk of the City Manager interfering with any potential witness as it appears that the ED: DOM, is the only witness. In contrast, his track record to date evidences that he has always followed due process and allowed due process to take its course.

e. *Commit further acts of misconduct.*

The chances of the City Manager, given the aforesaid, committing misconduct or any further acts of misconduct, as envisaged by the Regulations, is farfetched.

In fact, he has to date, in his almost 40 years of service not once been accused or charged of any misconduct. The chances of him, in the twilight of his career, starting to commit any type of misconduct or further acts of misconduct, is an extreme improbability.

Based on the objective information at the disposal of Council, it is evident that the requirements of the Regulations in respect of either an investigation or precautionary suspension have not been met.

- 4.1. Financial implications None Opex Capex
- Capex: New Projects
 - Capex: Existing projects requiring additional funding
 - Capex: Existing projects with no additional funding requirements

4.2. Legal Compliance

The Disciplinary Regulations for Senior Managers provides as follows:-

5. **Disciplinary procedures.**—(1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.
- (2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven (7) days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven (7) days to consider the said report.
- (3) If the municipal council is satisfied that—
- (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven (7) days appoint an independent investigator to investigate the allegation(s) of misconduct; and
 - (b) there is no evidence to support the allegation(s) of misconduct against the senior manager, the municipal council must within seven (7) days dismiss the allegation(s) of misconduct.
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 sub-regulation (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

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- (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.

4.3. Staff Implications Yes No

5. RECOMMENDATIONS

While it is considered in the overall context of this matter that a disciplinary investigation is not warranted, the matter is submitted to Council for consideration and decision as required.

Not delegated for decision by Council:

In the event that the Council is satisfied that there is reasonable cause to believe that an act of misconduct has been committed, it is recommended that it be:

RESOLVED that the Executive Mayor, as the employer, as defined in the Local Government: Municipal Performance Regulations for Municipal Managers and Managers directly accountable to Municipal Managers, 2006, be authorised to appoint, within 7 (seven) days of Council's resolution, an independent investigator to investigate the perceived misconduct

ALTERNATIVELY

In the event that the Council is satisfied that there is no evidence to support the allegation of misconduct, it is recommended that it be:

RESOLVED that the allegation is dismissed and that no further investigation is required.

LEGAL COMPLIANCE

REPORT COMPLIANT WITH THE PROVISIONS OF COUNCIL'S DELEGATIONS, POLICIES, BY-LAWS AND ALL LEGISLATION RELATING TO THE MATTER UNDER CONSIDERATION. NON-COMPLIANT

NAME LUNGELO MBANDAZAYO

COMMENT:

DATE 16 NOVEMBER 2017

Legally compliant based on the contents of the report

SIGNATURE



EXECUTIVE MAYOR

SUPPORTED NOT SUPPORTED

NAME

Patricia de Lille.

COMMENT:

DATE

16 November 2017

SIGNATURE

P de Lille.