REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter between: CASE NO. 5933/08

THE CITY OF CAPE TOWN	**APPLICANT**

and

THE PREMIER OF THE WESTERN CAPE	**FIRST RESPONDENT**
THE MINISTER FOR LOCAL GOVERNMENT AND HOUSING IN THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	**SECOND RESPONDENT**
THE HON. MR. JUSTICE N.C. ERASMUS N.O.	**THIRD RESPONDENT**
GEORGE PAPADAKIS N.O.	**FOURTH RESPONDENT**
HERDIE VERMEULEN N.O.	**FIFTH RESPONDENT**
DEMOCRATIC ALLIANCE	**INTERVENING PARTY**

JUDGMENT Delivered on **1st SEPTEMBER 2008**

SWAIN, J.

[1] The present dispute arose in the context of the political battle between the Democratic Alliance (DA) and the African National Congress (ANC) for control of the City of Cape Town, the council of

which is currently led by a coalition of the DA, together with other political parties, which was previously controlled by the ANC.

[2] The applicant is the City of Cape Town (the City) the executive Mayor of which is M/s Helen Zille, a member of the DA and its national leader.

2.1 The first respondent is the Premier of the Western Cape, Mr. Ebrahim Rasool (the Premier) and the second respondent is the Minister for Local Government and Housing in the Provincial Government of the Western Cape Mr. Qubudile Dyanatyi (the MEC). The Western Cape Provincial Government is controlled by the ANC which currently has a majority in the Western Cape Provincial Legislature. The Premier and the MEC are members of the ANC.

2.2 The third respondent is the Honourable Mr. Justice Nathan Erasmus, a Judge of the Cape Provincial Division of the High Court of South Africa, in his capacity as the Chairperson of the Commissions of Inquiry to be referred to hereunder.

2.3 The fourth and fifth respondents are the other two members of the said Commissions, namely Mr. George Papadakis, a forensic accountant and M/s Herdie Vermeulen, an attorney.

2.4 No relief is sought against the third, fourth and fifth respondents.

[3] The spark which ignited the inferno between these political protagonists was the conduct of an individual by the name of Badih Chaaban, a councillor on the council of the City, and a member of the Africa Muslim Party which was originally part of the DA led coalition governing the City until January 2007, when his party was dismissed from the coalition.

The Speaker of the council of the City, Mr. Jacob Smit, as well as Mr. James Selfe, a DA member of Parliament and the Chairperson of its Federal Executive, were informed that Chaaban was allegedly approaching coalition councillors with offers of bribes to change political allegiance in the run up to the so-called "floor-crossing" window period between 01 to 15 September 2008. During this period councillors were entitled to change party membership and continue to hold their seat on the council as representatives of their new party, as provided for in Schedule 6B to the Constitution. It was feared that the object of his conduct was to topple the coalition by such unlawful means.

[4] The City therefore engaged the services of a firm of private investigators, George Fivaz & Associates (GFA), to investigate the conduct of Mr. Chaaban. The investigation spanned the period June

to September 2007 and culminated in a finding by the disciplinary committee of the City on 19 October 2007 that Chaaban was guilty on six counts of misconduct. The council of the City decided on 31 October 2007, in terms of Clause 14 (2) (e) of the Code of Conduct for Councillors (Schedule 1 to the Municipal Systems Act No. 32 of 2000 "The Systems Act") that the MEC be requested to remove Chaaban from office.

[5] The lawfulness of the conduct of the City in investigating Chaaban and hiring a firm of private investigators to do so attracted the attention of both the MEC and the Premier. Their response was as follows:

5.1 On 27 November 2007 the MEC established an investigation in terms of Section 106 (1) (b) of the Systems Act with the third, fourth and fifth respondents as investigators.

5.2. The Premier by way of a proclamation on 04 December 2007 established a commission of enquiry into "Possible Occurrences of Maladministration, Corruption, Fraud or other Serious Malpractice in the City" with the third respondent as the Chairperson, and the fourth and fifth respondents as commissioners (the First Erasmus Commission).

[6] The Premier repealed the proclamation establishing the First Erasmus Commission by way of a proclamation on 19 March 2008, and established a new commission into "Possible Occurrences of Fraud, Corruption, Maladministration, Serious Malpractice and other unlawful conduct in the City and George Municipality ", again with the third respondent as its Chairperson and the fourth and fifth respondents as commissioners (the Second Erasmus Commission).

The proclamation also provided that the First Erasmus Commission "shall be deemed to have been established in terms of this proclamation and everything done by that commission or under its auspices shall be deemed to have been done in accordance with this proclamation….".

[7] The City, initially alone, and thereafter joined by the DA, as an intervening party, whose intervention was not opposed by the respondents, seek orders declaring the decision taken by the MEC to establish an investigation under Section 106 (1) (b) of the Systems Act, as well as the decisions of the Premier to establish the First and Second Erasmus Commissions, as being inconsistent with the Constitution and invalid. The City, apparently due to an oversight, did not initially attack the decision of the MEC but thereafter sought to do so by way of an amendment to the relief sought, which was granted without opposition.

The challenges raised in terms of the Intergovernmental Relations Framework Act No 13 of 2005

[8] Before dealing with the substantive challenges raised in respect of the first and second Erasmus Commissions, it is necessary to deal with what may loosely be referred to as "procedural challenges", raised by

8.1 The MEC and Premier in respect of the launch of the present proceedings by the City and by

8.2 The City in respect of the establishment of the Second Erasmus Commission by the Premier.

[9] The MEC and the Premier submit that the City acted prematurely by instituting the present legal proceedings, in a manner which was inconsistent with the Constitution and the provisions of the Intergovernmental Relations Framework Act No. 13 of 2005 (the Framework Act).

[10] The Framework Act was enacted to fulfil the requirements of Section 41 (2) of the Constitution, which provides that an Act of Parliament must establish, or provide for, structures and institutions to promote and facilitate intergovernmental relations, and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. It is clear that Section 41 of the Constitution, seeks to promote co-operative government and inter-

governmental relations, between the different spheres of government which are defined in Section 40 of the Constitution, as the national, provincial and local spheres which are "distinctive, inter-dependent and inter-related".

[11] Section 41 (3) of the Constitution, provides that an organ of state involved in an intergovernmental dispute, must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies, before it approaches a court to resolve the dispute.

Section 41 (4) of the Constitution, then provides that if a court is not satisfied that the requirements of sub-section (3) have been met, it may refer a dispute back to the organs of state involved.

[12] The MEC and the Premier rely upon the provisions of Section 45 of the Framework Act, which provides that no government or organ of state, may institute judicial proceedings in order to settle an intergovernmental dispute, unless the dispute has been declared a formal intergovernmental dispute in terms of Section 41, and all efforts to settle the dispute in terms of this chapter were unsuccessful.

[13] In terms of Section 40 (1) (b) of the Framework Act, all organs of state must make every reasonable effort to settle intergovernmental disputes without resorting to judicial proceedings.

