



DATE:

REPORT TO: COUNCIL

1. ITEM NUMBER

2. SUBJECT 03/11/17

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 of misconduct against the Executive Director: Directorate of the Mayor ("ED: DOM"), has been received by the City Manager from the newly appointed Chief: Forensic Services ("the Chief"), who has been in the position for less than two months, within the Probity Department, Directorate: Department of the Mayor.

This report brings the alleged misconduct to the attention of the municipal council in compliance with regulations 5(1) of the Disciplinary Regulations for Senior Managers under the Municipal Systems Act ("the Regulations"), for Council to determine whether to investigate the allegations or to dismiss them.

The Chief alleges that:

Allegation: Alleged Intimidation and Abuse of Authority

This relates to an alleged urgent management meeting called during the morning of 14 November 2017 by the ED: DOM, with the newly appointed Chief: Forensic Services, the City Ombudsman, the Chief Audit Executive and the Chief Risk, Ethics and Governance Officer at the offices of Forensic Services, 44 Wale Street. The Office Administration Manager of the ED: DOM recorded the meeting.

In a sworn affidavit, deposed to by the Chief, he alleges that:

*During the initial part of the aforesaid meeting, the ED: DOM requested copies of the following forensic reports, documents, files and exhibits ("forensic documents") and cited his delegated powers in terms of Section 6(3)(b) of the City's System of Delegations as approved by Council on 31 May 2017, effective as from 7 July 2017. The Chief states that he was sitting in close proximity to the ED: DOM and noticed that he was reading from a prepared script. The ED: DOM indicated to him that he wanted the forensic documents because he wanted to "**preserve the evidence**". The forensic documents the ED: DOM requested were:*

- FSD 356/13-14*
- FSD 291/15-16*
- FSD 049/14-15*
- FSD 427/12-13*

The Chief stated that he was totally surprised by this request as he thought it was a management meeting. He raised his concerns with the ED: DOM's interpretation of the above stated delegation. The Chief advised the ED: DOM that the delegations should be read in context and that sub-paragraph 6(1) had to be satisfied first before the ED: DOM could exercise his powers in terms of sub-paragraph 6(3)(b).

*The Chief also raised the relevance of the heading in paragraph 6 of the said delegations, namely, "Forensic and Ethics Investigations" as being part of the context and in support of his interpretation. On the Chief's interpretation, he would therefore be unable to release the requested forensic documents unless the ED: DOM could satisfy him of an authorized pre-investigation in terms of sub-paragraph 6(1). The ED: DOM indicated that he was not relying on sub-paragraph 6(1) but rather on 6(3)(b) and emphasized the wording contained in the latter where it states, inter alia, that "In the performance of **any**...." (the bold is the Chief's*

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emphasis) of the ED: DOM's functions, he would be entitled to have access to any forensic document.

The Chief raised a further concern with the ED: DOM, in view of the fact that the ED: DOM mentioned earlier in the meeting that he had represented Ms Lindiwe Ndaba (Portfolio Manager: Probity) at a pre-suspension hearing. The Chief enquired from the ED: DOM whether the latter conduct would place him in a conflict of interest position should the ED: DOM have access to the said forensic documents. The ED: DOM stated that he is not conflicted at all and that to date he has not been deprived of any of his powers as Executive Director.

Notwithstanding the Chief's objections and advice in the above regard, the ED: DOM instructed the Chief to hand over the requested forensic documents. The Chief felt obliged to comply with such instruction as the ED: DOM is his direct superior.

The Chief was concerned that his refusal to hand over the forensic documents, may be perceived as insubordination on his part. In this regard, the Chief states the conduct of the ED: DOM was very persistent to obtain access to the forensic documents in question. The ED: DOM signed a written acknowledgement of receipt setting out the Chief's objection as described above.

The Chief states that during the meeting he indicated to the ED: DOM that the presence of the other Chiefs of Branches in the Probity Department was unnecessary; the ED: DOM however overlooked this advice.

The Chief's allegations as set out herein above, derived from his voluntary affidavit, illustrates an abuse of power and intimidation of subordinate staff and may constitute misconduct on the part of the ED: DOM.

