IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 42/06

In the matter between

CHURCHILL FAKUDZE Applicant

and

THE CHAIRMAN OF THE
COUNCIL-IN-COMMITTEE OF THE
MANZINI CITY COUNCIL 1st Respondent

THE CITY COUNCIL OF MANZINI 2nd Respondent

Coram: J.P. Annandale, ACJ

For the Applicant: Mr. P.M. Shilubane of PM Shilubane & Associates

For the Respondents: Advocate D. Smith sc instructed by Currie & Sibandze Attorneys

JUDGMENT
10 MARCH 2006

[1] The applicant was employed by the City Council of Manzini since 2004 as Town Clerk. The council decided to renew his contract of employment for a further period and apparently still awaits approval of a new contract by the relevant Minister, as is required by statute. Meanwhile, he has continued his duties pending approval of his employment contract until late last year when he was notified that his services has been suspended on full pay and with retention of remunerative benefits.

[2] In a letter dated the 16th December 2005 the Mayor of Manzini wrote to the applicant, informing him of a decision by the first respondent to suspend him pending investigations of certain allegations of misconduct. The allegations are stated to be centred around issues arising from an alleged unauthorised overseas educational trip and related overpayment of subsistence allowance relating to it, as well as averred alleged improper appointment of abattoir slaughter men.

[3] Essentially, he is thus suspended on full pay and benefits, pending an investigative enquiry.

[4] The applicant now seeks, on a basis of urgency, disposing of the terms of service and the prescribed time limits relative thereto, relief formulated as foliows:-

> "2.1. Staying the disciplinary proceedings contemplated by the second respondent against the applicant pending the finalisation of this application.
>
> 2.2. That order (sic) referred to in 2.1 above operate with immediate effect pending the determination of the relief sought in paragraphs 3 and 4 infra.
>
> 3. Setting aside, reviewing and correcting the decision of (the first respondent) dated 15th December 2005 suspending the applicant from his duty as Town Clerk for the City Council of Manzini.
> 4....(Costs)..."

[5] Otherwise put, he seeks the decision to suspend him to be

set aside on judicial review as a final order and also an interim interdict, or a "stay of proceedings" as he terms it, with immediate effect, of the disciplinary proceedings "contemplated" against him. Apparent from this relief that he seeks is that it is not the decision to investigate allegations of misconduct that is sought to be set aside on review but rather the decision to place him under suspension in the interim, until investigations are completed, but also to put the investigation itself on hold for the time being.

[6] In his Notice of Motion, the applicant then calls upon "the respondent" (sic) to show cause why the decision to suspend him should not be "set aside and reviewed", further that *(verbatim):*

> "*(b) the respondent is hereby called upon to dispute ...to the registration the recording of the proceedings sought to be corrected or set aside together with such reasons as he is by the required or designs to give or make, and to notify the applicant that he has not done so*" *(sic).*

[7] That this is vague and embarrassing bears no argument. The respondents have not formally excepted hereto, perhaps they somehow are aware of what they are expected to do.

[8] The respondents have filed their answering affidavit, commencing with five legal points *in limine.*

[9] When the matter first came before me, the applicant's attorney sought and obtained extension of time to prepare his

argument in reply to the legal points, prior to the court hearing any argument. When the matter was recalled in the afternoon of the same day, more than an hour of court time was wasted on the issue of whether advocate Smith was entitled to argue or not, emanating from an allegation raised from the bar, requesting the court to turn itself into an inquisitorial body to establish if a work permit could be produced by counsel and if not, to investigate the issue from the bench, thereafter, if no permit was produced, to bar advocate Smith, a well known and highly respected member of the Pretoria Bar and founder member of the Law Society of Swaziland, whose membership fees are fully paid up and whose credentials far exceeds impeccable scrutiny, including senior status conferred upon him by former president Mandela, various acting appointments as Judge of the High Court of South Africa and, moreover, having been instructed by the very same attorney who raised the exception to his appearance as senior counsel in many matters in the past. After a verbal altercation, the court ruled that the matter of a work permit shall be resolved separately and that the applicant's alleged urgency will take precedence, requiring that the matter be proceeded with forthwith, without further time consuming and inappropriate delays incurred by the applicant's own attorney. Again, further extension of time then was sought by applicant's attorney to further prepare argument in reply to the legal points, as was set out in counsel's written heads of argument. The result of this was that despite the alleged urgency, applicant's attorney was only heard in February, with judgment having to be reserved, causing further delay. All of this forms part of an apparent resolution by the Law Society of Swaziland, which seems to be aimed at preventing non-resident counsel from appearing in

