

MR JAMES CLAASEN
RAUBENHEIMERS ATTORNEYS
PER E-MAIL:
jackies@raubenheimers.co.za

DATE: 26-06-2024
OUR REF: JCVDB/EF/JW0131
YOUR REF: JC/JACKIE/W67956/G179

Dear Mr Claasen

REQUEST FOR REASONS FOR DISMISSAL OF REQUEST FOR INVESTIGATIONS – REFER THE MEETING OF THE MUNICIPAL COUNCIL ON 5 MARCH 2024

We refer to your e-mail letter of 17 May 2024, addressed to us of which we acknowledged receipt of on the same date.

We are instructed to respond to your aforementioned letter.

Our clients' failure to respond fully thereto does not amount to an admission on the part of our clients of the correctness of anything contained therein and our clients reserve their rights to deal more fully therewith should the need arise.

Your numbered Paragraph 1:

A distinction between administrative and executive actions of GRDM cannot validly be drawn in this matter; kindly refer again to paragraphs 47 to 52 of our letter under reply that remain unanswered. In addition, please have regard to **Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape Province v Knysna Municipality and Others** (1345/2021; 1330/2021) [2024] ZAWCHC 167 (18 June 2024) at Para 58 to 71.

Your numbered paragraph 5:

We record our severe disappointment that the GRDM has consistently failed to produce material documents, despite numerous requests. With regard to these requests, apart from several PAIA requests, we draw your attention to our client's letter of 25 May 2023, **Annex "1"** (especially paragraph 9), GRDM's refusal of 30 May 2023, **Annex "2"**, and to the Cullinan letter of 18 September 2023 to GRDM, paragraph 28 and 33, in which our clients specifically requested documentation, but which your client has not yet supplied. As you may be aware, thereafter followed a Council Meeting on 25 October 2023 (<https://www.gardenroute.gov.za/wp-content/uploads/2023/10/2023-10-25.pdf>) and we invite you to look at Annexure "B" – *List of documents submitted to WALEAF based on information requested* on pages 334 to 341. (This is in fact our clients' document.) If you have regard thereto, you will find a large number of documents which was, and still is, outstanding as set out in the document that served

PARTNERS

Joseph Cornelius van der Berg B.Proc

TEL: (044) 873-0818

E-MAIL: legal@jcatorneys.co.za
Private Bag X6590, Suite 93, GEORGE
100 York Street
York Mall, 1st Floor, Room 103
GEORGE, 6530

before Council. Your client, GRDM, is fully aware that material information has not been supplied. In fact, the comprehensive complaint of 330 pages spelled out what material documents have not been provided. The question then is, why does your client not provide material information? Why does it not act as constitutionally obliged by being transparent?

The first of your following four paragraphs, not numbered:

With respect, it is not a gripe to raise maladministration for investigation, a complaint fully referenced to applicable legislation, policies and supporting documents. Not a single dispute has been raised as to the correctness of any of these submissions, NOT ONE DISPUTE.

We assume that you refer to the minutes of the meeting of 5 March 2024 attached to your letter as being the minutes setting out the reasoning of your client. It is with respect beyond comprehension that your instructions are to state *"it has acted lawful in all respects as far as the tender awarded and the conclusion of the lease are concerned"* in the face of clear evidence to the contrary. Anyone who reads the comprehensive complaints document would disagree with most statements made in the debate (as appears from the minutes of the meeting of 5 March 2024), statements such as:

- *"... the correspondence received from the complainants had no evidence provided of financial misconduct, mismanagement, if only contained allegations";*
- *"... there is no evidence provided by the complainants to support their allegations";*
- *"... if any councillors can find the evidence in the documentation in their possession to support the allegations, they must point such to him as he could not find it".*

Anyone who reads the comprehensive complaints document would know that in law it is for the investigative process to establish the evidence. That is why the document does not have annexed to it say 1 000 pages, but the GRDM is referred to the source documents upon which the averments rest.