[14] It is common cause that the dispute between the City on the one hand and the Premier and MEC on the other hand, as to the lawfulness of the establishment of the Second Erasmus Commission, constitutes an intergovernmental dispute, as defined in the Framework Act and that the City did not take all of the steps provided for in the Framework Act, to settle the dispute before launching the present proceedings.

[15] Mr. Heunis, S.C., who appeared for the Premier and the MEC, together with Mr. Arendse, S.C., M/s Bawa and Mr. Borgström, submitted that the provisions of the Framework Act and the Constitution in this regard were peremptory, and this Court did not have the power to condone non-compliance with Section 45 (1) of the Framework Act, with the result that the City contravened both its lawful obligations under the Constitution as well as the Framework Act.

Mr. Heunis submits that the discretion afforded to a court in terms of Section 41 (4) of the Constitution to refer a dispute back to the organs of state involved, only arises where there has been compliance with

the Framework Act, but the Court is of the view that further negotiation is required between the warring parties.

[16] The argument advanced in reply by Mr. Rogers, S.C. who appeared for the City, together with Mr. Binns-Ward, S.C. and M/s Mayosi was as follows:

16.1 It is not suggested that Section 41 (3) of the Constitution is not peremptory, nor that compliance with the Framework Act is unimportant.

16.2 Section 41 (3) of the Constitution only obliges an organ of state to make "every reasonable effort" to settle intergovernmental disputes by means of the mechanisms and procedures provided for that purpose, i.e. in the Framework Act.

16.3 Section 41 (4) of the Constitution is cast in discretionary terms. If a court is not satisfied that the requirements of Section 41 (3) have been met, the court "may" refer the dispute back to the organs of state. The necessary implication being that the court could on the other hand determine the dispute.

16.4 Section 45 (1) of the Framework Act, remains subject to Sections 41 (3) and (4) of the Constitution. If in all the circumstances of the case, it could not reasonably have been expected of the City to follow some, or any of the procedures of the Framework Act, Section

41 (3) of the Constitution is satisfied, and in terms of Section 41 (4) the court would not be entitled to decline to entertain the case.

[17] The provisions of the Framework Act must be construed consistently with the Constitution. Consequently, although Section 45 (1) of the Framework Act, is couched in peremptory language it has to be read consistently with the provisions of Section 41 (3) and (4) of the Constitution.

To disregard the provisions of Section 41 (4) of the Constitution, which vests in a court a discretion to hear a matter, even if not satisfied that the parties have made every reasonable effort to settle the dispute, would run counter to the provisions of Section 34 of the Constitution, which guarantees the right of the individual to have any dispute resolved by the application of law, decided in a fair public hearing before a court.

A limitation of this right by the provisions of Section 45 (1) of the Framework Act, would not be reasonable and justifiable in terms of Section36 (1) of the Constitution.

[18] In my view, Section 45 (1) of the Framework Act is therefore reasonably capable of being read in conformity with the provisions of Sections 41 (3) and (4) of the Constitution, without such an interpretation being unduly strained.

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2001 (1) SA 545 (CC) at 559, paragraphs 23 and 24

In my view, the discretion vested in a court by Section 41 (4) of the Constitution, is not limited in the way contended for by Mr. Heunis. What would the point be in vesting in a court a discretion to decline to hear a dispute, where it was clear that every reasonable effort had been made, albeit unsuccessfully, by the parties to settle it?

[19] What are the relevant facts which this Court must consider in exercising its discretion?

19.1 The City, represented by the Mayor, questioned the lawfulness of the conduct of the MEC in instituting an investigation in terms of Section 106 (1) (b) of the Systems Act, and the decision of the Premier to appoint the First Erasmus Commission. This was done at a meeting between the Mayor and the Premier held on 06 February 2008, at which the Mayor declared that the meeting was a formal contact in terms of Section 41 of the Constitution and the Framework Act.

Section 41 (2) provides that before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party. Mr. Rogers submits that this was what the Mayor was attempting to do at this meeting.

19.2 At this meeting the Mayor advised the Premier that if the proceedings of the First Erasmus Commission, were not stopped and she was advised by no later than 10 February 2008 that this would happen, she would approach the High Court for urgent relief.

19.3 This was followed by a letter dated 07 February 2008, which advised that the City had obtained advice from Senior Counsel that the establishment of the First Erasmus Commission, as well as the investigation in terms of Section 106 (1) (b) of the Systems Act, were unlawful.

19.4 The Premier then agreed to suspend the hearings of the First Erasmus Commission, until he was satisfied as to the lawfulness of the First Erasmus Commission. The MEC responded to the Mayor's letter, indicating that although he supported the suspension of the hearings, he perceived the conduct of the Mayor "as a blunt attempt to avoid further investigation into a matter of considerable seriousness for your own (political) motives".

19.5 The City then supplied the Premier with a copy of the papers drafted to challenge the lawfulness of the Commission and the investigation.

19.6 The Premier then indicated to the Mayor that he would obtain a preliminary evaluation of the evidence collected for the purposes of the First Erasmus Commission from the evidence leader, to decide whether proceeding with the Commission would be "an exercise in futility". If it was, he "would be inclined to abandon the Commission".

19.7 By proclamation dated 19 March 2008 the Second Erasmus Commission was established and the Premier had the following to say in his media statement "Clearly the Mayor of Cape Town is desperate that this Commission should not do its work. Our normally fearless Mayor is suddenly wanting to stop the Commission in its entirety".

As with many of the media statements issued by the main political protagonists during the course of this controversy, due allowance must be made for what can only be termed "political rhetoric".

19.8 On 08 April 2008 the present application was launched on the eve of the Second Erasmus Commission commencing its hearings.

[20] Mr. Heunis submits that it is quite clear that the City did not comply with the requirements of the Framework Act, nor Section 41

of the Constitution, as there was no contact by the City with either the Premier, or the MEC, before it launched the present proceedings.

[21] The answer of Mr. Rogers is that on the particular facts of this case, it was not reasonable to expect the City to have complied with the Framework Act for the following reasons:

21.1 The procedures contemplated in the Framework Act for dispute resolution are time consuming.

21.2 The Premier was most unlikely to abandon his course of conduct in relation to the Second Erasmus Commission, as he had established it in the face of a threatened challenge to the First Erasmus Commission, a challenge based *inter alia,* on disclosed grounds which remained applicable to the Second Erasmus Commission.

21.3 The proceedings of the Second Erasmus Commission were intended to resume without delay and it was to report to the Premier by 30 June 2008 and the City would have been denied effective redress, if it held back on legal proceedings while following the framework processes.

21.4 The prospects of the Premier agreeing to a further deferment of the Erasmus Commission proceedings were remote.

[22] The Premier and the MEC argue that these submissions constitute assumptions on the part of the City as to how they would react. The fact remains however, that despite the City furnishing to the MEC and the Premier, details of the legal grounds upon which the lawfulness of the Section 106 (1) (b) investigation and the First Erasmus Commission were challenged, in the form of the draft application papers, there was no attempt by the Premier to meet with the City before establishing the Second Erasmus Commission, to discuss any grievances the City may still hold in that regard.

