

MEMORANDUM

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TO : THE ACTING MUNICIPAL MANAGER

**IN RE : EPHRAIM MOGALE LOCAL MUNICIPALITY // M.M.
MATHEBELA**

1.

I refer to the meeting which instructing attorney and I had with the honourable Mayor Molaudi Mothogwane, the honourable Speaker Bushy Modisha and the honourable Chief Whip Segopa Sedibane of the Ephraim Mogale Local Municipality as well as the acting Municipal Manager Ms K V Sithole, the Director of Corporate Services Makoko Lekola and the Corporate Services : Human Resource Manager Molefe Matseke on Friday, 11 October 2019 at Marble Hall.

2.

The **purpose** of the meeting was twofold. Firstly, the municipality required the legal team to provide a progress report about the review proceedings which was instituted against the grossly irregular ruling by the chairperson of the disciplinary hearing in the Mathebela-enquiry and, secondly, what further measures should be taken in respect of the continuation of the review proceedings at this stage.

3.

Instructing attorney informed the meeting that the review application had been filed with the Registrar of the Labour Court and had been served on the two

respondents namely adv Jimmy Hlongwane (the chairperson of the disciplinary hearing) and Ms M.M. Mathebela (the municipal manager who has been disciplined). In terms of the notice of motion adv Hlongwane was requested to make the record of the proceedings available to the Registrar of the Labour Court. On the enquiry of instructing attorney it appears that the chairperson has not filed any documents with the Registrar which failure results in an unnecessary delay of the review proceedings which certainly prejudice the municipality. The prejudice lies in the fact that Ms Mathebela, who has not been invited to return to work, is still receiving her monthly salary.

4.

On the options which may be considered at this stage I advised the municipality that the issue relating to Ms Mathebela's continued employment until the finalisation of the review proceedings can be considered on two basis, firstly, on the basis of settlement negotiations to avoid further litigation and legal costs and, secondly, to continue pursuing the review application mindful of the accompanying complications. I deal with the following complications hereunder.

5.

SETTLEMENT NEGOTIATIONS:

I have already indicated in my initial opinion that a settlement of the irregular sanction issued in respect of Ms Mathebela is an option as long as it is economically justified. I am informed that a period of approximately 2½ years of Ms Mathebela's 5-year fixed term contract of employment had not yet expired. Ms Mathebela may be prepared to settle the dispute on the basis that an amount equal to her salary for the remaining 2½ years be paid to her. Such a settlement cannot be justified especially in the light of the report by adv Terry Motau SC to the Prudential Authority dated 10 October 2018. Adv Motau, under the heading "The Commissions and bribes that were paid" dealt with deposits which municipalities had made to the VBS Mutual Bank. Although Ms Mathebela's

s name is not been mentioned as an official who has received any bribes from the VBS Mutual Bank, the Motau report refers explicitly to the fact that the Ephraim Mogale Local Municipality has paid a deposit of R84 709 134-00 to the VBS Mutual Bank. Any settlement payment to Ms Mathebela that cannot be justified on the basis that such settlement payment with Ms Mathebela would in fact curtail the municipality's future legal costs may expose the Council of the Ephraim Mogale Local Municipality to fierce criticism in the media and by the community which it serves. If the review process does not become complicated the municipality would incur approximately R 550 000,00 as further legal costs to finance the review application. My proposal is that a fair settlement should not exceed the aforementioned amount.

6.

THE CONTINUATION OF THE REVIEW APPLICATION:

- 6.1. In instances where review proceedings is not subject to complications the process entails the issuing of a review application (which has been done), the consideration of the record of the disciplinary hearing, the filing of a supplementary affidavit, the filing of a replying affidavit (after the respondents answering affidavits has been considered), the drafting of heads of argument and an appearance of the legal team at the Labour Court at the time when the review application is to be argued.
- 6.2. I wish to deal with the following issues which may complicate the continuation of the current review proceedings against Ms Mathebela.

