IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 3671/2013

In the matter between:

ANDILE LILI	**Applicant**
And	
INDEPENDENT ELECTORAL COMMISSION: CHIEF ELECTORAL OFFICER	**First Respondent**
MEC FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENTAL PLANNING	**Second Respondent**
SPEAKER: COUNCIL OF THE CITY OF COUNCIL	**Third Respondent**
COUNCIL OF THE CITY OF CAPE TOWN	**Fourth Respondent**
CHAIRPERSON: DISCIPLINARY COMMITTEE OF THE COUNCIL OF THE CITY OF CAPE TOWN	**Fifth Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVLOPMENT	**Sixth Respondent**
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Seventh Respondent**

JUDGMENT: 28 NOVEMBER 2013

LE GRANGE, J

Introduction:

[1] The Applicant, a former proportionate representative councillor of the Fourth Respondent (the Council) has initially, on an urgent basis, only sought to review

and set aside the decision to expel him as member from the Council. Further relief, in the form of a prohibitory interdict, was also sought against the First Respondent. The Applicant thereafter amended his notice of motion.

[2] In the Amended Notice of Motion, the Applicant is also now challenging the constitutionality of certain provisions of Item 14 of Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000, which deals with breaches of the Code of Conduct. The relief sought in the Amended Notice of Motion was framed as follows:

> *"That the Chief Electoral Officer of the Independent Electoral Commission be interdicted from acting as contemplated in Item 18 of part 3, Schedule 1 of the Local Government: Municipal Structures Act, 117 of 1998 Structures Act, 117 of 1998;*
>
> *That the decision of the MEC purportedly taken in terms of Item 14(6) in Schedule 2 of the Local Government: Municipal Systems Act, 2000 to remove the Applicant from office, be reviewed and set aside on the grounds that it is inconsistent with procedural and substantive fairness;*
>
> *That the decision of the Council of the City of Cape Town purportedly taken in terms of Item 14(2)(e) in Schedule 1 of the Local Government: Municipal Systems Act, 2000 to request the MEC to remove the Applicant from office, be reviewed and set aside on the grounds that it is unlawful and inconsistent with procedural and substantive fairness;*

Declaring the conduct of the Speaker to be unlawful in that it is in contravention of Item 13(1) in Schedule 1 of the Local Government: Municipal System Act, 2000;

Declaring the disciplinary proceedings of the Disciplinary Committee to be irregular and in conflict with procedural fairness;

Declaring that the following Items of Schedule 1 of the Local Government Municipal Systems Act, 32 of 2000 are inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996, (the Constitution):

a) Item 14 (2) (c)

b) Item 14 (2) (e)

c) Item 14 (3) (a)

d) Item 14 (3) (b)

e) Item 14 (3) (c)

f) Item 14 (3) (d)

g) Item 14 (4) and (5)

h) Item 14 (6) (a)

i) Item 14 (6) (b)

Parties

[3] Mr. T Masuko assisted by Mr. Sidaki appeared for the Applicant. Mr P Hathorn assisted by Ms N Mayosi appeared for the Second Respondent (the MEC). Mr PBJ Farlam assisted by Ms N Mangcu-Lockwood appeared for the Third-Fifth Respondents and Ms N Cassim SC, appeared for the Seventh Respondent. Extensive heads of argument were filed by counsel and it was of great assistance in preparing this judgment.

[4] The First and Sixth Respondents abide the decision of this Court. The Second, Third – Fifth and Seventh Respondents (the Respondents) oppose the application to the extent that the relief sought in the Amended Notice of motion is applicable to them. The prohibitory relief sought against the First Respondent in the course of events has dissipated and the Applicant is no longer persisting with it.

Background:

[5] The events which triggered the launch of these proceedings by the Applicant can, in brief, be summarised as follows: In May 2012 the Applicant was charged by the City with contravening Items 2 and 11 of Schedule 1 (the Code of Conduct) of the Local Government: Municipal Systems Act No 32 of 2000. The charges included the unlawful intervening in the City's housing allocation process by instructing a resident to move out of her home, participating in the unlawful demolition of another resident's home and making offensive comments to two community members.

[6] The Applicant's initial hearing was held before a multi-party Disciplinary Committee, consisting of councillors from the Democratic Alliance ("DA"), the African National Congress ("ANC") and Cope, assisted by a number of Council officials. The hearing began on 13 June 2012 and continued over several days in August and September 2012.

[7] In the course of the proceedings in September 2012 the Applicant was required to leave the hearing. He then instructed his attorney to abandon the proceedings and to take the matter on review. There appears to be some dispute of fact surrounding the circumstances under which the Applicant left the hearing. What is common cause is the hearing continued and concluded in the absence of the Applicant and his representative.

[8] The Disciplinary Committee found the Applicant guilty and recommended that the MEC remove him from office in terms of Item 14(2)(e) of the Code of Conduct.

[9] The Council at its meeting on 27 September 2012 adopted the resolutions, firstly, noting that the Applicant had been found guilty of the charges brought against him; and, secondly, requesting the MEC to remove him from office in terms of Item 14(2)(e) of the code of Conduct.