It is absurd to argue that a municipality would only order an investigation once it has the evidence to support a finding of financial misconduct, alternatively of misconduct, as in such a case an investigation would serve no purpose. However, if anyone doubted any of the averments, such a person was given the reference to the source documents, most of which are in the possession of the GRDM or are publicly available. We revert to this aspect later. In addition, as referred to later herein, in several cases the complaints are about non-compliance with binding law, and thus not a complaint based on evidence available in the public domain. Likewise in other cases the complaints are about steps not taken, by definition there will be no evidence available in the public domain.

The second, third and fourth of your following four paragraphs, not numbered:

It is our clients' view that any municipality taking its constitutional obligations seriously, would have taken the route of self-review when it learned of the extensive maladministration.

What is more so, is that our clients believe that all political parties represented on the GRDM Council publicly would agree with statements such as that the GRDM is accountable for its actions, that the GRDM and the councillors themselves must act

honestly, that they themselves believe in the supremacy of the South African Constitution and the rule of law, that the GRDM and the councillors themselves must be held to high standards of integrity. Our clients did not do anything beyond holding them thereto these values and principles, values and principles stated to be common to most political parties represented on the GRDM.

Your clients accuse ours in your letter of “*continuing to make reckless and false accusations of untoward and improper conduct*”. They are then threatened with legal action. This happens in circumstances where NOT ONE of the averments in the comprehensive complaints document of 330 pages has been shown to be false, NOT ONE AVERMENT. As anyone would be able to see, averments are based on clear references to legislation and policy, and source documents where applicable and publicly available are listed. It is possible that in this process an error could have been made, despite the great care taken. Clearly, if our clients had made any errors, they immediately would have addressed such errors, if pointed out. There would have been no need for any threatening letters about unspecified instances of alleged reckless and false accusations. But the one thing that did happen, is that the office bearers and officials of the GRDM have avoided dealing with the case made out. If there was an answer, why is it not given?

Your client complains about our clients referring the matter to political leadership of the parties represented on the GRDM Council. In context, the Cullinan letter of 18 September 2023 ought to have triggered an investigation into maladministration. We know how it was dealt with; it is dealt with in the comprehensive complaint. Thereafter our clients had to engage the political leadership of the public representatives on the GRDM Council. This too would have been unnecessary if the GRDM made proper disclosure of material documents, and properly addressed the comprehensive 330-page document as set out in clear law. We know how it acted, that history is set out in correspondence between us. Under these circumstances, it is legitimate conduct to raise the conduct of the GRDM councillors with the leadership of their political parties to hold the GRDM Councillors to the stated values and principles of the parties they represent, to raise their conduct with the provincial government, and to raise their conduct with the national government.

The very detailed comprehensive document submitted on 23 January 2024 raised various matters for investigation in terms of the two applicable sets of regulations (promulgated under the MFMA and Systems Act). We fail to understand that your client apparently considers these matters as “reckless and false accusations”, where it fails to produce material documents (even annexures to a lease), and fails to answer a single averment made by our clients. As we by now have repeatedly stated, backed by detailed references to legislation, policies, and source documents, most of it are in its own possession.

The two sets of regulations repeatedly quoted in the comprehensive document, lay out the procedure to be followed, and which specifically requires an investigator, or investigating board, to investigate evidence, much of which is quite clearly identified and referenced in the comprehensive document, to be researched by the investigator(s). We do not repeat those submissions.

It is civil society that managed to address the overpayment to officials of the GRDM, a matter not dealt with by the GRDM when it too had all the necessary material before it

to act. In this matter too, it is civil society (WALEAF) who will continue to seek to hold the GRDM Council accountable.

Unsubstantiated averments?

We have referred to the absurdity of the view that a municipality would only order an investigation once a complainant produces the evidence to support a finding of say financial misconduct, an absurdity as in such a case an investigation would serve no purpose. We have referred in detail to what the legal tests are in the comprehensive document. We repeat them. They do not require an assessment of the evidence prior to the investigations being embarked upon, as argued by some councillors.

In addition to the referenced source documents, many of the complaints are about contraventions of the law that are evident from reports and the lease agreements that served before the councillors without any further evidence required. In addition, many of the GRDM councillors witnessed many events described in the comprehensive document.

To this one must add those instances referred to where the complaint is steps prescribed by law were not taken, and where a complaint is that the lease agreement does not comply with the law.

However, even if one ignores the aforesaid, the version that the complainants only made unsubstantiated allegations, is clearly not intelligible. The detailed document contains repeatedly references to applicable source documents (i.e. evidence) to be used by the investigator(s), once appointed, to establish the facts.

We could present you with numerous examples to illustrate that the averment of a lack of substance, is unfounded. By way of such example, have regard to an extract from paragraph 22 of the matters re the Municipal Manager in the comprehensive document. This is a mere summary of what is to follow in the document, later therein the various potential charges are dealt with in great detail referring to the legislation, policies and available documentary proof. In paragraph 22 our clients state (we retained the references to the footnotes, but do not repeat them):

“... the GRDM entered into a lease agreement with an entity that did not tender, Water Leaf Properties (Pty) Ltd.²⁷ Yet at all times the Municipal Council, and at least the Provincial Treasury, were and are advised, falsely, by senior officials, that Waterleaf Properties had submitted the winning tender. That false version is persisted with to this day in reports to the Municipal Council.²⁸ The actual fact is that Waterleaf Properties was only part of a joint venture²⁹ that submitted a bid. The joint venture to which Waterleaf Properties was one of three partners, consisted of a non-existing company as the financier (falsely represented as being an incorporated company in the bid document), a micro enterprise that apparently conducted a waterproofing business in Hoedspruit, and Waterleaf Properties, itself being another micro enterprise that had been dormant for years (it had no assets or determinable expertise). No one in this joint venture, on the known facts, had any expertise to undertake such a large property development, or and no one in the joint venture had any capital to finance it. The joint venture and all three its partners were not on the list of entities that municipalities could use for the construction of infrastructure and/or large buildings, i.e. not listed by the

Construction Industry Development Board. Their bid document³⁰ is inherently contradictory on the investment and rental tendered, self-evidently contains what appears to be false representations as to its expertise, and did not comply with the prior compliance assessment that the GRDM was obliged to carry out. ...”

Please note the use of footnotes. Those footnotes, instead of misleading the GRDM Council (or being allegedly reckless and false), refers to GRDM in most cases to documents. The comprehensive document contained a specific list of documents that the GRDM’s investigators should obtain to check the veracity of these averments. This appears in the same document at pages 127 to 131, items 1 to 44. If anyone executed this simple task, he or she would have seen from the GRDM’s own records that the averments were true.

For instance, only on the false version that Water Leaf Properties (Pty) Ltd tendered, please find attached:

Annex “3”, a MEMORANDUM from the GRDM Department Financial Services dated 22 November 2019 listing the four tenders received. Note that no tender was received from Waterleaf Properties as a stand-alone entity, it only participated in a joint venture and was evaluated as such. This GRDM document forms part of the documents listed in the comprehensive document under item 49.6 on page 35, and item 12 on page 127. It is Annexure D to the *Bid Evaluation Committee Agenda* for 8 April 2020;

Annex “4”, the Minutes of the GRDM *Bid Adjudication Committee Meeting* of 1 April 2020 which records:-

That the BAC recommends to the Municipal Manager that through SCM processes undertaken, the preferred bidder for consideration be Waterleaf Properties/ Abupheli Joint Venture, subject to positive resolution of the following matters:

- a. *Due diligence by Legal on entities participating in the Waterleaf Properties/Abupheli Joint Venture, including shareholding and directorships.*

The recommendation records quite clearly that a joint venture, not a single entity, was the successful bidder. This GRDM document forms part of the documents listed in the comprehensive document, e.g. item 12 on page 127. Obviously, the joint venture bid document (although not a GRDM document but in the possession of the GRDM) itself would show this incontrovertible fact too. That document is listed in the comprehensive document, item 9 on page 127.

These documents are in the possession of the GRDM. It knows that the alleged false averments are in fact true, and not false. Many of the councillors were in meetings where they were told that the bidder was Waterleaf Properties, with not a word having been said about the joint venture’s bid.

We refer you to another example, the blatant non-compliance with the Asset Transfer Regulations, the non-compliance with the requirements from the Treasury departments, and the misleading of the Council (and Treasury) in concluding a lease

agreement that does not even contain the annexures referred to therein. (Annexure A was to describe the development of Kleinkrantz, and Annexure B was to set out payment detail.)

The report from the Mayor that served before the Council on 5 March 2024 contained a number of annexures. One is a letter dated 4 November 2020 by the Provincial Treasury and one by National Treasury dated 4 December 2020. Why have these not been disclosed in the PAIA process? They substantiate our clients' complaints of some of the defects in the lease agreement, as will appear below.

In the end a lease agreement was concluded for ninety-nine years with an entity that did not tender, at a ridiculously low annual increase. We maintain the view that an investigation, as per the quoted relevant Regulations, of the various matters raised will clarify whether the GRDM has acted lawfully. As example only, the approved Notarial Lease provides for 88 years of 0,3% escalation of the rental without any provision for three-yearly reviews as prescribed in section 116(1)(b)(iii) of the **MFMA**, namely *“a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years”*.

Our clients have raised the various glaring defects in this process and with the lease agreement. We refer to two to illustrate the point:

Already on 4 December 2020 (see annexure to the Mayor's report now produced for the first time), the GRDM was told by National Treasury that there appears to have been a material procedural defect, non-compliance with regulation 35 of the MATR. This is undoubtedly correct. See the comprehensive complaints document paragraphs 58.2.2, 70.3.2, 98 to 100, 110 to 111, 164.2.2, 164.2.6.3, 164.2.6.5, 164.2.9 (only in the matter pertaining to the municipal manager). Our clients have dealt in detail what the GRDM Council (and National Treasury) was told and not told in the comprehensive document as to this non-compliance;

Already on 4 December 2020 (see annexure to the Mayor's report now produced for the first time), the GRDM was told by National Treasury that cessions of rights are unlawful as in regulation 45(2)(x) of the MATR. The lease agreement had to include a clause disallowing the private sector party from ceding or subcontracting the right to another person. This is undoubtedly correct. See the comprehensive complaints document paragraphs 58.2.3, 70.3.3, 121.2, 123.7.3, 128.6.3, 144, and 154.5.5, and footnote 138 (only in the matter pertaining to the municipal manager). Just the opposite happened, as per clause 5.2 of the signed lease:

*“5.2. The LESSEE may cede or assign its rights under this agreement.
..”*

The leases were before the councillors when they decided not to investigate the matter. Our clients have dealt in detail what the GRDM Council was told and not told in the comprehensive document as to this non-compliance;

In addition to the example given earlier, and in addition to the absence of the material annexures, no one needs evidence to see that the lease agreements are to the

prejudice of the GRDM with regard to rental and rental increases and that the process and/or outcome do not comply with section 14 of the **MFMA**, Clause 3 of Annexure "A" to the GRDM **Immovable Property Management Policy**, 2012, and regulation 5(3)(b) of the **Asset Transfer Regulations**, 2008. See the comprehensive complaints document paragraphs 25, 96.3, 98, 103, 121.1, 123.5, 123.7.5, 128, 129.3, 130, 135.4, 142, 143, 154.5.2, and 154.5.4 to 154.5.4 (only in the matter pertaining to the municipal manager). Our clients have dealt in detail what the GRDM was told and not told in the comprehensive document as to this non-compliance.

In Closing

It will serve no purpose at this stage to address the defects in the report (and its annexures) that served before the council on 5 March 2024, or in the process that was followed. As stated at the outset, we reserve our clients' rights to address your letter and its annexures should the need arise.

We again have to record that this matter has been dealt with appallingly by the GRDM Council. It has been provided with a clear case to investigate maladministration, and it decided not to do so in breach of its legal obligations. Instead, without foundation, our clients' complaints are labelled reckless, false, absurd, frivolous, and vexatious, and the like.

Yours Faithfully



JC VAN DER BERG ATTORNEYS
JC VAN DER BERG

Copied to:

The Provincial Minister of Local Government, Environmental Affairs and Development
Planning of the Western Cape Provincial Government

By e-mail to:

mam@westerncape.gov.za ; Bernice.Labuschagne@westerncape.gov.za and

Hod.lg@westerncape.gov.za ; Anton.bredell@westerncape.gov.za

Attention: Minister Anton Bredell