The municipality's liability to continue paying Ms Mathebela' s salary until the finalisation of the review proceedings:

- 6.3. I have suggested to the meeting on Friday, 11 October 2019, in order to curtail the municipality's expenditure, that it must be considered to suspend Ms Mathebela' s monthly salary payments until the finalisation of the review proceedings on the basis that if the review application is unsuccessful she would take up her former duties and the suspended payments would be paid to her if the review application is successful Ms Mathebela would forfeit the suspended salary. This exercise must make provision for her to submit reasons why her salary should not be suspended.
- 6.4. This measure is an extreme and **risky exercise** and as I have explained to the meeting may prompt Ms Mathebela to approach the Labour Court on an urgent basis to interdict the Council to implement a decision to suspend her salary.

The failure by the chairperson of the disciplinary hearing to file the record in terms of the Rules of the Labour Court:

- 6.5. The failure by the chairperson to provide the Registrar of the Labour Court with the record is a failure to comply with the provisions of Rule 7A of the Rules of the Conduct of Proceedings in the Labour Court.
- 6.6. The municipality is advised to institute an application to compel the chairperson of the disciplinary hearing to provide the record.
- 6.7. A substantive application should be launched against the chairperson of the disciplinary hearing. The institution of an application to compel

the chairperson of the disciplinary hearing to provide the already requested record will obviously result in an unnecessary delay of the review proceedings.

The lawfulness of the disciplinary hearing:

- 6.8. The review application against the ruling of the chairperson of the disciplinary hearing has been launched on the basis that the institution of the disciplinary proceedings against Ms Mathebela on 18 March 2018 has been properly authorised by the municipality's council. Instructing attorney has not received any instructions to the contrary when we were briefed to launch the review application.
- 6.9. **However, the acting municipal manager is requested to urgently and carefully establish whether the municipality's council has instituted the disciplinary proceedings against Ms Mathebela lawfully i.e. per resolution by the council.**
- 6.10. Instructing attorney and I, are aware that the council, on 14 December 2018, considered a report from its financial misconduct board and resolved that the investment of the monies in the VBS Mutual Bank be referred to the next level of investigation in terms of Regulation 5(4) of the **municipal regulations on financial misconduct procedure and criminal proceedings**. In terms of a resolution taken on 14 December 2018 the council resolved that after a supply chain management process has been followed and an external investigator be appointed to investigate the possibility of an irregular and unlawful payment to the VBS Mutual Bank. Lucky Thekiso Incorporate was appointed as an external investigator and recommended that disciplinary steps be taken against Ms Mathebela. **What is not known to us, is whether the council of the municipality has in fact resolved in terms of a**

resolution that disciplinary proceedings be instituted against Ms Mathebela.

- 6.11. If the disciplinary proceedings have not been instituted properly the relevant facts must be incorporated in the municipality's supplementary affidavit and the notice of motion must be amended in order to make provision for setting aside the disciplinary proceedings on an urgent basis or a substantive application must be brought on an urgent basis to set aside the disciplinary proceedings. If the lawfulness of the disciplinary proceedings is not addressed at this stage it may be raised by the employee at a later stage which will result in further complications, the unnecessary extension of the review proceedings, wasted costs, and continued salary payments to Ms Mathebela until the conclusion of the current review proceedings.
- 6.12. If it appears that the disciplinary proceedings against Ms Mathebela has not been properly instituted the Labour Court must be approached on an urgent basis for the setting aside of the disciplinary proceedings. This step will enable the municipality, after the former disciplinary hearings have been set aside, to institute fresh disciplinary proceedings against Ms Mathebela with the objective to have her fate be determined by an external presiding officer.

DATED at PRETORIA on this the 15th day of OCTOBER 2019.



ADV E S J VAN GRAAN SC
BROOKLYN ADVOCATES' CHAMBERS