[10] On 15 January 2013 the MEC addressed a letter to the Applicant advising him of the Council's recommendation. The Applicant was furnished with copies of all the documents provided to the MEC, including the transcript of the hearing before the

Disciplinary Committee, and invited to make representations to him. The Applicant, in the papers filed, denied receiving all the documents in the possession of the MEC, in particular he denied receiving the transcript of the disciplinary hearing. In his answering papers, the MEC was adamant that all relevant documentations were handed to the Applicant. Counsel for the Applicant during argument conceded that the relevant documents were indeed forwarded to the Applicant

[11] On 1 March 2013 the MEC advised the Applicant that after considering his representations and all the relevant information provided to him, he was of the opinion that:

11.1 The investigation was in accordance with the rules of natural justice; and

11.2 His conduct warranted his removal from office.

The Review and Constitutional Challenge:

[12] The Applicant has raised a raft of complaints regarding the conduct and procedure of the disciplinary proceedings against him. The nub of these complaints centres around what the Applicant alleges to be irregular, procedurally unfair and irrational disciplinary proceedings against him. The Applicant in his replying affidavit has further challenged the constitutional validity of certain provisions of Item 14 of Schedule 1 ("the Code of Conduct") of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") on two grounds. The first is Municipal legislatures enjoy constitutional autonomy which, so the argument goes, may not be surrendered and cannot go beyond the constitutional parameters as set out in s 139 of the Constitution.

In the alternative the argument advanced was, even if assuming the inherent power of the Municipal legislatures to regulate their internal arrangements can lawfully be exercised by a member of the provincial executive, the impugned provisions of Clause 14 of the Code violates the principles of intergovernmental relations as set out in s 41(1)(e) to 41(1)(h) of the Constitution. The second ground was that the Systems Act undermines the role of the Speaker of Council and is inconsistent with s 160 of the Constitution. A third ground was also raised in the heads of argument of the Applicant to the extent that the Code of Conduct is inconsistent with the ss 16, 17 and 19 of the Constitution.

[13] Mr. Hathorn and Mr Farlam raised two complaints regarding the manner in which the Applicant raised its constitutional challenge in this case. The first complaint relates to the issue that the Applicant in his replying affidavit for the first time sought to challenge the constitutional validity of the provisions in Item 14 of Schedule 1 of the Code of Conduct. The second relates to the manner in which the Applicant in his heads of argument attempted to introduce further causes of action, which were not foreshadowed in his founding or replying affidavits, in particular the claims that the impugned provisions of the Code are inconsistent with ss 16, 18 and 19 of the Constitution.

[14] It is now well-established in our law that parties who wish to challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. This is

clearly necessary to alert the other party of the case it has to meet. In this regard see Prince v President, Cape Law Society and Others 2001 (2) SA 388 (CC) at paragraph 22.

[15] In the present instance Applicant did indeed failed to raise the constitutional challenge regarding the provisions in Item 14 of the Code of Conduct in his founding papers and only did so in his replying papers. The further complaint that new causes of action, in particular the challenge that the Code of Conduct is inconsistent with the ss 16, 17 and 19 of the Constitution, were introduced for the first time in the Applicant's heads of argument, is also not without merit. The Applicant's claims based upon ss 16, 18 and 19 of the Constitution were however not significantly persisted with during argument and perhaps correctly so as the Respondents were not properly alerted to it in the Applicant's papers. The Respondents did also not deal with this particular challenge in their papers. Legal argument was however presented by the Respondents on the Constitutional challenge which is premised on the provisions of Item 14 of the Code and the role of the Speaker of Council in terms of the Systems Act. I now turn to deal with it.

<u>The Constitutionality of the relevant provisions of Item 14 of Schedule 1 of the Systems Act:</u>

[16] The powers of municipalities are primarily dealt with in Chapter 7 of the Constitution. In terms of s 41 of the Constitution the three spheres of government being National, Provincial and Local/Municipal, are enjoined to nurture the principle of co-operative government, to assist and support each other, to consult on matters of common interest and to co-ordinate their actions.

[17] The Respondents are all contending that the Applicant's constitutional attack based on the principle of municipal autonomy is fundamentally flawed. In fact the 7th Respondent, who is the National Minister of Corporate Governance and Traditional Affairs and a member of the same political party as the Applicant, contends that the Applicant's constitutional challenge based on the principle of municipal autonomy is misguided and unjustified.

[18] In respect of the first ground of the constitutional attack, the argument advanced was that the National, Provincial and Municipal spheres of government must respect the status, powers and functions of each other and "*not assume any power or function except those conferred on [it] in terms of the Constitution*". To that extent, so the argument goes, in the present instance there exist no jurisdictional facts that allow the provincial executive to intervene in terms of 139(1), which is the only permissible basis on which intervention in the local government matters may be justified. Moreover, the removal of a councillor should be deemed an exercise of municipal legislative remedial powers by a Municipal Council in terms of s 43(c) of the Constitution to regulate itself and that such powers cannot be taken away by a member of the provincial executive, as s 160(1)(a) of the Constitution provides that the Municipal Council "*makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality*." Furthermore, according to Mr Masuko, the highly circumscribed nature of the scope of intervention by national and provincial spheres of government into local government affairs under sections 139 of the Constitution all ineluctably lead to the conclusion that the MEC has no power to remove an elected municipal councillor from his office. According to him this remains a legislative function of an autonomous municipal body

and it is unconstitutional to grant an MEC a veto power over an essentially legislative function of an autonomous body.