court. It is not only in this matter but in various other cases where the Law Society sought to intervene in order to achieve the very same result, which resulted in numerous delays and time consuming distractions. At the end of the day, it is instructing clients who have to bear the brunt. When all is said and done, it does remain the prerogative of instructing clients to have a freedom of choice as to who they wish to appear in court, within the parameters of the existing legislation. This option should not be sought to be arbitrarily removed by a statutory body such as the Law Society of Swaziland. This has to be viewed in context, with the letter of suspension dated 16th December 2005, a month and a half ago.

[10] I now turn to deal with the points raised *in limine* by the respondents.

[11] A decisive issue, over and above the other aspects that will be reverted below, is the appropriateness of the application *vis-a-vis* the statutory requirements that befall such a matter.

[12] Part XIV of the Local Government Act, 1969 (Act 8 of 1969) ('the Act') places a limitation on actions as follows:-

> *"116.(1) No legal proceedings of any nature shall be brought against a council in respect of anything done or omitted by it after the commencement of this Act, unless such proceedings are brought before the expiry of twelve months from the date upon which the claimant had knowledge or could reasonably have had knowledge of the act or omission alleged.*

(2) No such action shall be commenced until thirty days' written notice of the intention to bring such proceedings have been served on the council, and particulars as to the alleged act or omission shall be clearly and explicitly given in such notice.

(3) The High Court may, on application by a claimant be barred under subsection (1) or (2) from instituting proceedings against a council, grant special leave to him to institute such proceedings if it is satisfied that:-

(a) the council against which the proceedings are to be instituted will in no way be prejudiced by reason of the failure to institute the proceedings within the stipulated period or by reason of the failure to give or the delay in giving the required notice; or
(b) having regard to any special circumstances, the person proposing to institute the proceedings could not reasonably be expected to have complied with the requirements of subsection (1) or (2)".

[13] It is common cause that the applicant falls foul of compliance with this statutory provision. The applicant did not seek to be excused from the statutory period in which he is debarred from litigating against the council. Unless condonation has been granted, upon application to the court, as is provided for in the statute, he is to first give 30 days

written notice to the council. No notice was served on the council to indicate the intended action against it.

[14] The applicant was at liberty to come to court when he did, provided that at the same time that he brought the matter to the High Court, or preceding it, he included a proper and substantive application for condonation of non-compliance with the time limits as prescribed by the legislature. This course was patently and openly available.to him. He chose not to do so.

[15] Instead, in response to argument raised *in limine* by the respondents, he chose a totally different avenue of attack namely to challenge the constitutionality of the provision in argument from the bar. He gave no notice to the respondents of this novel approach, presumably taken as a response to the stance of the respondents due to his failure to comply with the legislation. He chose to challenge the validity of the legislation, again without giving any form of notice to the council of his intention to do so. Effectively, he sought to bring in a constitutional challenge to the validity of legislation through the backdoor. It is not necessary to rule on the appropriate procedure to do so, namely whether proper notice is required or not.

What is required of this court is to decide whether the applicant is debarred from bringing his application without giving the required statutory period of notice (30 days) unless he has sought and obtained leave of the High Court to be condoned from compliance with the law.

In the present matter, it is only once he has been deprived of

the opportunity to have his matter resolved and determined, before expiry of the 30 days required period of notice, that the court will be enjoyed to decide on the constitutional or otherwise fairness and enforceable result of the legal operation and effect of Section 116(2), in the absence of condonation under section 116(3) of the Act.

The applicant chose not to allege any impediment whatsoever that caused him to be unable to give the required 30 day period of notice to the council of his intended legal action against it. He has not averred any difficulty to do so either, or that in doing so, it would infringe on any constitutional right that he may have. He blatantly ignored the statutory limitation and did not even refer to it at all in his founding affidavit, by which he shall stand or fall.

[19] Apparently, it rather seems that he was in ignorance of this provision and that it was only as a last resort, when the respondents raised it as an issue, that he started to clutch at straws and decided that since he failed to seek condonation, that he would raise the constitutional validity of Section 116(3) of the Act, as an afterthought.