As a result of the affidavit by the newly appointed chief, the City obtained legal advice on the interpretation of the relevant and applicable delegations. The conclusion reached in such opinion, is inter alia that:

- (1) *The ED: DOM's powers under paragraph 6(3)(b) of Part 29 of the City's Systems of Delegations are confined to pending "investigations" or "preliminary enquiries/assessments". They cannot be exercised in the absence of such proceedings, or in an unrelated manner, or for purposes which do not serve the objectives of paragraph 6(1) and (2).*
- (2) *A forensic report prepared pursuant to a forensic and ethics investigation falls within the custodianship of the City Manager. The City Manager's*

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*authority is therefore required to disclose or release such report. **Such report may not be seized by other officials without the City Manager's authorisation. A report falling within the remit of the Speaker requires the Speaker's authority before it may be disclosed.*** [emphasis added]

- (3) *The interaction between the ED: DOM's delegations and the City Manager's powers operates as follows*
- (a) *The ED: DOM is authorised to recommend to the City Manager the initiation of an investigation.*
 - (b) *The City Manager is not required to follow the ED: DOM's recommendation.*
 - (c) *Nor is the City Manager's power to authorise the initiation of an investigation dependent upon the ED: DOM's recommendation.*

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.

The aforesaid responsibilities inherent in the position of the ED: DOM is also inherent to the responsibilities of the newly appointed Chief: Forensic Services. It is therefore disconcerting that the ED: DOM, notwithstanding having been advised by the Chief, that his actions is questionable and in fact breaches the above, he elected to continue on this path.

It can be seen from the contents of this report that the ED: DOM may have materially breached and/or failed to uphold the above stated qualities.

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:

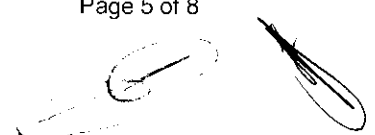
- a. *Jeopardise any investigation into the alleged misconduct; or*
- b. *Endanger the wellbeing or safety of any person or municipal property;*
- c. *Be detrimental to stability in the municipality; or*
- d. *May interfere with potential witnesses; or*
- e. *Commit further acts of misconduct.*

As is evident from the content of this report, weighed against the above legislative requirements, there is reasonable grounds for precautionary suspension in that the ED: DOM may have abused his authority and intimidated a subordinate staff member in the Probity Departments, namely, the newly appointed Chief: Forensic Services.

The actions of the ED: DOM as outlined herein above:

- Ignored the possibility of a potential conflict of interest which the newly appointed Chief brought to his attention;
- Seriously calls into question the integrity of the Forensic Services branch as well as the Chief by suggesting that he (ED: DOM) wants to "*preserve the evidence*";
- Raises serious concerns about the real motive for requesting the specific forensic documents;
- More so in light of the fact that the Forensic Services branch has always been responsible for the safe keeping and also to "*preserve the evidence*" of forensic documents used in both litigious, non-litigious and disciplinary matters;
- Exposes the City to a myriad of substantial risks, by removing forensic reports, documents, files and exhibits, some of which risks have already materialised, in that unauthorised individuals are now in possession of forensic reports and documents.
- As the representative of Ms Ndaba and at the time of requesting the documents, he was fully aware that these documents are central to the disciplinary hearing of Ms Ndaba.

Given the aforesaid, there is a very real risk that the ED: DOM may jeopardise the investigation, interfere with potential witnesses and commit further acts of misconduct.



4.1. Financial implications None Opex Capex Capex: New Projects Capex: Existing projects requiring additional funding Capex: Existing projects with no additional funding requirements4.2. 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.

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- (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 of misconduct has been committed, it is recommended that it be:

RESOLVED that the City Manager be authorised to appoint, within 7 (seven) days of Council's resolution, an independent investigator to investigate the alleged 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 be dismissed and that no further investigation is required.

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FOR FURTHER DETAILS CONTACT

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SIGNATURE		17.11.2017	

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
 DATE 15 NOVEMBER 2017

COMMENT:

Certified as legally compliant based on the content of the report

SIGNATURE 



EXECUTIVE MAYOR

- SUPPORTED NOT SUPPORTED

NAME Patricia de Lille
 DATE 17 November 2017
 SIGNATURE P. de Lille.

COMMENT: