



DATE:

REPORT TO: COUNCIL

1. ITEM NUMBER **02/11/17**

2. SUBJECT

**REGULATION 5(1) OF THE DISCIPLINARY REGULATIONS FOR SENIOR MANAGERS: C KESSON**

3. DELEGATED AUTHORITY

In terms of delegation

This report is FOR DECISION BY COUNCIL

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

4. DISCUSSION

**Allegations:**

The following allegations of serious misconduct on the part of the Executive Director: Directorate of the Mayor, Craig Kesson ("ED: DOM"), is submitted for consideration by Council.

The City Manager alleges that:

The conduct of the ED: DOM amounts to a violation of his employment contract, the Ethics Code of the City of Cape Town ("the Ethics Code"), Regulations 1, 5, 6, 13 and/or 19 of Part II of the Disciplinary Regulations for Senior Managers ("the Regulations") and Item 2(b), (d), (e) and/or 6(1) and/or 9 of the Code of Conduct for Municipal Staff Members ("MSM Code") and/or what is generally expected of a senior manager in the position of the ED: DOM.

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In that:

1. The ED: DOM has committed an act of serious misconduct in that he leaked and/or caused to be leaked confidential forensic investigation reports to a political party and/or a member(s) of a political party without the requisite authority and contrary to the legislative prescript.

A member of the Democratic Alliance ("DA"), who is not a member of this Council, telephonically contacted a staff member of the municipality, 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 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.

2. The ED: DOM committed an act of serious misconduct when he instructed the scanning of the past 5 years' forensic reports onto a number of external storage devices. 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** of the City of Cape Town municipality, without the requisite authority.

The delegations and legislative authority to seize such forensic reports vests with the Speaker. Specifically, Item 13 of the Code of Conduct for Councillors, vests the authority with the Speaker to authorise any investigations into councillors. It can once again be confirmed that the Speaker gave no such authority.

3. The ED: DOM committed an act of serious misconduct when he instructed the scanning of the past 5 years' forensic reports onto a number of external storage devices. In this fashion he took possession of what amounts to approximately one thousand (1000) confidential forensic investigation reports. These forensic

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investigation reports included reports relating to **officials** of the City of Cape Town municipality, without the requisite authority.

The ED: DOM had no legislative or delegated authority to seize the finalised forensic reports.

4. The ED: DOM has undertaken and conducted investigations into section 56 staff members. This is borne out by the documents that the ED: DOM submitted to both the City Manager as well as the Executive Mayor. The ED: DOM has no authority in law or by way of delegation to conduct such investigations. In fact, regulation 5 of the Regulations, clearly vests such authority in Council and therefore this amounts to an abuse of power, a serious breach and serious misconduct on the part of the ED: DOM.
5. The ED: DOM, based on the same documents referred to herein above, levelled frivolous and vexatious allegations of misconduct in terms of the Regulations, against the City Manager without any evidentiary basis. To the extent that in these documents, the ED: DOM indicates that the "allegations" must be carried forward irrespective of "...whether or not the City Manager is suspected of, or guilty of, any misconduct. They have potentially serious implications for the City..."

In the same documents, he also states that "...**no allegation of misconduct** has been made but...I am nonetheless of the view that you should ask the Council to cause the issue raised therein to be independently investigated." [emphasis added]

This clearly, are very serious allegations levelled against the Accounting Officer; more so, as the ED: DOM almost concedes, as reflected in the above quote, that no supporting evidence exists in this regard.

This is extremely defamatory, reckless, negligent, mischievous and seriously impinges upon both the reputation of the City as well the City Manager.

6. The ED: DOM, based on the same documents referred to herein above, levelled frivolous and vexatious allegations of misconduct in terms of the Financial Misconduct Regulations ("Financial Regulations"), against the City Manager without any evidentiary basis. To the extent that in these documents, the ED: DOM indicates that the "allegations" must be carried forward irrespective of "...whether or not the City Manager is suspected of, or guilty of, any misconduct. They have potentially serious implications for the City..."

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This, notwithstanding the fact that the ED: DOM had full knowledge that:

- a. The City Manager authorised a forensic investigation into alleged unauthorised transactions relating to the cash management and payment component of the station management contract;
- b. The City Manager actioned the recommendations resulting from such authorised forensic investigation, with reference FSD291/15-16 ("FSD291");
- c. Flowing from a presentation done to inter alia, the City Manager and key staff, on FSD291, the City Manager directed that, a consultant be appointed to determine the quantum of any loss suffered by the City. Furthermore, the City Manager also 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. The City Manager, is reliably informed that the appointed consultant, Pricewaterhouse Coopers ("PwC"), are still in the process of quantifying the alleged loss, if any, and that no final report has been submitted in this regard to the City 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 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 and its Regulations by any municipal official.

Given the aforesaid, the very serious allegations levelled against the Accounting Officer by the ED: DOM, is extremely defamatory, reckless and negligent, especially if one has regard to the possibility of a criminal sanction that can befall such transgression. Additionally, it is defamatory, mischievous and seriously impinges upon both the reputation of the City as well as that of the City Manager.

7. In addition, the ED: DOM circulated and/or caused to be circulated to subordinate staff members, untested, unsubstantiated and defamatory information. This is in itself extremely defamatory, tainting the good image of the City Manager amongst City staff, is a serious breach of the fiduciary responsibilities of the Executive Director and a breach of confidentiality.

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8. Accusing and/or suggesting that the City Manager played a role in the alleged "altering" of a forensic report, with reference number FSD356 but dated 24 March 2016 (unissued) and 30 March 2016 (issued) respectively, and that same be investigated. The ED: DOM had full knowledge, that FSD356 dated 24 March 2016 was never issued to the City Manager and was never received by the office of the City Manager for actioning. Whilst having such full knowledge, there is no factual basis or truth in such submission. In fact, the ED: DOM had evidence at his disposal, at the time of making such averment, that there was no merit to such submission.

The ED: DOM nonetheless, in an extremely defamatory, reckless and negligent manner, proceeded to make such submission, thereby bringing the City Manager and the Forensic Services Department into disrepute. Consequently, the integrity of the staff and forensic reports are seriously brought into question through these negligent, mischievous and malicious actions of the ED: DOM. This amounts to a serious misconduct as it is extremely defamatory and taints the reputation of the City, the Forensic Services Department, the City Manager, the individual staff members of the Forensic Services and exposes the City to possible legal risk.

9. The ED: DOM requested that the role of the City Manager, in the re-appointment of the Commissioner: Transport and Urban Development ("the Commissioner") should be investigated.

The appointment of section 56 officials is regulated by the Regulations on Appointment and Conditions of Employment of Senior Managers ("the Regulation"). Chapter 3 of the Regulations dictates the process that must be followed by Council for the recruitment, selection and appointment of section 56 staff. The Executive Mayor has been delegated the authority to shortlist candidates, whilst Council retains its legislative authority to make the individual appointments based on the recommendations of the panel, constituted in terms of the Regulations.

As is prescribed in terms of the Regulations, the City Manager is a member of the panel and is also the chairperson thereof. The City Manager does not have the authority in law or delegations, to appoint members of the panel. The Executive Mayor, in the subject process, was delegated such authority by way of Council resolution C05/08/16. There is therefore no possible manner in which the City Manager could have acted contrary to his legislative role.

The ED: DOM once again, has displayed his lack of understanding of the applicable legal and policy framework, delegations and process. The ED: DOM nonetheless, in an extremely defamatory, reckless and negligent manner, proceeded to make such submission, thereby bringing the City Manager, the other individual members of the interview panel, the City and the entire recruitment and appointment process into disrepute.

Based on the objective information contained in this report, it is evident that the requirements of the legislation and policy framework has been met; establishing reasonable cause that an act of misconduct has been committed by the ED: DOM and that an independent investigator to investigate such allegations, be appointed.

The above allegations are viewed as extremely defamatory, malicious, reckless and negligent conduct of the ED: DOM and amounts to a violation of his employment contract, the Ethics Code, Regulations 1, 5, 6, 13 and/or 19 of Part II of the Regulations and Item 2(b), (d), (e) and/or 6(1) and/or 9 of the MSM Code and/or what is generally expected of a senior manager in the position of the ED: DOM.

#### **Precautionary Suspension:**

If Council proceeds to authorise an investigation, it may wish to consider whether a precautionary suspension is appropriate, in terms of regulation 6 of the Disciplinary Regulations.

The ED: DOM is employed by the City, and charged with managing all Probity functions within the City, which consists of the Forensics Services Department, Internal Audit, Risk & Ethics Governance and the Ombudsman. As such, the ED: DOM:

- a. Must display a high level of ethical conduct;
- b. Has a duty of confidentiality to the City and functional area, which includes intentional and unintentional disclosure of information;
- c. Must promote an adequate level of independence;
- d. Must possess the status required to effectively discharge his responsibilities;
- e. Must display professional behaviour.

It is quite clear from the contents of this report that he has materially breached and/or failed to uphold the above.

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Should Council approve the independent investigation into the actions of the ED: DOM, it is required by Regulation to consider whether precautionary suspension is required. As such, the regulation require specific consideration of inter alia, the following:

a. ***Jeopardise any investigation into the alleged misconduct;***

Given his actions to date, he has demonstrated his inability to appreciate and apply the prescript of the law. It is re-iterated, that he abused his authority by conducting unauthorised investigations into senior managers.

He has now, in the interim, assumed the functions and authority of the suspended Portfolio Manager: Probity ("PMP") which allows him unfettered access to confidential and pertinent information and records.

The ED: DOM additionally, as indicated above, leaked and/or caused to be leaked confidential information of the City.

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

He has conducted unauthorised investigations into senior managers as well as undermined the authority of Council in this regard.

He has caused to conduct an investigation and/or "review" into finalised forensic investigations authorised by the Speaker into transgressions of councillors, without the authority of the Speaker, with whom the legislative authority vest.

He has caused to conduct an investigation and/or "review" into finalised forensic investigations authorised by the City Manager without his authority.

As a result of his aforementioned actions, the Forensic Services branch has elevated the leaking of confidential information as a risk on its risk register.

Made serious unfounded and untested, allegations against the head of the administration, which can cause severe reputational damage to the City and the stability of the administration.

c. ***May interfere with potential witnesses;***

His position as the ED: DOM creates the very real potential that he may interfere with witnesses as some are within his direct line of report. Particularly so, as he has now assumed the responsibility for the entire Probity function.

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**d. *Commit further acts of misconduct.***

His actions to date has proven that it is highly likely that he may well commit further acts of misconduct which may include the interference with potential witnesses and the further distribution of confidential information.

Additionally, and as mentioned above, the Portfolio Manager: Probity, Ms Lindiwe Ndaba, who fulfils a crucial position within the City, has been suspended and is facing substantially similar disciplinary charges as expressed herein above.

Based on the objective information contained in the report, it is evident that the requirements of the Regulations in respect of precautionary suspension have been met and that the ED: DOM should accordingly be placed on precautionary suspension.

**Consideration of Representations:**

As by Regulation 6(2), a senior manager must be given an opportunity to make written representations to the Council, why he/she should not be suspended within 7 days of being notified of the Council's decision to suspend him/her.

Considering the time periods envisioned by the legislation and the consequent need for numerous Council meetings, which comes at significant cost to the City, it cannot under the current climate of budget constraints be justified and/or absorbed. As such, a purposeful interpretation of the Regulations is required and it is recommended that the Speaker be authorised by Council to consider any written representations by the ED: DOM, in terms the aforementioned regulation and report back at the next sitting of Council.

**Probity Function:**

The ED: DOM is employed by the City, and charged with managing all Probity functions within the City, which consists of the Forensics Services Department, Internal Audit, Risk & Ethics Governance and the Ombudsman.

The actions taken by the ED: DOM to date, together with the direct allegations contained in this report, evidences that the ED: DOM lacks the mandatory capacity to objectively execute and/or manage the probity function. His actions have cast a shadow on the integrity of the Probity Function, more especially Forensic Services.

In addition, this has clearly indicated that the positioning of the Probity function is incorrect and consequently all related Probity delegations must be shifted to the City Manager.

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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

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- 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
    - (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

Not delegated for decision by Council:

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

1. the City Manager, be authorised to appoint, within 7 (seven) days of Council's resolution, an independent investigator to investigate the alleged misconduct;
2. the Executive Director: Directorate of the Mayor, Craig Kesson ("ED: DOM"), be placed on precautionary suspension, with immediate effect, until finalisation of the investigation and until such time that Council resolves on the way forward;
3. That the Speaker be delegated the authority to consider any written representations made by the ED: DOM, as envisaged by Regulation 6 of the Disciplinary Regulations and report back at the next sitting of Council;
4. In light of the serious allegations against the ED: DOM, which directly links to his Probity functional area, that all Probity delegations be removed and be delegated to the City Manager with immediate effect.

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**FOR FURTHER DETAILS CONTACT**

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SIGNATURE	 15-11-2017		

**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 RIAANA SAYED

COMMENT:

DATE 15 NOVEMBER 2017

**Certified as 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.

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