[20] The case law on which the applicant relies does not advance his position any further. Each of the decided cases he had the court refer to, was decided on a distinguishable basis other than the point he raises. Each of the authorities he relies upon to support his contention were decided upon the basis that the statutory impediment complained of deprives a litigant of a right to be fairly and promptly heard. In each matter, the legislation negated or unfairly impinged upon rights akin

to his own. In each of those matters, the alleged infringement was argued, and held, to deprive a basic right, caused by a restrictive element causing an infringement. In the present matter, the applicant does not allege any of this in his founding affidavit at all.

[21] The applicant makes no assertion whatsoever that he seeks to litigate against the council or its officers but that there exists an unfair disadvantage, a disparity of arms, contained in the restrictive statute, which prevents him from doing so. Further, he does not say that the alleged limitation on his ability to litigate impairs him to any extent, less so that he sought to be liberated from the yoke but that the court deprived him of it due to the legislation he seemingly belatedly became aware of.

It is my considered view that Section 116(2) of the Act, read with subsection (3) thereof, could only be said to cause an unfair disadvantage to the applicant once he has sought liberation from the time limit imposed by the statute but a denial of condonation followed his application. Even then, it will not automatically follow that the provision will be struck down as unconstitutional *per se* due to the consequence of the legal operation of the said clause. That it could ultimately be done is a matter that will have to be decided under appropriate circumstances when the time arises, but presently it will be imopportune to do so.

In *Mohlomi v Minister of Defence* 1997(1) SA 124(CC), the Constitutional Court held that a requirement under the South African Defence Act of 1957 (Act 44 of 1957), requiring an

action to be instituted only within six months after the cause of action arose, and if one month notice had been given to the defendant (the Minister), infringed upon the right of access to court. The subsection was declared invalid. The court held at paragraph 12 that:

> "*What counts ... is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation (of the right to access to court) leaves open in the beginning for the exercise of the right. For the consistency of the limitations with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one.*"

[24] Subsequent to striking down of the offensive subsection which placed an undue limitation of the right of access to court, the legislature in South Africa enacted the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act 40 of 2002). The limitation on instituting legal proceedings against a City Council are not totally unlike the limitation under consideration *in casu.* The present legislation requires 30 days to lapse from the time that the cause of action arose, before proceedings such as these can be instituted. However, should a litigant be prejudiced by this, or if it impedes on his right of access to court, the built-in "safety valve" is an enabling provision in the same Act, whereby he can apply for condonation, to remove the time constraint. Thus, the

limitation to institute legal proceedings can readily be removed, if so sought. It is only if sought but refused that it can reasonably be argued to deprive that right.

[25] The applicant, as said, chose to simply ignore this provision. Had he not done so and had he sought but was denied access to court, he only then could be heard to complain of an impediment, as he now already seeks to do. He puts the cart before the horse in wanting to have legislation struck down as unconstitutional, bypassing his clear and simple remedy.

[26] The upshot of this is that the applicant is time barred from bringing the present matter for adjudication by the High Court, in that he failed to give the required period of 30 days notice to the council of his intention to do so. This period could have been shortened on application if he chose to do so, as is required of him, but which he did not do.

[27] Thus, *de lege ferenda,* the application stands to fail. There are further aspects which also impede the application detrimentally.

[28] One such aspect which was repeatedly referred to in the course of argument, is whether the applicant was entitled to be heard prior to the decision to suspend him was taken. Importantly, at the present stage of the application, the court is not yet priwy to argument that relate to the merits of the application itself, as the present focus remains on the points *in limine* that were raised by the respondents. Nevertheless, counsel on both sides referred

to the applicability of the application itself in the course of address and the court was referred to various decisions in this regard. The object of the exercise was to try and persuade the court, on the one hand, that the application is to be heard on the merits, urgently so and bypassing all other matters that require to be decided, since the application is held out as meritorious. On the other hand, counsel for the respondents argued that even if the court were to dismiss the preliminary issues, against the hearing of the matter, as one of urgency or not, the application itself is doomed to failure since the applicant could not insist on a right to have been heard insofar as his suspension goes - on full pay, pending the outcome of the preliminary investigative enquiry, which would determine his future - whether he should be subjected to a disciplinary hearing or whether his suspension should be set aside and he be allowed to continue with his duties.

As a point *in limine,* it should strictly speaking not be entertained at this stage at all. Nevertheless, whatever the legal position may be, the applicant has in fact been affected by his suspension, even if on full pay and with retention of benefits. A sword remains hanging over his head and he wants it to be determined whether due process was followed or not.

In this regard, the applicant's attorney relies on *Zantsi v The Chairman of the council of State & Another* 1994(6) BCLR 136 (CK) at 160 - 170 as authority for the proposition that there is a disparity of arms between the applicant and the respondents on a two-fold basis -firstly, that he is disadvantaged by the statutory limitation imposed upon him, to seek relief only after 30 days has lapsed since his cause of action arose, despite

being able to seek condonation of the onerous provision which he did not deem it fit to ask for. Secondly, that even if his suspension is on full pay and with retention of other benefits, he was prejudiced by not having been given an opportunity to be heard in the matter before it was decided to suspend him until the investigation into the allegations has been completed, which he fears to commence at any time, and which he seeks to be interdicted, even though his sought relief states it somewhat differently.

Zantsi (supra) is, unfortunately for the applicant, a matter that was decided on a distinguishable set of facts. Notably, it addressed a limitation imposed by Section 71 of the Ciskei Defence Act, 1986 (Act 17 of 1986), which provided that civil actions against the Defence Force or any member of it had to be instituted within a fixed time limit (six months). The present matter does not yet have such impediment. It does have a limitation imposed on the applicant to institute his matter prior to the expiry of a restricted time limit. He is not too late to do so. The restriction he complains of is that he cannot do so soon enough. As said above, the restraint on bringing his matter to court is one perceived as causing a delay in that he is required to first wait for a month before coming to court. As also repeatedly pointed out, he cannot yet hold it out as an impediment as the act itself gives him the opportunity to be condoned from such restraint but that he chose to not adhere to the legislation and include a prayer for condonation, stating his reasons for needing it. Instead, he chose to ignore the avenue leading to his destination and rather wants to travel from Cape Town to Pretoria via London.

This court has no quarrel with the exposition of the position as

adumbrated by Chaskalson CJ in his commentary in the Constitutional Law of South Africa, 1998 at 14 - 50. There, in the Chapter regarding equality, the respected and learned author *inter alia* refers to the decisions of the European Court of Human Rights in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 at 431 (para 26) and *Konig v Federal Republic of Germany* (1978) 2 EHRR 170 at 193 (para 90), where it was held that "*the requirement of equality of arms between civil litigants is equally applicable where one of the litigants is the state*". It does not matter if the State acts in its sovereign or private capacity and equally, it applies to the City Council of Manzini.

Ad nauseam, I reiterate that the present case does not have such a restriction, as was present in all the matters I was referred to, as the applicant is not hampered in any way by a statutory constraint which has impeded him or was shown to be likely to do so. This would become a reality if he was refused condonation of the time limit of 30 days, which he has to wait before coming to court. Or, if he was placed in a predicament to be able to explain why he should be alleviated from a time constraint but being unable to do so, it also might have an adverse effect on him. He has done neither. *Prima facie,* it rather seems to me that he was ignorant of the provision to seek condonation, or that his legal advisor did not know about it, or else that he just did not care about the manner in which he came to court. Whatever it could be, the considerations that have been subjected to judicial scrutiny in the matters he relies upon do not come into play at this stage of the proceedings.

[34] The second aspect of the applicant's argument in this

regard, which remains premature at this stage of the proceedings and fall to be determined only once the merits are decided, concerns his right to be heard prior to being suspended.

[35] From the onset, one aspect needs to be mentioned. The applicant refers in his papers to the contract of service which is yet to be approved by the relevant Minister. He did not enclose a copy of the draft, nor the previous but expired contract. Yet, he objects to the court being made priwy to it. The respondents did attach copies of the contracts to the answering affidavit, in which it is brought to the fore that in fact the applicant did agree, in writing, to the non-deprivation of the right of the City Council to suspend him, should the need arise, pending the institution of an enquiry.

This is exactly what the application seeks to prevent, a suspension pending the outcome of an investigation, which ultimately could lead to a disciplinary enquiry. I am hard pressed to understand why the applicant does not want to take cognisance of the of his employment contract terms, which he refers to by incorporation in his application, but which document he does not want the court to see. He cannot have his cake and eat it, so to speak. If he relies on a contract of employment, which he avers to have been adversely infringed, referring to annexed correspondence which has as primary object the service contract forwarded to the Minister for approval, he cannot be also heard to say that the court may not look at it. The court does so.

In clause 11.2, under the section headed "Discipline", which is

contained in both his previous and potential future "Memorand(a) of Agreement" (i.e. Employment Contracts), annexed to the respondents' answering affidavit as annexures "OD1" and "OD2", the following words are recorded:-

> "1*1.2 Subject to the provisions of the Employment Act, the Council shall have the right to suspend the employee pending any investigation and/or disciplinary action*".

In his application, he says that the Council does not have such a right.

The essence of his application is that the decision to suspend him should be set aside on review since it negated the *audi alteram partem* principle, also that it did not follow procedural prescribes of standing orders of the council. These are issues that will be adjudicated once the merits come up for judicial review. Presently, there are preliminary legal objections that stand in the way of that hearing, which first have to be decided, after which the merits of the application itself will be dealt with, if need be.

It is only once the merits are decided upon, that the court will have proper regard to interesting and relevant authorities, that I have been referred to in the interim. It is at that stage when careful consideration will have to be given to the question of whether or not the applicant had a right to be heard prior to be suspended, or not, and if he did indeed have such a right, if negating it would vitiate the decision to suspend him. Thus, albeit it premature but in order to obtain a wider perspective of the matter before court, currently limited to points *in limine,* it is useful to have regard also to the ultimate prospects of

success but without purporting to pronounce on it. A bioptic view may have the result that the forest is not seen because of the trees in it.

In Swart and Others v Minister of Education and Culture, House of Representatives, and Another 1986(3) SA 331(C), Selikowitz AJ (as he then was) referred at p 344 with approval and relying upon it, to the sage words of Lord Denning MR which were echoed approvingly by Ormrod LJ and Geoffrey Lane LJ in *Lewis v Heffer and Others* (1978) 3 All ER 354. There the Court of Appeal in England had to consider whether the decision by the National Executive Committee of the Labour Party to suspend certain officers and committees pending an enquiry was impeachable, *inter alia,* by reason of a failure to apply the rules of natural justice. Lord Denning held:

> "*But then comes the point: are the NEC to observe the rules of natural justice? In John v Rees, Megarry J held that they were. He said:*
>
> > '*...suspension is merely expulsion* pro tanto. *Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment the rules of natural justice* prima facie
>
> *apply to any such process of suspension in the same way that they apply to expulsion.*'

Those words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a

solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply: see Fumell v Whangarei High Schools

Board. So in this case the rules of natural justice do not apply. The suspensions are not invalid on that account."

Whether this decision gives good guidance in the present matter or not requires consideration later on in this matter, if it is pursued. There are also cases where the opposite result was reached, such as *Mhlauli v Minister of Department of Home Affairs and others NNO* 1992(3) SA 635 SECLD, but in which rather different considerations and circumstances apply and *Muller & Others v Chairman of the Minister's Council: House of Representatives & Others* (1991)12 ILJ 761(C) which equally will require to be decided whether or not it is applicable to the present matter or not, in due course. Mr. Shilubane referred to a number of further authorities, as did advocate Smith for the

respondents, but as said, these matters will be considered at the appropriate stage of these proceedings, not presently.

What it does show is that the merits of the application is not a forgone conclusion, which if it was, might have persuaded this court to place less emphasis on preliminary issues. Since it is not a virtually forgone conclusion as to what the potential eventual outcome will

be, I shall confine myself to only deal with, and decisively so, with the points raised and argued *in limine.*

[44] The respondents have advanced convincing argument on further aspects which compound and fortify the end result.

[45] The aspect of urgency has been judicially considered and pronounced upon in a phletora of case law. The bottom line, or refrain of the decisions when applied to the present case, is that the applicant is enjoyned, compulsory so, so fully, precisely and explicitly explain and motivate why his matter has to by-pass other cases on the court roll and be given precedence, to be heard and have his case determined forthwith, without the wheels of justice taking a notoriously long time to grind until one day in the future, when his matter comes up for adjudication.

[46] In the (unreported) judgment of the Court of Appeal of Swaziland, Civil Case No. 7 of 2005, the case of *Nhlavana Maseko and 2 others v George Mbatha and Another,* Steyn JA commented on the issue of bringing matters to court as

matters of urgency. In his judgment, the following was said at paragraph 2 *et seq.:*

"*There has been a tendency to bring matters to court as being so urgent as to justify a departure from the time constraints imposed by the Rules of court. There can be no doubt that the need exists to cater for the facilitated and speedy access to the court where the delays of the law might cause harm to a litigant and effectively frustrate his chances of obtaining a just resolution of his dispute. Such cases are however, clearly exceptional and our courts must be on their guard to protect parties against the abuse of these special powers. Our Rules of Court have been framed in order to ensure that the legal processes will be orderly and that parties are given a fair opportunity to prepare and present their case. Rule 6 has been designed to achieve this objective and a departure from its provisions will only be sanctioned in cases which fall within the purview of sub rule 6(11) (sic) [Rule 6(25)]. This rule reads as follows:*

<[6(25)(a)] In urgent applications the court or judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the court or judge, as the case may be, seems fit.

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims

that he could not be afforded substantial redress at a hearing in due course/

In several cases before us and in this current matter also, the High Court has allowed applications to proceed as matters of urgency where the facts do not justify such a departure from the Rules. Moreover, certificates of urgency submitted by counsel - as in this case - are bland and do not comply with the requirements of sub-rule [6(25)(b)]».

[47] The learned Justice of Appeal then went on to quote a "certificate of urgency" which in essence is on par with the "Certificate of urgency" filed in the present matter. It reads as follows:

% the undersigned, Paul Mhlaba Shilubane do hereby make oath and say that:-

1. I am an attorney of the above Honourable Court practising under the style of PM Shilubane & Associates at Ground Floor, Lilunga House, Somhlolo Road, Mbabane.

2. *I have read the applicant's Notice [of] motion and the annexures thereto.*

3. *In my opinion, the matter is urgent by reason of the facts and allegations made therein.*"

It is then signed by the attorney and dated at Mbabane.

The "Certificate of Urgency" is averred to have been made under oath but the commissioning thereof by a commissioner of oaths is glaringly absent.

In regard to bland averments in such a "certificate" on "oath", Steyn JA remarked as follows in Maseko (supra):-

> "As *is evident from the contents of this affidavit no attempt has been made by the deponent to set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course: I make bold to say that had the deponent attempted to comply with these provisions, he would have found it difficult on the facts of this case to make out a credible case for a departure from the rules governing due process*".

[50] I now turn to the affidavit of the applicant himself, this time seemingly commissioned, although it lacks in stating the full names of the commissioner of oaths, the street address where it was commissioned and whether the deponent had no objection to taking of the oath, that he considered it to be binding on his conscience and that he uttered the words "So help me God" in the presence of the commissioner.

[51] Mr. Churchill Fakudze states *inter alia* the following:

> "*9. The matter is urgent by reason of the fact that the disciplinary proceedings may commence at any time before these proceedings*' *finalisation (sic).*
>
> *10. The applicant has no other remedy but to bring this application for the relief sought herein*".

[52] He also says in paragraph 8 that:-

> "*I further submit that it will be in the best interest of justice if the disciplinary proceedings are stayed pending the finalization of this application because if this is not done the outcome of this matter will be academic and I will suffer irreparable harm*".

[53] Counsel for the respondent, correctly so in my view, argues that the applicant at most pays mere lip service to the requirements of the law, by failing to set out in detail what the reasons for urgency are so that the court can make an informed decision as to whether the facts warrant a departure from the normal rules relating to applications.

[54] In *Mangala v Mangala* 1967(2) SA 415(E) at 416, Munnik J held that:-

> "*It does not follow that, because an application is one for a spoliation order, the matter automatically becomes one of urgency. The applicant must either comply with the Rules in the normal way or make out a case for urgency in accordance with the provisions of Rule 6(12)(b)*". *[On par with Swazi Rule 6(25)(b)J.*

[55] The same can be said of the present matter, namely that a dissatisfaction with a decision to suspend the applicant, on full pay, does not in itself render his matter to be dealt with as one of urgency.

[56] Mr. Shilubane argues to the contrary, though he accepts Mangala (supra) as trite law and does not dispute it. He has it

that this matter is urgent by its very nature.

[57] Since the applicant states that the disciplinary proceedings may be instituted at any time and since the respondent does not dispute it, this averment is argued to be true and it is so accepted. That may well be so, but to argue that because of this being so, it in itself makes the matter urgent, misses the point made in Mangala *(supra),* and the mandatory requirement under the Rules. I repeat and extract:-

> "*...the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he could not be afforded redress at a hearing in due course*".

[58] From the aforementioned founding affidavit, it seems to me that the applicant has an apprehension of facing a disciplinary enquiry, but he does not justify why his matter should not be heard in the normal course, sufficiently so to justify it to be heard urgently. He says it will be academic if he does not get heard right away, but he does not also do justice to the requirement of stating why he will not have redress at a hearing in due course. What the irreparable harm is that he fears, he does not state and what the ill consequences of a hearing in due course will be, he is equally tacit about.

[59] I accept that subjectively, the applicant, in his own mind, fears the worst if his application is not heard forthwith, on the merits. What he does not do, is to express these fears, as well as the detrimental consequences of not being able to be heard right away, as is enjoyned of him under the Rules.

[60] Finally, in order not to overburden this ruling any further and causing more delay in handing it down, the aspect of seeking an interdict to prevent the holding of an enquiry needs brief consideration.

[61] For an interdict to be ordered, such as is sought here on an interim basis, at minimum the applicant has to show that he has a *prima facie* right to it; that he has a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the granting of an interim interdict; and that he has no other satisfactory remedy. (See *Setlogelo versus Setlogelo* 1914AD 221 at 227) and the host of authorities thereafter wherein these salient requirements have been followed. The applicant, in my view, has failed to meet the requirements. The court will rarely, if ever, interdict an employer from holding a disciplinary enquiry into alleged misconduct - See *Ndlovu versus Transnet t/a Portnet* (1997) 18 ILJ 1031(LC). Likewise, in *SA Commercial Catering and Allied Workers Union and Others versus Truworths and Others* (1999) ILJ 639 LC it was held at 641 H - J that:

> "*This Court has on previous occasions indicated its unwillingness to adjudicate prior to the reference of the dispute to conciliation. It will do so only in exceptional circumstances and on proven urgency.*"

[62] It is for the employer and not the court to decide whether an employee is guilty of misconduct. To do this, an employer must hold a disciplinary enquiry. To prevent it from doing so, as the applicant now seeks to be done, and on the basis the

applicant motivates his reasons to seek injunctive relief at once, goes against what he has himself agreed to and it also does not meet with the requirements of the interdict he seeks.

[63] That the applicant has a right to have a flawed disciplinary enquiry subjected to judicial review bears no contradiction. However, such enquiry has not yet been held. He wants that enquiry which is still to be instituted, to be prevented from taking place, by way of an interdict. In *Mantzans versus University of Durban -West Floor and Others* (2000) 2, INJ 1818 (LC) at 1820 -C, it was held that

> "*...such interdict proceedings should not interfere with uncompleted proceedings, except in the most exceptional circumstances where a grave injustice or a miscarriage of justice might otherwise occur or where justice might not by other means be attained*".

[64] Presently, the enquiry that is sought to be interdicted has not even commenced, let alone being in progress. Although this court is not bound by decisions of the Labour Court of South Africa, the approach taken there is salient and persuasive, when applied to the matter before me. I hold that it would not be proper to interdict the enquiry, which is only anticipated at the stage of institution of the present application, from being held. The application is premature, seeking a curtailment of a proper procedure wholly within the purvey of the respondent City Council *qua* employer. Indeed, the employer is obliged to hold an enquiry if disciplinary action against any of its employees is envisaged. Should the enquiry be such that no

action is taken, so be it. Should it result in action that is improperly taken, the applicant has his legal remedies to then pursue.

[65] It is for these reasons that the points raised *in iirdhe* stand to be upheld and it thus follows that the application is ordered to be dismissed in *limine,* with costs. Costs of counsel are certified to be dealt with under the provisions of Pule 68(2).

JACOBUS P. ANNANDALE
ACTING CHIEF JUSTICE