[19] Mr Masuko also contended that the powers granted to the MEC by the Systems Act are expansive and amount to usurping the functions of a legislative body in violation of the Constitution. For this proposition he relied on 151(4) of the Constitution which provides the national or provincial government may not "*compromise or impede a municipality's ability or right to exercise its powers or perform its functions*." To this end the argument advanced was that the clauses complained of in Item 14 of the Systems Act intrude upon the power of a legislative body to regulate its own constitution and composition for the purpose of preserving its dignity and efficiency, as well as to preserve public confidence in the institution of local government. Furthermore, the powers conferred upon the MEC by the Systems Act, for all practical purposes, 'eviscerate' the provisions of s 40 and 41 of the Constitution. The contention further was that the removal of a member of the local government by the MEC constitutes an unlawful interference with the powers of a local municipality and in direct violation of section 151(4) of the Constitution. Moreover, the argument was that the impugned provisions of the Systems Act are a further violation of s 160(1)(a) of the Constitution which provides the Municipal Council makes decision concerning the exercise of all powers and the performance of all the functions of the municipality.

[20] In terms of the second ground it was argued that the Systems Act undermines the role of the Speaker. It was contended that the traditional common law powers of the Speaker are eviscerated and the Speaker's discretion in disciplinary matters is taken

away. Moreover, the suspension or removal of the elected representative by the MEC for Local Government, is in circumvention of the constitutional constraints enshrined in sections 139 and 151 – 156 of the Constitution as it gives the MEC untamed powers. Furthermore, the MEC's supervisory powers under the Act impermissibly encroach on legislative powers of councillors and the MEC may use this vast power to pressurise municipal councillors and speakers into recommending removal of persons against whom the MEC has an axe to grind. According to Mr Masuko in the present instance there is credible evidence that the removal of the Applicant was based on the on-going public spats he has had and continues to have with the Premier of the Province and the Democratic Alliance, which is the governing party of the Province.

[21] Counsel for the Respondents were all *ad idem* that National, Provincial and Municipal spheres of government, whom they represent, do not take issue with the powers accorded to the MEC in this particular instance or the restrictions placed on the Municipalities. In the arguments advanced on behalf the Respondents it was contended that all three spheres of government are satisfied that there had been no breach of the co-operative government principles and no undue interference into the municipal sphere.

[22] The answer to the constitutional attack as raised by the Applicant must undoubtedly be found within the framework of the Constitution itself. The powers and duties of a provincial executive in respect of Provincial intervention in local government are dealt with in Chapter 6 of the Constitution (s 139). However, in my view Chapter 7 (s 151 -164) is also important. It deals with the core constitutional framework for Local

Government and these provisions are also relevant within the context of this case. The Applicant's contention that the *"basic constitutional premise"* on which the constitutional challenge is brought is that: "s *139 of the Constitution is the only (my underlining) permissible basis on which intervention in the local government matters may be justified"* needs closer scrutiny.

[23] The provisions in Chapter 7 of the Constitution deal with the status of municipalities, and make it rather clear that the right of a municipality to govern is far from unqualified: In fact, s 151(3) of the Constitution provides as follows:

> "*151 (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.*

[24] In the present circumstances s 164 in the Constitution is of equal importance. It is now well-established that the Constitution was drafted in accordance with 34 constitutional principles. In this regard see Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (10) BCLR 1253 CC. The constitutional principle XXIV is of relevance in this instance which provided that:

> *"A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both".*

[25] This constitutional principle was reinforced in s 164 of the Constitution which provides that:

> *"Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation."*

[26] In lieu of the aforementioned, it is safe to conclude that the Constitution itself only provides a broad framework for the powers of local government. It follows that the detail, the comprehensive powers and functions of municipalities, are entrusted by the Constitutional Assembly to national and provincial legislatures. In Premier, Western Cape v President of the Republic of South Africa 1999(3) SA 657 CC at 677 C, the Constitutional Court expressed the following view that *"Local governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences in respect of the structuring of local government, and for overseeing its functioning."* The powers and functions of municipalities must therefore be read together with those of provinces. See also (First Certification Judgment at paragraph [252].

[27] The contention by the Applicant that s 139 of the Constitution is the '*only*' permissible basis for provincial government intervention in local government matters and that the impugned provisions of Item 14 of the Systems Act exceed the boundaries' established by s 139 is with all respect unsustainable. It is also inconsistent with the findings of the Constitutional Court in the *First Certification Judgment*. In my view the Constitution provides no more than a broad framework for local government powers and functions. While the broad framework of the Constitution granted

municipalities the power to govern local government affairs, this power is however explicitly subordinated to national and provincial legislation. It is in this constitutional context that the Systems Act must be viewed and in particular the constitutional attack on the provisions of Item 14 as the removal of councillors from a Municipal Council is not expressly addressed in the Constitution.

[28] The Applicant's attack on the provisions of Item 14 of the Code of the Systems Act is essentially premised on the contention that the Constitution has established "*three coequal branches of government*" which enjoy "*constitutional autonomy which may not be surrendered to other branches of government*."

[29] The pre-amble to the Systems Act which inter alia provides "*Whereas the Constitution establishes local government as a distinctive sphere of government, interdependent, and interrelated with national and provincial spheres of government..,"* clearly recognised the fundamental principal that the Constitution provides for a hierarchy of spheres of government in terms of which local government is subject to the supervision, monitoring, support and, in certain instances, intervention, of the provincial government.

[30] The Constitution further provides that the right of a municipality to govern the local government affairs of its community is "*subject to"* national and provincial legislation (s151(3)). The particular wording "*subject"* was discussed in S v Marwane 1982(3) SA 717 (A) and the Appellate Division, as it then was, interpreted it as follows at 747 H – 748 A:-

> *"The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject", is dominant – in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."*

[31] The above interpretation has been endorsed by the Constitutional Court. In this regard see Zantsi v Council of State, Ciskei and Others 1995 (4) SA 615 (CC) at paragraph [27]. The Constitution thus explicitly subordinates the right of municipalities to govern in local government affairs to national and provincial legislation, which in the present instance includes the Systems Act. The Applicant's reliance on an unrestricted right to municipal autonomy is therefore misguided. The Constitution clearly confers the powers on provincial governments to supervise, monitor and support local government.

[32] To sum up, whilst it is correct that one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state, the actual integrity of each sphere of government and organ of state must be understood in light of the powers and the purpose of that entity. Moreover, while the political framework created by the Final Constitution demands that mutual respect must be paid, all the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of

each other. They are all interrelated. These spheres of government do not have total independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that 'all of them perform governmental functions for the benefit of the people of the country as a whole. Therefore, National and Provincial governments have responsibility to ensure that Municipalities function effectively and to intervene in their affairs if necessary'. In this regard Constitutional Law in South Africa 2nd Ed. Vol 1, 14-9 and the cases referred to therein.

[33] Item 14 of the Code of Conduct essentially deals with breaches of the Code whilst Item 13 deals with the duties of the chairperson of municipal councils. The relevant parts of Item 14 of the Code read as follows:

> *"(1) A municipal council may –*
>
> *(a) Investigate and make a finding on any alleged breach of a provision of this Code; or*
> *(b) Establish a special committee -*
>
> *(i) To investigate and make a finding on any alleged breach of this Code: and*
> *(ii) To make appropriate recommendations to the council.*
>
> *(2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may –*
>
> *……*

…..

(e) Request the MEC to remove the councillor form office.

(3) …..

(4) The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation as to the appropriate sanction in terms of sub-item (2) if a municipal council does not conduct an investigation contemplated in sub-item (1) and the MEC for local government considers it necessary.

(5) …..

(6) If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may –

(a) Suspend the councillor for a period and on conditions determined by the MEC; or

(b) Remove the councillor from office.

(7) Any investigation in terms of this item must be in accordance with the rules of natural justice."

[34] In Van Wyk v Uys NO 2002 (5) SA 92 (C), the legal construction of Item 13 and 14 were considered. The Court at p 99 E – F held that whilst Item 14 "*does not present a glittering example of the quality of legislative drafting to which the country is entitled…. It unquestionably fits within the principle of co-operative governance*". I agree with this conclusion. Furthermore, the provisions of Item 14 do confer discretionary powers on a

municipal council to investigate and make a finding on an alleged breach of the Code or to establish a special committee for this purpose. In the event the council or committee finds that the Code has been breached, the council itself may issue a formal warning, reprimand or fine the councillor, or, alternatively, it may request the MEC for local government to suspend the councillor or remove the councillor from office.

[35] The underlying reasoning behind all of this seems to be that when the municipality seeks to impose the more stringent sanctions of suspension or removal from office in terms of Items 14(2)(c) or (e), it is required to refer the matter to a higher authority, namely the MEC.

[36] The MEC is then entitled either to form an opinion on the papers in terms of Item 14(6), which would represent a judicially considered view, or he or she can appoint a committee or person in terms of Item 14(4) to investigate the matter and make appropriate recommendations.

[37] It is apparent from the above analysis that where an MEC makes a decision in terms of Item 14(6), the decision is the culmination of a multi-stage process. In the present matter, the Item 14 process consisted of three stages:

37.1 The Disciplinary Committee's investigation and recommendations to the City in terms of Item 14(1);

37.2 The City's finding and request to the MEC in terms of Item 14(2)(e); and

37.3 The MEC's decision in terms of Item 14(6).

[38] The contention on behalf of the Applicant that Item 14 confers "*unbridled powers of intervention*" upon the MEC is in my view flawed. On a proper reading of the provisions of Item 14 there is no unrestrained power that the MEC wields in the affairs of the local municipality. The powers granted to the MEC can only be regarded to constitute a safeguard and that form part of a system of checks and balances applied to disciplinary proceedings against councillors. The MEC has in fact no self-standing disciplinary powers over local councillors which can be exercised *mero motu*. Moreover, a council itself must in all cases investigate and initiate disciplinary proceedings against its own councillors. In less serious matters, where the sanction imposed is no more than a warning, reprimand or fine, the MEC's role is confined to acting as an appeal forum.

[39] When a municipality wishes to take more stringent action and suspend or remove a councillor from office, as in the present instance, it is required to refer the matter to a higher authority, to decide whether the imposition of potentially far-reaching sanctions is justified. The purpose of the provision cannot be regarded as "*unbridled powers of intervention*" by an MEC as contended by the Applicant, but must be seen rather to provide oversight and ensure restraint in council disciplinary proceedings.

[40] I am in agreement with the Respondents' view that the Item 14(6) procedure applicable in more serious cases is broadly equivalent to an administrative appeal process, in that the person charged has the benefit of the matter being re-considered by a higher authority before far-reaching sanctions can be implemented. Furthermore,

the Item 14(6) process shares many of the beneficial qualities of an internal appeal, by providing an immediate and cost-effective forum for disciplinary proceedings to be re-considered without having to resort to litigation, thereby enhancing the constitutional values of accountability, responsiveness and openness.

[41] The Applicant also advanced the argument that even if the MEC may lawfully exercise disciplinary powers over a municipal councillor, this power may not be exercised in a manner inconsistent with the principles of intergovernmental relations in ss 41(1)(e) – (h) of the Constitution. The Respondents did not take issue with the Applicant's argument that the MEC may not exercise his powers in terms of Item 14 "*in a manner that violates the principles of intergovernmental relations*". The question remains whether the Applicant has established that the impugned provisions are unconstitutional. In my view this question must be answered in the negative.

[42] The national, provincial and local spheres of government are distinctive, interdependent and interrelated (Constitution 40(1)). All spheres are obliged to respect the constitutional status, institutions, powers and functions of government in the other spheres (*41(1)(e)*); not assume any power or function except those conferred on them in terms of the Constitution (*41(1)(f)*) and exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere (*41(1)(g)*).

[43] The powers of the MEC under Item 14, when performed as in the present instance, can therefore not be regarded as constitutionally objectionable as they fall

squarely within the principal of co-operative governance. The role and functions of the Speaker of the local municipality within the constitutional framework is also not "eviscerated" or undermined as suggested by the Applicant. In fact in the present instance the council was unanimous in its recommendation as to the guilt and sanction of the Applicant. It follows that the challenge by the Applicant on the ground that the MEC's power derived from Item 14 of the Systems Act is overbroad and constitutionally impermissible because it unnecessary interferes with essentially legislative function of an autonomous body, cannot survive.

[44] In respect of the challenges raised by the Applicant based on s 16, 18 and 19 of the Constitution, even though they were not dealt with by the Respondents, they are, in my view in any event, manifestly incapable of sustaining a challenge to the Code of Conduct. A provision which permits a councillor to be removed after there has been a finding that the councillor has breached the Code of Conduct in a particularly egregious way is hardly inconsistent with section 19 of the Constitution, or the right of every adult citizen "*to stand for public office and, if elected, to hold office*". The Code of Conduct is clearly a law of general application, as is apparent from its preamble, and it is aimed at ensuring the accountability of councillors and the proper performance of their obligations. That can hardly be said to be an unreasonable or unjustifiable infringement on the rights of persons who serve as councillors.

The Review:

[45] Returning to the grounds of review. The Applicant seeks to review and set aside not only the decision of the MEC, but also the decisions made by the City and the

Speaker. The Applicant in his Amended Notice of Motion also seeks a declaratory order in respect of the proceedings before the Disciplinary Committee. It is evident from the papers filed that the decision to remove the Applicant from office was however not taken by the Speaker, the Disciplinary Committee or the City, but by the MEC. It is therefore the MEC's decision that requires to be reviewed.

[46] According to the MEC, he formed the opinion that the three primary issues he was required to decide were:

46.1 whether it had been established, on a balance of probabilities, that the Applicant had breached the Code in respect of the relevant charges;

46.2 whether the proceedings had been conducted in accordance with the requirements of natural justice; and

46.3 if the Applicant had been found guilty in accordance with the principles of natural justice, what the appropriate sanction should be.

[47] The thrust of the Applicant's attack on the MEC's decision, as set out in his founding affidavit, is focussed on the procedural fairness of the Disciplinary Committee hearing.

[48] The Applicant contends that the hearing conducted by the Disciplinary Committee failed to comply with the "*elementary requirements of procedural fairness*."

[49] The main attack on the procedural fairness of the Disciplinary Committee hearing by the Applicant was whether it was fair for the hearing to be concluded in his absence. The Applicant's complaint is that:

49.1 He was unfairly ejected from the proceedings, with the result that he was denied the right to cross-examine witnesses, lead evidence in his defence and make legal submissions;

49.2 On 14 June he was denied a postponement, denying his legal representative a fair opportunity to consider the evidence presented in her absence and prepare cross-examination;

49.3 His attorney was subject to unfair objections from members of the Disciplinary Committee, leading to her being unable to conduct her cross-examination properly;

49.4 The chairperson of the Disciplinary Committee failed to fulfil her function of properly regulating the proceedings; and

49.5 He was denied adequate legal representation (as he was obliged to pay for the services of his attorney).

[50] In the present instance, it is perhaps necessary to distinguish between the decision to exclude the Applicant from the hearing and his subsequent instruction to his attorney to withdraw from the proceedings. The former issue is somewhat clouded by factual disputes.

[51] According to the record of proceedings of the disciplinary committee, on 12 September 2012 the Chairperson of the Disciplinary Committee requested the Applicant to leave the room. The Applicant then instructed his attorney to "*abandon the proceedings as they are*" and to take the matter on review.

[52] The fairness of the decision to exclude the Applicant depends primarily on the resolution of the factual disputes concerning the events leading up to the decision. Two conflicting versions of the events have been presented. The Applicant states that the Chairperson of the Disciplinary Committee ejected him because he had raised objections to the fairness of the process.

[53] The Disciplinary Committee in its findings, which were accepted by the MEC, stated that the Applicant had been disruptive and after having been given three prior warnings for disruptive behaviour, he had a fourth outburst and alleged that the hearing was biased against him. It was this fourth outburst that led to the Applicant being requested to leave the hearing. The MEC accepted the Disciplinary Committee's version of events and found that the hearing was procedurally fair as the Applicant's repeated outbursts and disruptive behaviour made it impractical for the proceedings to continue with him present. The MEC noted the following:-

> "*The Applicant, who behaved in an increasingly volatile fashion throughout the course of the proceedings – he at one point furiously accused a witness of being "a liar". This is a criminal, the person who stole somebody's plot!" – was given three warnings with regard to his outbursts, on the third occasion a five minute adjournment was ordered to enable him to calm down, and only*

> *after his fourth outburst was he instructed to leave the proceedings. These are not the hallmark of a body that was intent on convicting the Applicant without regard for his right to a fair hearing."*

[54] The Applicant, however, denies that he was rowdy or that he failed to restrain himself. He states that he was not removed from the hearing on account of disruptive behaviour, but because the DA councillors on the panel were bent on finding him guilty in order to undermine the position of the ANC in the council.

[55] If the Applicant's version is correct, counsel for the MEC conceded it will undoubtedly be difficult to justify the decision to exclude him. However, if the Disciplinary Committee findings are accurate and he was excluded only after his fourth rowdy outburst, having already received three warnings for his conduct, counsel for the MEC argued the decision to exclude him can hardly be regarded as unreasonable.

[56] The age-old saying that 'politics are not for the faint hearted' is perhaps apt in the present instance. In my view it is not open for this court to decide what conduct is the most appropriate for politicians. The relevant question for determination is however whether the proceedings in the present circumstances were procedurally and substantively fair and in accordance with the rules of natural justice. A reading of the transcript paints a rather different picture as to what the Applicant tries to make out in his papers. The proceedings were marked by several outbursts by the Applicant. Some were, to put it bluntly, outright unruly and unnecessary. In fact, at one stage the proceedings were adjourned by the chairperson for five minutes for the Applicant to

calm down. His own attorney also intervened at one stage to calm him down. She later offered an apology for his behaviour. The Chairperson had also warned the Applicant that if he continues to behave in a similar manner, the hearing will proceed in his absence. Despite this warning there were two further outbursts by the Applicant before he was ordered to leave the room. On the face of the record it seems rather obvious that the Applicant's behaviour was calculated, deliberate and aimed to obstruct the disciplinary proceedings to continue in an orderly fashion. Moreover, the Applicant's version of political interference is somewhat irreconcilable with the fact that the Disciplinary Committee – which consisted of five DA councillors, two ANC councillors and one Cope councillor – was unanimous in its findings, both with regard to guilt and sanction of him.

[57] Although the Applicant in his Replying Affidavit denies that the Disciplinary Committee findings were unanimous. He further stated that even if the Disciplinary Committee was unanimous "*that is in no way an indication that the disciplinary hearing was conducted in a fair impartial manner*."

[58] In my view however the question for consideration in this regard is whether the fact that the Applicant was asked by the tribunal to leave the proceedings resulted in a material mistake. In our law it is now well –established that a material mistake of fact can indeed constitute a potential ground of review. In this regard see Pepcor Retirement Fund & Another v Financial Services Board & Another 2003 (6) SA 38 (SCA) [47]-[48]. This review ground is however limited in order to avoid the blurring between an appeal and a review. A court is therefore not entitled to reconsider the matter

afresh. The ground of review is restricted to those situations where a mistake of fact is uncontentious and the fact that a mistake has been made is objectively verifiable.

[59] In the present instance, the facts alleged by the Applicant with regard to the circumstances leading to his ejection from the hearing are hardly convincing. It is also not "*uncontentious and objectively verifiable*". To the contrary, a reading of the transcript of the disciplinary hearing rather supports the MEC's conclusion that the Applicant's behaviour made it impractical for the proceedings to continue with him present. Moreover, the Applicant instructed his attorney to "*abandon the proceedings*" and to take the matter on review. This decision by the Applicant to abandon the proceedings was made in the face of the Disciplinary Committee explicitly requesting his attorney to continue to participate in the proceedings and to present witnesses for the Applicant.

[60] Although the Applicant contends that his exclusion denied him the right to cross-examine witnesses, lead evidence in his defence and present legal submissions, the MEC noted the reason the Applicant's version was not heard for the final part of the proceedings as a result of the Applicant's insistence that his attorney should abandon the hearing.

[61] Our courts are not unduly unsympathetic to parties who disrupt judicial or disciplinary proceedings. In the present instance however the objective evidence of the transcript clearly establishes that the Applicant had deliberately engaged in conduct that squarely falls in those rare categories where the continuance of the proceedings in his

presence would have been impracticable and effectively would have denied the complainants and the City a reasonable opportunity to proceed with a fair hearing.

[62] Based on the facts found by the MEC, his finding on the Applicant's exclusion from the hearing, in my view, cannot be criticised.

[63] The Applicant also complained that the hearing on 14 June 2012 was unfair as the Disciplinary Committee would not entertain any application for a postponement in order to allow him to furnish his attorney with instructions or to allow her to listen to the audio recording of the previous day's proceedings. According to the record the Applicant elected to represent himself at the beginning of his hearing on 13 June 2012. It is clear from the record he had difficulties as a lay-person to conduct his own cross-examination. The hearing was then postponed to 14 June 2012 in order for the Applicant to obtain an attorney to represent him. The Applicant alleges that the period of 20 minutes which he alleges his attorney was granted for this purpose was inadequate.

[64] The following facts however emerge from the record of proceedings. According to the transcript the hearing was postponed at 13h02 on 13 June 2012. It commenced shortly before 11h00 on 14 June 2012, in order to give the Applicant time to give instructions to his attorney, to the extent that he may not have done so prior to 13 June 2012. The matter then stood down from lunch-time 13 June 2012 to the morning of 14 June 2012 at the explicit request of the Applicant's attorney, who requested that the matter commence at 10h00 on 14 June 2012.

[65] At the re-commencement of proceedings on 14 June 2012, a limited further postponement was granted and the Applicant and his attorney were afforded the opportunity to consult for an hour from 11h45 to 12h45. The Applicant's claim that the Disciplinary Committee would not entertain any application for a postponement is therefore contrived. The further allegation that the Applicant and his attorney were only granted 20 minutes to consult is also unfounded. They were granted an hour and kept on consulting for a further 30 minutes without any objections from the committee.

[66] According to the Applicant's attorney she indeed listened to the transcript. Moreover, there were no objections from her side that the time was inadequate for preparation. In fact she was able to cross-examine with full knowledge of what had transpired the previous day. At no stage after the hearing resumed in the afternoon of 14 June 2012 did the Applicant's attorney complain that she had had insufficient time to acquaint herself with the evidence of the previous day or obtain instructions. To the contrary, at one point she referred the Committee "*to the record which I have just listened to right now*".

[67] What is particularly telling with regard to the claim the attorney had been prejudiced in conducting the Applicant's defence is that in the representations to the MEC, drafted by Applicant's attorney, the focus is almost exclusively on alleged procedural irregularities in the Disciplinary Committee hearing. No reference was made by Applicant's attorney to any failure to grant a postponement or to any subsequent prejudice in the conduct of the case. It is therefore inconceivable that the failure to grant a postponement did result in any prejudice. There is also a glaring absence in the

Applicant's papers of any affidavit from the attorney confirming that she had been prejudiced in the conduct of the case or explaining how that prejudice had arisen.

[68] The Applicant further objected to the fairness of the Disciplinary Committee hearing on the grounds that there was no chairperson to regulate the conduct of the proceedings and interruptions in cross-examination.

[69] This contention fails to take into account the principle that an administrative tribunal is entitled, subject to its own rules, to determine is own rules of procedure. The Applicant does not identify any rules setting out how the chairperson should have conducted the hearing nor does he explain how these rules were violated.

[70] In any event, the claim that there was no chairperson to regulate the conduct of the proceedings cannot be sustained on the facts. As the MEC noted:-

> '1) At the outset of the hearing the chairperson of the Disciplinary Committee identified herself as such;
>
> 2) The Chairperson took a leading role in the conduct of the proceedings, particularly in the critical period leading up to the Applicant being requested to leave the hearing; and
>
> 3) When the proceedings were disrupted by the Applicant on 12 September 2012, and he enquired as to whom the presiding officer was, the chairperson again identified herself as such.'

[71] A further complaint by the Applicant is that his legal representative was not treated with respect and was subjected to constant interjections, mostly from the DA members of the Committee. He describes the interjections as "*inordinate, disparaging and disruptive*".

[72] The Speaker in his answering affidavit avers that there was nothing untoward about the objections by the initiators. There were indeed interjections by members of the committee. For instance members interjected for the following reasons:

72.1) The Attorney misrepresented evidence in putting questions to a witness;

72.2) The Attorney asked questions of a lay-witness that required specialised legal knowledge;

72.3) The Attorney asked irrelevant questions;

72.4) The Attorney made long argumentative statements to which the witnesses were somehow expected to respond; and

72.5) Certain of the interjections were made in response to inadequate translation.

[73] A closer scrutiny of the record does not bear out the "*inordinate, disparaging and disruptive*" interjections as alleged by the Applicant. What it does reveal are comments made by a presiding office in a hearing, in order to ensure that the hearing proceeds smoothly and expeditiously and that witnesses are treated fairly. Viewed as a whole and in context, the interjections did not in my view deprive the Applicant of his right to have the proceedings conducted in accordance with the principles of the rules of natural justice. In fact, the record provides rather ample justification for the MEC's conclusions

that the interjections by the various members of the Disciplinary Committee were often prompted by a desire to focus the cross-examination conducted by the Applicant's attorney on relevant issues and to manage/control the Applicant's volatile behaviour.

[74] The Applicant further complained that the Disciplinary Committee failed to provide him with adequate legal representation in that the City was obliged to provide and pay for his legal representation.

[75] According to the record, the Applicant initially elected to represent himself, but when it became apparent that he had some difficulty in conducting his own defence, the Disciplinary Committee encouraged him to obtain legal representation, which he eventually did. In my view, the complaint that the City's failure to pay for the Applicant's legal representations rendered the disciplinary hearing procedural unfair, is simply misguided. The rules of natural justice, in this instance, simply do not require that the party instituting the proceedings should pay for the Respondent's legal representation. Moreover, the Applicant has failed to demonstrate that he was in any way prejudiced by the alleged allegation that the City should have funded his legal fees.

[76] The MEC in assessing whether the disciplinary hearing had taken place in accordance with the principles of the rules of natural justice stated that his point of departure was, evaluating the conduct of an administrative body, chaired by a non-lawyer, not a court of law. It is trite that the rules of natural justice do not require a tribunal to apply the technical rule of evidence observed in a court of law. In this regard

see Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991(4) SA 43 W at 48 C.

[77] It follows that the MEC was entitled to assess the hearing in terms of basic principles of fairness, rather than the procedural and evidential standard observed in a court of law.

[78] The Applicant further alleges that the Disciplinary Committee was "*clearly infected with vindictiveness*" and that the outcome of the DA dominated disciplinary process was a foregone conclusion. In the present instance the Disciplinary Committee consisted of eight elected political representatives assisted by three City officials (including two legal advisors). The Committee was chaired by a non-lawyer and was required to hear oral evidence including cross-examination and make findings in respect of that evidence.

[79] On a proper reading of the record the allegations made by the Applicant are in my view contrived. The Disciplinary Committee in this instance included members of the Applicant's own party. The facts overwhelmingly suggest that the Committee's findings were unanimous. The record also reveals that the Disciplinary Committee went to considerable lengths to protect the Applicant's rights and as the MEC correctly noted, these are not the hallmark of a body that was intent on convicting the Applicant without regard for his right to a fair hearing.

[80] What remains to be considered is whether in these circumstances an appropriate sanction against the Applicant warrants a removal from office.

[81] Item 14(6) of the code provides that the MEC, if he "*is of the opinion that the councillor has breached a provision*" of the Code, may, if the sanction is warranted:

> *"(a) Suspend the councillor for a period and on condition determined by the MEC; or*
> *(b) Remove the councillor from office."*

[82] In the present instance the Systems Act granted the MEC the "*sole and exclusive*" function of determining whether the Applicant breached the Code, and, if so, whether his removal from office was warranted. Once he had determined these jurisdictional facts, he was entitled to exercise his powers accordingly. The grounds upon which this Court can intervene are limited. It can only interfere on grounds such as *mala fides*, ulterior motive, a failure to apply one's mind and in light of the constitutional right to just administrative action, these requirements would now also include rationality and reasonableness.

[83] In my view the MEC's findings that the required jurisdictional facts were present were fully justified on the evidence before him. He noted that a striking aspect of the representations made to him on behalf of the Applicant in annexure "AL20" was their failure to engage with the substance of the charges brought against him. This was despite detailed evidence of misconduct having been presented at the hearing by six different witnesses. This evidence had been carefully evaluated by the Disciplinary Committee, which had concluded that he was guilty on both charges brought against him. The Applicant in his representations had not denied, attempted to explain or in any way deal with the far-reaching evidence of misconduct. The Applicant had simply

contended that the disciplinary hearing was procedurally unfair "*without getting into the merits of the matter*". No explanation or motivation was provided for the failure to deal with the substance of the charges.

[84] The MEC viewed the charges on which the Applicant had been found guilty in an extremely serious light. The preamble to the Code of Conduct states, *inter alia*, that councillors' are elected to represent local communities, to ensure that municipalities have structured mechanisms of accountability to communities, and to meet the priority needs of communities by providing services equitably, effectively and sustainably.

[85] The MEC also took into account that housing is amongst the most complex of service delivery challenges and that in housing matters it is the responsibility of elected representatives to represent their councils in a manner that does not negatively affect their integrity and credibility.

[86] The MEC stated that the actions of the Applicant and the manner in which he treated citizens who are vulnerable members of society were unacceptable. The potential consequences of such action, if unchecked, would be far-reaching both for the municipality and the community which it serves.

[87] In my view having regard to the above considerations, the conclusion by the MEC was in fact justified. There was nothing in the Applicant's representations to persuade the MEC that any other sanction was appropriate. Moreover, the Applicant does not contest the validity of the sanction imposed by the MEC in his Heads of

Argument. In fact the 7th Respondent, being the National Minister of Cooperative Governance and Traditional Affairs and a member of the same political party as the Applicant, went so far as to state in his affidavit that the Applicant was properly removed from office as a result of the transgressions he was found guilty of.

[88] For these reasons, the Review Application cannot succeed. It follows that the relief sought by the Applicant cannot be successful.

[89] In the result, the following order is made:

> The Application is dismissed with costs, including the costs occasioned by the employment of two counsel.

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LE GRANGE, J

For Applicant	**:**	**Adv. T Masuku** **Adv. T S Sidaki** **Adv. S Gcelu**
For 2nd Respondent	**:**	**Adv. P Hathorn** **Adv. N Mayosi**
For 3rd, 4th and 5th Respondents:		**Adv. P B J Farlam** **Adv. Mangu-Lockwood**
For 7th Respondent	**:**	**Adv. N Cassim SC**
Attorney for Applicant	***:***	***Xulu Attorneys Inc.***
Attorneys for 1st Respondent	***:***	***A Parker & Associates***
Attorneys for 2nd Respondent	***:***	***State Attorneys***
Attorneys for 3rd to 5th Respondents	***:***	***Fairbridges Attorneys***
Attorneys for 6th & 7th Respondents	***:***	***State Attorneys***

Heard on : 12, 13 & 14 AUGUST 2013