22.1 In addition there was no attempt by the Premier to obtain additional information from the City, as to any of the concerns he may have held. As will become apparent later in this Judgment, this aspect is of importance in regard to a substantive challenge raised in relation to the lawfulness of the establishment of the Second Erasmus Commission.

[23] In my view, it would have been reasonable to expect the Premier to meet with the City, in an attempt to reduce the possibility of the conflict continuing. The fact that he did not and established the Second Erasmus Commission, without further reference to the City, lends credence to the City's contentions.

[24] I am of the view that in all of these circumstances, the City could not reasonably have been expected to take the steps envisaged in the Framework Act, before instituting the present proceedings. In the result, this Court has the power to entertain these proceedings in terms of Section 41 (4) of the Constitution.

[25] Turning to the challenge raised by the City that the conduct of the Premier in establishing the Second Erasmus Commission, was clearly calculated to give rise to a dispute. This conduct was contrary to the provisions of Section 40 (1) (a) of the Framework Act in terms of which the Premier was obliged to make every reasonable effort to avoid such a dispute. In failing to do so, he acted unlawfully, as compliance with Section 40 (1) (a) is a jurisdictional prerequisite for the exercise by organs of state of their powers when these impact on other organs of state. As a consequence his establishment of the Second Erasmus Commission was unlawful.

[26] Mr. Heunis submits that the challenge is really that the Premier should have known as a matter of fact when he established the Second Erasmus Commission, that a further dispute was inevitable, and he should have pre-emptively avoided that result.

[27] The Premier however states in his answering affidavit that he believed the Mayor and the City would co-operate with the

establishment of the Second Erasmus Commission, he was surprised at the Mayor's response, and believed the Mayor would be "pleased" at the widening of the Commission's term of reference, to include Chaaban's conduct.

[28] Mr. Rogers submits that the objective facts show that he could not conceivably have held such a belief, by reference *inter alia,* to the media statement of the Premier referred to above.

[29] Although it would have been reasonable for the Premier to meet with the representatives of the City to discuss any grievances, the City may still have held in regard to the establishment of a further Commission, this does not mean that the Premier's failure to do so, constitutes a breach of the provisions of Section 40 (1) (a) of the Framework Act.

Section 40 (1) (a) requires "every reasonable effort….to avoid intergovernmental disputes". Although a meeting with the representatives of the City would constitute "a reasonable effort" to avoid a dispute, it would still have to be proved that the Premier appreciated that the establishment of the Second Erasmus Commission would give rise to a dispute with the City.

[30] In the face of the Premier's statements of the belief he held as to the attitude of the Mayor and the City to the establishment of the Second Erasmus Commission, due regard being had to the said media statement, I cannot, on these papers, reject the Premier's assertion as "far fetched or clearly untenable"

Plascon Evans Paints Ltd. v van Riebeek Paints (Pty) Ltd. 1984 (3) SA 623 (A) at 635 C

[31] The establishment of the Second Erasmus Commission by the Premier was consequently not rendered unlawful, as a consequence of the alleged failure on his part to comply with the provisions of Section 40 (1) (a) of the Framework Act.

The substantive challenges raised as to the lawfulness of the MEC's decision in terms of section 106(1)(b) of the Systems Act to establish an investigation and the Premier's decision to establish the First and Second Erasmus Commissions

[32] Turning now to deal with the substantive challenges to the lawfulness of the MEC's decision, in terms of Section 106 (1) (b) of the Systems Act to establish an investigation, as well as the Premier's decisions to establish the First and thereafter the Second Erasmus Commissions.

[33] By way of Proclamation No. 4 of 2008 dated 19 March 2008, the Premier repealed Proclamation No. 18 of 2007 dated 04 December 2007, which established the First Erasmus Commission. On the same date in terms of Proclamation No. 5 of 2008, the Premier established the Second Erasmus Commission. The validity of Proclamation No. 4 of 2008 is not challenged.

[34] The First Erasmus Commission was therefore dissolved and ceased to have any legal existence, on the same date that the Second Erasmus Commission was established. As regards the investigation established by the MEC, although there is no mention in the papers that the MEC took any administrative steps to dissolve the investigation, it is clear it must have suffered the same fate as the First Erasmus Commission, for the following reasons:

34.1 The MEC, in his notice dated 27 November 2007 to the Mayor, stated that he had decided to proceed with an investigation in terms of Section 106 (1) (b) of the Systems Act and "was in the process of designating persons as members of the commission".

34.2 In the media statement released by the MEC dated 27 November 2007, he states that:

"The Section 106 investigation will take the form of a commission, which will be appointed by the Premier in terms of the Western Cape Provincial Commissions Act".

34.3 In Proclamation No. 18 of 2007 dated 04 December 2007, establishing the First Erasmus Commission, the Premier referred to the fact that the MEC had "designated the persons listed hereunder to conduct an investigation in terms of Section 106 (1) (b) ……" of the Systems Act and that the "investigation will be conducted in terms of the said Act" and then appointed the third, fourth and fifth respondents as members of "this commission" acting in terms of Section 1 of the Western Cape Provincial Commissions Act No. 10 of 1998.

34.4 The Second Erasmus Commission comprised the same commissioners with the same terms of reference, albeit with additions.

34.5 Mr. Heunis submitted that the MEC's investigation under Section 106 (1) (b) was superseded and replaced by the First Erasmus Commission.

[35] The City and the DA both seek orders declaring that the decisions of the MEC and the Premier, respectively establishing the Section 106 investigation and the First Erasmus Commission, are inconsistent with the Constitution and invalid. In the alternative, orders are sought reviewing and setting aside these decisions.

The reasons advanced for this are that the Premier's proclamations of 19 March 2008 are premised on the validity of the First Erasmus Commission, i.e. disestablishment presupposes prior lawful establishment. In addition, the new proclamation makes provision for the actions of the First Commission to be deemed to have been done in accordance with the proclamation of the 19 March 2008, and the lawfulness of the First Commission is relevant to this deeming provision.

[36] The Premier and the MEC in terms of a conditional counter-application, seek an order declaring that the First Erasmus Commission was lawfully established, in the event that an order is granted in favour of the City declaring unlawful, or setting aside, the establishment of the Second Erasmus Commission.

[37] The power of this Court to grant in its discretion a declaratory order lies in the provisions of Section 19 (1) (a) (iii) of the Supreme Court Act No. 59 of 1959. This Section provides that a division of the High Court, may in its discretion and at the instance of any interested person, enquire into, and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim relief consequent upon the determination.

[38] In the exercise of its discretion, the court may decline to deal with a matter where there is no actual dispute. This does not mean that there must be a dispute before a court will exercise its discretion, but it is essential that there be an interested party upon whom the declaration will be binding.

Ex Parte Nell 1963 (1) SA 754 (A) at 759 H - 760 C

[39] The declaration must relate to a right or obligation which can be existing, *in futuro* or contingent. The word "contingent" is used in the sense of "not vested".

Lawson & Kirk (Pty) Ltd. v Phil Morkel Ltd.
1953 (3) SA 324 (A)

[40] Any right on the part of the City and the DA, to challenge the validity of the provision in the new proclamation deeming the actions of the First Commission, to have been done in accordance with such proclamation, does not in my view, for reasons I will set out below, depend for its resolution upon a determination of whether the First Commission was lawfully established, or not.

40.1 In addition I do not agree that disestablishment of the First Commission, presupposes its prior lawful establishment. The lawfulness of the establishment of the First Erasmus Commission, is

not a prerequisite to the validity or lawfulness of its disestablishment, particularly where the validity of the proclamation which disestablished it, is not challenged.

[41] Any contingent right on the part of the Premier and the MEC, to declare the establishment of the First Erasmus Commission valid, depends upon the outcome of the challenge made to the establishment of the Second Erasmus Commission.

[42] In the light of the conclusion I have reached as to the validity of the Second Erasmus Commission and the ground for that conclusion, I do not agree with the submission of Mr. Heunis, that a legitimate objective of the conditional counter-application to declare the First Erasmus Commission lawful, would be to enable the Premier to "reactivate" the First Erasmus Commission and thereby prevent further litigation.

I agree with the answer of Mr. Rogers that the MEC would have to take a fresh decision in terms of Section 106 (1) (b), and the Premier would have to take a fresh decision to establish a new commission, on the facts known to them at that time. The facts disclosed in this application, as well as our conclusion in regard to the validity of the Second Erasmus Commission and our reasons for that conclusion,

would have to be considered by both of them before taking any decision.

[43] Consequently, in my view, this Court, for the above reasons, should not in the exercise of its discretion, entertain the respective claims of the parties to determine the lawfulness, or otherwise, of the First Erasmus Commission, on the ground that there is no actual, or live dispute, before us in this regard.

[44] A determination of the validity of the following provision contained in Proclamation No. 5 of 2008, which established the Second Erasmus Commission. "The Commission of Inquiry established by Proclamation 18 of 2007 published in the Provincial Gazette 6485 on 04 December 2007, which was repealed by Proclamation 4/2008, shall be deemed to have been established in terms of this Proclamation and everything done by that Commission or under its auspices shall be deemed to have been done in accordance with this Proclamation" does not depend upon a determination of the validity of the First Erasmus Commission, for the following reasons:

44.1 There is a strong presumption in South African law that legislation is not intended to operate with retrospective effect, or in such a manner as to interfere with existing rights and liberties. This presumption applies equally to legislation that authorises administrative action

Baxter – Administrative Law – page 355

44.2 The Premier's authority to establish commissions of inquiry is found in Section 127 (2) (a) of the Constitution and Section 1 (1) (a) of the Western Cape Provincial Commissions Act 10 of 1998. No authority is granted to the Premier in either the Constitution or the Act, to establish a commission of inquiry with retrospective effect.

44.3 In repealing the proclamation which established the First Erasmus Commission, by means of Proclamation No. 4 of 2008, and on the same date by way of Proclamation No. 5 of 2008, establishing the Second Erasmus Commission, which deemed the First Erasmus Commission to have been established in terms of Proclamation No. 5 of 2008, the Premier clearly purported to re-establish the First Erasmus Commission with retrospective effect. This the Premier was clearly not entitled to do.

44.4 As regards the declaration that "everything done by that Commission or under is auspices shall be deemed to have been done in accordance with this proclamation". In the light of the conclusion that the First Erasmus Commission could not validly be re-established by Proclamation No. 5 of 2008, I find it difficult to see how such a declaration can possess a validity independently of the First Erasmus Commission itself.

44.5 In any event, in the context of the challenge raised by the City at the time, that the First Erasmus Commission was unlawful, it is clear that the object of the declaration was to alter, with retrospective effect, rights which arose as a consequence of the establishment of the First Erasmus Commission. Express, or clearly implied authority, is necessary if a public authority wishes to take action which alters legal relations with retrospective effect.

Baxter supra at page 355.

It is clear that such authority was not possessed by the Premier.

[45] In purporting to do so, the Premier acted *ultra vires* his powers, with the result that such declarations fall to be set aside. However the nature of the evidence relied upon by the Premier in establishing the First Erasmus Commission, its reconsideration by the Premier in establishing the Second Erasmus Commission, and its relevance to the challenge raised in respect of the Second Erasmus Commission will be considered later in this Judgment.

[46] Turning to the challenges mounted by the City and the DA against the lawfulness of the Second Erasmus Commission, they are as follows:

46.1 The Premier does not possess an independent power to appoint a commission to investigate the affairs of a municipality. His power is restricted to the appointment of a commission in terms of Section 106 (2) of the Systems Act, as an adjunct to the appointment of investigators by the MEC in terms of Section 106 (1) (b) of the Systems Act.

46.2 The Premier's decision to appoint the Second Erasmus Commission is vitiated on the constitutional principle of legality, as a result of bad faith and an ulterior motive on the part of the Premier. It is alleged that the Premier did not hold the honest belief that a commission was warranted for any lawful purpose, and his intention was to use the commission for the ulterior and improper purpose of attempting to embarrass, or discredit, political opponents.

46.3 The appointment of Judge Erasmus, as a serving Judge, to chair the Second Erasmus Commission was incompatible with the separation of powers ordained in the Constitution and therefore unlawful and invalid.

Does the Premier possess a power to appoint a commission to investigate the affairs of a municipality independently of the provisions of section 106(2) of the Systems Act?

[47] Dealing firstly with the Premier's power to appoint a commission to investigate the affairs of a municipality. The issue is whether the

Premier's only power is that contemplated in Section 106 (2) of the Systems Act, as contended for by the City and the DA, or whether the Premier's power is "untrammelled" as contended for by the Premier and the MEC.

Should the power of the Premier be limited in such a manner, then the Premier would not have possessed the power to appoint the Second Erasmus Commission, as he did not act in terms of Section 106 (2) of the Systems Act when doing so. In such event the Second Erasmus Commission falls to be set aside as unlawful.

[48] The countervailing arguments advanced before us in this regard are comprehensive and detailed. Consequently, a proper resolution of this issue requires that they be fully set out in this Judgment to facilitate their proper consideration. The argument advanced by the City and the DA is as follows:

48.1 The Constitution establishes and recognizes differing spheres of responsibility for national, provincial and local government. A province has the duty in terms of Chapter 3 of the Constitution to:

48.1.1 Respect the status, powers and functions of local government (Section 41 (1) (e)).

48.1.2 Not to assume any powers or functions except those conferred by the Constitution (Section 41(1) (f)).

48.1.3 To exercise its functions in such a manner as not to encroach on the functional or institutional integrity of local government (Section 41 (1) (g)).

48.1.4 To co-operate with local government institutions in mutual trust and good faith (Section 41 (1) (h)).

48.2 These duties are reinforced by Section 3 of the Systems Act which states that the provincial government must exercise its executive and legislative activities in a manner that does not compromise or impede a municipality's ability, or right to exercise its executive and legislative authority. In terms of Section 52 (1) of the Constitution of the Western Cape No. 1 of 1998, the ability or right of a municipality to exercise its powers, or perform its functions, may not be compromised, or impeded.

48.3 The very different nature of local government in the new constitutional order was recognised by the Constitutional Court in the case of

City of Cape Town & another v Robertson & another
2005 (2) SA 323 (CC) at paragraphs 53 - 60

where it was noted that municipalities previously were creatures of statute and enjoyed only delegated or subordinate legislative powers, derived exclusively from ordinances or Acts of Parliament.

In the new constitutional era local government exercises original powers under the Constitution which includes original legislation and executive authority. The Constitution expressly precludes the national or provincial government, from impeding the proper exercise of powers and functions of municipalities. A municipality has the right to govern the local government affairs of its area and community.

48.4 The executive authority of provinces is set out in Section 125 of the Constitution. One of these powers is to perform any other function assigned to the provincial executive, in terms of the Constitution or national legislation. (Section 125 (2) (g)). The assignment of functions to provinces in respect of local government in accordance with this section is found in Section 139 which is headed "Provincial Intervention in local government".

48.5 Section 139 authorises intervention where a municipality cannot, or does not fulfil an executive obligation in terms of the Constitution or legislation (Section 139 (1)) or cannot or does not fulfil an obligation in terms of the Constitution or legislation, to approve a budget or other necessary revenue-raising measures (Section 139 (4)) or is, as a result of a financial crisis, in serious and persistent

breach of its obligation to provide basic services, or to meet its financial obligations (Section 139 (5)).

48.6 The Constitutional Court in

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996
1996 (4) SA 744 (CC) at paragraph 370
(the Certification Judgment)

stated that the provincial "supervisory" function in respect of local government was "fully captured" in Section 139.

48.7 In terms of Section 151 (3) of the Constitution a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation. In terms of Section 151 (4) the national and provincial government may not compromise, or impede the municipality's ability, or right to exercise its powers, or perform its functions. It is submitted that the Erasmus Commission will impede the City's ability or rights in this regard as senior officials will be taken away from their municipal duties.

48.8 In terms of Section 155 (6) (a) of the Constitution provinces must "by legislative or other measures" provide for the monitoring and support of local government. Sections 105 and 106 of the Systems

Act, are aimed at facilitating such monitoring *inter alia*, with a view to assessing possible intervention under Section 139 of the Constitution. It is submitted that the Erasmus Commission cannot be justified as part of the Western Cape Provincial Government "support" and "monitoring" function in terms of this Section for the following reasons:

48.8.1 What the provincial government must do is to make provision for monitoring and support, such provision to be contained in "legislative or other measures". The establishment by proclamation of an *ad hoc* commission of enquiry to investigate specific matters in a particular municipality is not a "legislative or other measure" contemplated in Section 155 (6) (a). The proclamation establishing such a commission is not an enactment or measure providing for the monitoring or support of local government in the province.

48.8.2 What the legislature had in mind is reflected in Section 105 (1) of the Systems Act, which states that the MEC for local government, being the representative of the executive component of the provincial government in relation to local government matters, must establish "mechanisms, processes and procedures in terms of Section 155 (6) of the Constitution" for monitoring municipalities. It is submitted that what is envisaged are measures of general application which make provision for ongoing monitoring of municipal performance in the province.

48.8.3 The MEC, when exercising powers in terms of Section 105 (3) may make reasonable requests to municipalities for additional information, after taking into account *inter alia* the administrative burden on municipalities to furnish the information and the cost involved. It is submitted that this shows the process of monitoring was intended to be as non-intrusive as reasonably possible.

48.8.4 The power of "monitoring" was said by the Constitutional Court in the First Certification case ***supra*** at paragraph 372, to be antecedent to "support" and "supervision" and was stated to correspond with "observe" or "to keep under review". The monitoring power was said not to be a substantial power in itself which did not bestow additional or residual powers of provincial intrusion "beyond perhaps the power to measure or test at intervals [local government] compliance with national and provincial legislative directives or with the [constitution] itself" (paragraph 373). The Constitutional Court referred to the lawmakers concern for the autonomy and integrity of local government and the mandating of a "hands-off relationship" as between the province and the municipalities in its area.

48.9 It is submitted that the establishment by the Premier of an *ad hoc* commission to investigate specific acts in a particular municipality, is neither an act of monitoring by the "provincial government" nor is it a legislative or other measure which itself makes

provision for monitoring, nor is it the sort of "observation" and non-intrusive form of monitoring as referred to in the First Certification case.

48.10 In addition, the power of the provincial government in terms of Section 155 (7) of the Constitution to "see to the effective performance" by municipalities of their functions, has to be exercised in a specific way "by regulating the exercise by municipalities of their executive authority referred to in Section 156 (1)". Again it is submitted that the establishment of an *ad hoc* commission into specific conduct at a particular municipality is not an act whereby the Premier "regulates" the exercise by municipalities of their executive authority. Regulation is forward-looking and does not include an investigation into past suspected misconduct.

48.11 As regards Section 154 (1) of the Constitution which provides that the national government and provincial government must by legislative and other measures support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions, it is submitted that the establishment of a provincial commission is neither a legislative or other measure, by which the capacity of municipalities to achieve these objectives is supported and strengthened.

48.12 It is submitted that what Sections 154 (1), 155 (6) and 155 (7) have in mind is legislation or measures of general application, forward-looking, by which municipalities in general in the province

may be supported and strengthened. They do not contemplate *ad hoc* enquiries into specific past events at a single municipality.

48.13 As regards Section 106 (1) (b) of the Systems Act, the MEC is only entitled to appoint investigators if he has a reasonable belief of suspected misconduct of the requisite severity, coupled with a genuine belief that the appointment of investigators is necessary.

48.14 The question of whether there was reason to believe has to be assessed objectively and the MEC's belief has to be rational or reasonable. The term "serious malpractice" must be interpreted in the light of the preceding words "maladministration, fraud, corruption". This means wrongdoing of some severity which typically connotes dishonesty, impropriety, and perhaps breach of a fiduciary duty.

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48.15 It is submitted that the restrictions imposed upon the MEC by Section 106 (1) are consistent with the constitutional autonomy of municipalities. An enquiry into a municipality's affairs by investigators enjoying commission powers is a potentially serious invasion of the municipality's constitutional autonomy.

The appointment of investigators may create intergovernmental conflict as in the present case. The Legislature did not intend the MEC to have a free hand. He should be entitled to investigate only in cases of serious misconduct and on objectively reasonable grounds.

48.16 The obligation imposed on the MEC by Section 106 (3) to submit a written statement to the National Council of Provinces, motivating his action, is an indication of the serious light in which the legislature viewed such intervention by the MEC and its desire to subject his actions to a measure of hierarchical scrutiny and oversight.

48.17 Where the MEC has validly appointed investigators under Section 106 (1) (b), the investigators can then be constituted as a commission under Section 106 (2). This contemplates and requires a decision by the Premier to appoint the investigators as a commission.

Minister of Local Government, Housing and Traditional Affairs (KwaZulu Natal) v Umlambo Trading 29 CC and others 2008 (1) SA 396 (SCA)

48.18 It is submitted that Section 106 (2) as interpreted in Umlambo's case ***supra,*** is the source of a Premier's power to invoke provincial commissions' legislation to establish a commission to enquire into municipal affairs. But for Section 106 (2) the use of the commission- appointing power for that purpose would offend the constitutional autonomy of the municipality.

48.19 The contention of the Premier and the MEC that no commission appointing power is to be found in Section 106 (2) and that Umlambo's case ***supra*** held that Section 106 (2) does not apply when provincial commission legislation exists is disputed on the following grounds:

48.19.1 All that was held in Umlambo's case was that the "applicable provincial legislation" in Section 106 (2) is provincial commission legislation and where there is provincial commission legislation the same applies without the modification implied by the words "with the necessary changes as the context may require".

48.19.2 It is implicit in Section 106 (2) that when investigators have been appointed under Section 106 (1) (b) they may, in terms of Section 106 (2) be vested with commission's powers under provincial commissions' legislation (if any) or under national legislation.

48.19.3 It is a necessary implication in Section 106 (2) as interpreted in Umlambo's case, that the Premier has the power to use provincial commissions legislation, to constitute investigators appointed by the MEC under Section 106 (b) as a commission of enquiry. Section 106 (2) sanctions the use of the provincial commissions

legislation, for a purpose which would not outside of the confines of Section 106 (2) be lawful and constitutional.

48.19.4 The Court in Umlambo's case was not required to consider a case where the commission appointing power was exercised independently of a Section 106 decision by the MEC. Umlambo's case was the converse. A Section 106 decision had been taken by the MEC without an accompanying decision by the Premier to appoint the investigators as commissioners.

48.20 If the Premier possessed an independent power to appoint a commission to enquire into a municipality's affairs, it would give rise to an absurdity. In such a case the MEC would never have to form the reasonable opinion required by Section 106 (1) and his involvement would be rendered entirely unnecessary. The statutory requirements carefully formulated in Section 106 (1) to limit undue intrusion into municipal affairs would become a dead letter. Whether the MEC had acted reasonably or not, would be irrelevant as the Premier would be entitled to say that he enjoyed an independent power to appoint the commission, which was not dependent for its validity on anything done by the MEC.

48.21 In addition the Legislature's intention that such intervention should be the subject of a motivated report to the National Council of Provinces would be frustrated.

48.22 The submission by the MEC and the Premier that the provisions of Section 106 (2) of the Systems Act cannot be construed as limiting the circumstances in which the Premier can appoint commissions under Section 127 (2) (e) of the Constitution, because the Systems Act as national legislation is subservient to the Constitution and must be interpreted in the light of the Constitution and not *vice versa*, is responded to as follows:

48.22.1 Although all legislation must be interpreted in the light of the Constitution, it is equally true that provisions within the Constitution must be interpreted in the light of other provisions contained in the Constitution. Such provisions include Chapter 3, dealing with co-operative government and Chapter 7, dealing with local government. These Chapters envisage a special role for local government, and contemplate national legislation to give effect to their provisions.

48.22.2 The Systems Act is part of a suite of legislation giving effect, *inter alia* to Chapter 7 of the Constitution.

Democratic Alliance and Another v Masondo NO and another 2003 (2) SA 413 (CC) paragraphs 12 and 59

The Systems Act is not "ordinary legislation" but legislation specifically authorised by the Constitution in order to give effect to its provisions.

48.22.3 Although Section 127 (2) (e) of the Constitution states that the Premier of a Province has the "responsibility for appointing provincial commissions", there is no reason to suppose that the responsibility was intended by the framers of the Constitution to be untrammelled and incapable of restriction by reference to other provisions of the Constitution and by national legislation, authorised by the Constitution. There was therefore no reason why Section 106 of the Systems Act, should not be construed as confining the circumstances in which a provincial commission can be appointed into municipal affairs. The alternative is that Section 106 of the Systems Act effectively becomes a dead letter, which is not consistent with the Constitution.

48.22.4 In addition, there is an important difference between the Premier's responsibility under Section 127 (2) (e) of the Constitution and the coercive powers which he has to appoint commissions under the Western Cape Commissions Act. The Premier's responsibility/power under Section 127 (2) (e) of the Constitution, in the absence of provincial legislation, would simply be a power to engage commissioners to advise him, as it is not accompanied by any coercive trappings. Such commissioners would have no powers to *subpoena* witnesses, compel the production of documents, nor

would the Premier have any power to make regulations regarding the commission.

48.22.5 The Western Cape Commissions Act is the exclusive source of the Premier's power to appoint coercive commissions. In the present case, the Erasmus Commission was established with coercive powers under the Western Cape Commissions Act. It is such provincial commissions legislation which Section 106 of the Systems Act has in mind. When Section 106 was enacted, the Premiers of the provinces already possessed their commission-appointing responsibilities, under Section 127 (2) (e) of the Constitution. Section 106 (2) of the Systems Act was not concerned with that pre-existing constitutional responsibility, but with provincial commissions legislation, which might or might not exist.

48.22.6 Accordingly, the question is not whether Section 106 of the Systems Act limits the powers of the Premier under Section 127 (2) (e) of the Constitution , but whether it limits his right to invoke provincial commissions legislation. The contest is not between the Systems Act and the Constitution, but between the Systems Act and provincial legislation. The Systems Act is higher in hierarchy and therefore prevails.

48.23 The City and the DA therefore submit that for the above reasons the Premier did not have the independent power to establish the Second Erasmus Commission.

[49] Turning to the countervailing argument of the Premier and the MEC.

49.1 A Premier's power to appoint commissions of inquiry derives entirely from the Constitution itself in the form of Section 127 (2).

49.2 The Premier's authority to establish a commission is confirmed but not enhanced by the fact that the Constitution of the Western Cape No. 1 of 1998 also provides that the Premier is responsible for "appointing commissions of inquiry".

49.3 The Premier's constitutional authority is also confirmed but not enhanced by the Western Cape Commissions Act No. 10 of 1998 which provides that he or she may, by proclamation, "appoint a commission of inquiry".

49.4 The Commissions Act supplements the Premier's power to appoint a commission and the provisions of the Act apply *ex lege* once a commission is appointed by the Premier.

49.5 The Premier's sole authority to appoint commissions means that he or she is solely responsible for the manner in which he or she

exercises this power and individually accountable to the provincial legislature for the exercise of the power.

49.6 The powers of the Provincial Government of the Western Cape in relation to the City are not limited to those under Section 139 of the Constitution, and the City's autonomy is equally not untrammelled for the following reasons:

49.6.1 In terms of Section 151 (3) of the Constitution the City's right to govern is limited to "local government affairs". The ambit of these affairs is dealt with in Section 156 (1) of the Constitution read together with part B of Schedules 4 and 5. Issues of malperformance and maladministration are clearly not exclusive local government affairs. Nor is the investigation of malperformance and maladministration in a local government. These are pre-eminently legitimate tasks for a commission of inquiry.

49.6.2 It is submitted that there is no suggestion that the Commission's activities "compromise or impede a municipality's ability or right to exercise its powers or perform its functions" in accordance with Section 151 (4) of the Constitution.

49.6.3 In terms of Section 155 (6) (a) of the Constitution, the Provincial Government of the Western Cape is obligated to "provide for the monitoring and support of local government in the province through legislative or other measures". The power

is repeated in Section 54 (1) of the Western Cape Constitution.

49.6.4 In terms of Section 155 (7) of the Constitution the Provincial Government of the Western Cape has the "legislative and executive authority to see to the effective performance by municipalities of their functions in respect of [local government affairs] by regulating the exercise by municipalities of their executive authority referred to in Section 156 (1)". This power is also reflected in Section 54 (2) of the Western Cape Constitution.

[50] The Constitutional Court in the Certification Judgment ***supra*** at paragraph 42 held that the "ambit of provincial powers and functions in respect of [local government] is largely confined to the supervision, monitoring and support of municipalities". The power to "support" local government is "not insubstantial". The monitoring power is weaker in the sense that it is antecedent to the province's support function and does not allow the province to "control" local government affairs or to launch legislative interventions. It does, however, allow the province "to measure or test at intervals local government compliance with national and provincial legislative directives or with the new text itself" (at paragraph 373).

[51] The Constitutional Court in the Certification Judgment at paragraph 373 ***supra*** stated that the Constitution revealed a concern

for the autonomy and integrity of local government and prescribes a hands-off relationship between local government and other levels of government on the one hand, but on the other hand, acknowledges the requirement that higher levels of government monitor local government functioning and intervene where such functioning is deficient or defective, in a manner that compromises this autonomy. This is a necessary hands-on component of the relationship.

[52] One of the manners in which the Provincial Government of the Western Cape exercises its monitoring, support and oversight powers over the City, is by exercising powers under Section 106 (1) of the Systems Act. This provision empowers the MEC to question or investigate "maladministration, fraud, corruption or other serious malpractice". This is a clear indication that investigation of these issues constitutes a valid provincial function. This power does not however exhaust the provincial monitoring powers.

[53] The Commission also does not interfere in local government affairs because it merely collects information.

[54] There can be no suggestion that an investigation into maladministration, fraud or corruption is, in any abstract sense, an invasion of the hallowed terrain of local government.

[55] In the Umlambo case ***supra*** at paragraph 21, it was held that when an investigator appointed under Section 106 (1) (b), required the powers of *subpoena,* the only viable route open to the MEC was to approach the Premier, with a request to appoint a commission in terms of the Provincial Commissions Act.

[56] The submission by the City that the Premier's decision to institute a commission under his constitutional and statutory powers was "ancillary" to and dependent on, a valid exercise of the power of the MEC to hold an investigation under Section 106 (1) (b) of the Systems Act is incorrect. A lawful exercise of the MEC's statutory powers cannot present a "jurisdictional prerequisite" for a lawful exercise of the constitutional powers of the Premier, to institute a commission of inquiry into malperformance and maladministration of the City or any other municipality.

[57] The City's contention that the power of the Premier to appoint a commission to investigate the conduct of a municipality is located in Section 106 (2), as interpreted in the Umlambo case, is incorrect for the following reasons:

57.1 The decision in the Umlambo case confirms that Section 106 (2) does not apply when a Provincial Commissions Act exists. A commission set up in these circumstances is obviously informed by

the MEC's investigation, but is instituted by the Premier, applying his mind independently, in terms of his powers in Section 127 (2) (e) of the Constitution, Section 37 (2) (e) of the Western Cape Constitution and Section 1 (1) (a) of the Western Cape Commissions Act. Section 106 (2) does not separately empower the Premier to appoint commissions.

57.2 The Premier has almost untrammelled powers to appoint commissions of inquiry, quite independently of Section 106 of the Systems Act. This power to appoint commissions is not reduced or ousted, when a Section 106 (1) (b) investigation exists.

57.3 Section 106 of the Systems Act is not exhaustive of the Provincial Government of the Western Cape's oversight and support functions in terms of Sections 155 (6) and (7) of the Constitution, or of its ability to investigate fraud, corruption and maladministration or "other unlawful conduct" in a local government. There is no reason why the Premier could not institute a commission in the absence of an investigation by the MEC under Section 106 (1) (b).

57.4 The Premier has made it clear that the Commission is not a precursor to an intervention in the City's affairs in terms of Section 139 of the Constitution, which provision entitles the Provincial Government of the Western Cape in serious cases, to wholly or partially take over the administration of a municipality, or to appoint an administrator for these purposes.

[58] Having considered these opposing arguments, it seems to me, that the issue for determination is whether the object of the Legislature in enacting Section 106 of the Systems Act, was not only to define the circumstances in which the MEC could appoint investigators to enquire into the affairs of a municipality, but also the circumstances in which the Premier was entitled to appoint a commission, with coercive powers to enquire into the affairs of a municipality.

[59] In terms of Section 127 (1) of the Constitution the Premier "has the powers and functions entrusted to that office by the Constitution and any legislation". Section 127 (2) (e) of the Constitution provides that the Premier is "responsible" for appointing commissions of inquiry. Section 37 (2) of the Constitution of the Western Cape also provides that the Premier "is responsible for" appointing commissions of inquiry. Section 37 (1) of the Constitution of the Western Cape also provides that the Premier has the powers and functions entrusted to that office by the National Constitution, the Western Cape Constitution and any legislation.

[60] Section 1 of the Western Cape Provincial Commissions Act No. 10 of 1998, provides that the Premier may, by proclamation in the Official Gazette of the province, appoint a commission of inquiry, define its terms of reference and make regulations providing for procedure. Sections 2 - 9 apply to all commissions. The coercive

powers of *subpoena* etc. are contained in Section 3. This position is contrasted with the position applicable at national level. The President is responsible for appointing commissions of inquiry in terms of Section 84 (2) (f) of the Constitution. In terms of Section 1 (1) (a) of the Commissions Act No. 8 of 1947, if the President has established a commission of inquiry he may make the provisions of the Act applicable provided the investigation objectively relates to a matter of "public concern". Without making the provisions of the Commissions Act applicable, any such commission would not be possessed of any coercive powers.

[61] It was held in

President of RSA and others v SARFU and others2000 (1) SA 1 (CC) paragraphs 140 - 148 and 165 - 167

that the decision of the President to establish a commission of inquiry under Section 84 (2) of the Constitution did not constitute administrative action. As regards the second decision by the President to make the Commissions Act applicable and whether this also constituted administrative action, the issue was left open.

[62] It was held in the SARFU case that the term "public concern" must be a concern of members of the public which is widely shared (paragraph 175) and that this requirement was a significant limitation

on the power of the President to vest commissions with powers of coercion. It is an objective check justiciable by the courts and it was pointed out at paragraph 176 that

"Coercive powers of *subpoena* are generally reserved for courts. It is quite appropriate that, where the President is given the power to extend them to a commission investigating a matter, he or she may do so only where, viewed objectively, the matter to be investigated by the commission is one of public concern".

[63] Consequently, the President's power to vest commissions of inquiry with coercive powers is limited, whereas the Premier's power is not.

[64] In ascertaining the effect of Section 106 (2), upon the power of the Premier to appoint a commission of inquiry with coercive powers to investigate the affairs of a municipality in terms of the Western Cape Commissions Act, read with Section 127 (2) (e) of the Constitution, and Section 37 (2) of the Constitution of the Western Cape, the object is to ascertain from the language employed the intention which the Legislature meant to express

Protective Mining & Industrial Equipment Systems v Audiolens 1987 (2) SA 961 (A) at 991 G

65.1 In ascertaining this intention, regard is to be had both to the language of the enactment and to the context, using this word in the wide sense. Among the factors which the court is justified in taking into account are the matter of the statute, its apparent scope and purpose, the history of the statute, with particular reference to the presumption against any further alteration of current law than that clearly conveyed by the statute under consideration

Audiolens supra at 991 G to 992 A and authorities there cited

65.2 Section 106(2) provides as follows

"In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act 1947 (Act No 8 of 1947) and the regulations made in terms of that Act apply with the necessary changes as the context may require, to an investigation in terms of subsection (1)(b)."

65.3 I do not agree with the submissions made on behalf of the Premier and the MEC, that the **Umlambo** case confirmed that this section does not apply when a Provincial Commissions Act exists. It is only in the absence of provincial legislation that the national legislation applies. If provincial legislation exists it applies.

Umlambo's case supra at page 400 F – 401 A.

[66] The background against which a statute was enacted and the object which the Legislature intended to obtain, are of great importance

Nedbank Limited v Norton
1987 (3) SA 619 (N) at 627 A

[67] The following background factors to the passing of the Systems Act and in particular Section 106 are, in my view, relevant:

67.1 In the preamble, the Act is said to be part of a suite of legislation that gives effect to the new system of local government.

67.2 The constitutional order of local government emphasised the autonomous nature of local government.

67.3 There was an obligation on the provinces to provide for the monitoring and support of local government by legislative or by other means in terms of Section 155 (6) (a) of the Constitution.

67.4 At the time the Systems Act came into operation on 01 March 2001, eight of the nine provinces in South Africa had legislation dealing with the appointment of commissions by the relevant Premier in terms of Section 127 (2) (e) of the Constitution.

Umlambo's case supra at page 400 footnote 1

At the time the Systems Act was assented to by the Legislature on 14 November 2007, the Western Cape Provincial Commissions Act was already in existence, having been assented to on 29 May 1998, with the date of commencement being 01 June 1998.

67.5 The provisions of the Western Cape Provincial Commissions Act must however be read subject to the provisions of the Systems Act in terms of the hierarchical structure of legislation.

67.6 The source of the Premier's power to appoint a commission of inquiry resides in Section 127 (2) (e) of the Constitution, but his power to appoint a commission with coercive powers resides in the Western Cape Provincial Commissions Act, in terms of which there is no restriction upon the vesting of coercive powers in the commissioners.

[68] The purpose, or object, of the Legislature must have been to pass legislation which struck a balance between the constitutional obligation imposed on the provinces to monitor local government in terms of Section 155 (6) (a) of the Constitution, and the circumstances under which the constitutional autonomy of local government could be impaired by way of an investigation or

commission, in which the commissioners were invested with coercive powers.

[69] The object of the Legislature must also have been to ensure that before investigators were invested with coercive powers, the requirements of Section 106 (1) were complied with. Such an objective would be consistent with:

69.1 The Constitutional Court's approval of the restraints placed upon the President's power to grant coercive powers to commissioners and

69.2 The absence of any restraint upon the Premier to grant coercive powers to commissioners in terms of the Western Cape Commissions Act.

[70] If the Premier was entitled to appoint a commission, in terms of the Western Cape Provincial Commissions Act with the automatic conferral of coercive powers, to investigate the affairs of a municipality without regard to the provisions of Section 106 (1), it would render these provisions superfluous. What would be the point in establishing such stringent requirements to be complied with by the MEC, whose concern is local government, when the Premier could ignore them by establishing a commission independently? It is a trite

principle of statutory interpretation that a statute should not be construed so as to render any part of it superfluous.

CIR v Golden Dumps (Pty) Limited
1993 (4) SA 110 (A) at 116 F - 117 B

[71] In my view, the intention of the Legislature in enacting Section 106 of the Systems Act was to make provision for the exercise by the Premier of his power to appoint a commission of inquiry in terms of the Western Cape Provincial Commissions Act, to investigate the affairs of a municipality.

I agree that Umlambo's case ***supra*** is authority for the proposition that the Premier has the power to use the provisions of the Western Cape Provincial Commissions Act to constitute investigators appointed by the MEC under Section 106 (1) (b) as a commission of inquiry with the coercive powers this implies. It did not however deal with the issue of whether this was the only source of the Premier's power to do so.

[72] This does not constitute an attempt to diminish the authority held by the Premier to appoint commissions of inquiry in terms of Section 127 (2) (e) of the Constitution, nor Section 37 (2) of the

Constitution of the Western Cape, as such authority does not encompass the authority to grant coercive powers to a commission.

[73] In so far as Section 106 limits the power of the Premier, in terms of the Western Cape Provincial Commissions Act, to appoint a commission to enquire into the affairs of a municipality, I regard this as a necessary implication from the wording of Section 106, because the very situation which the Section was designed to remedy was the uncontrolled investigation of the affairs of municipalities by the province

Nedbank case supra at 626 I

[74] Consequently, the Premier was not entitled to appoint the Second Erasmus Commission independently of and without reliance upon, Section 106 (2) of the Systems Act, as an adjunct to the appointment of investigators by the MEC, in terms of Section 106 (1) (b) of the Systems Act.

[75] A further argument advanced by Mr. Rogers on behalf of the City in this regard also has to be considered.

[76] It is submitted that a consideration of the legitimate purposes for which a provincial commission can be established, supports the conclusion that the Premier had no independent power to establish a commission to investigate the matters in question. The constitutional principle of legality requires that the decision to appoint the commission, must be rationally connected to the purpose for which the commission-appointing power was conferred.

[77] Although Sections 127 (2) (e) of the Constitution and Section 37 (2) (e) of the Western Cape Constitution, do not state the purpose for which the power was conferred, the purpose must have been to enable the Premier to decide whether or not to embark on a particular course of action. The commissions report must be one which could rationally result in some legitimate action by the Premier, or provincial government.

[78] The right of the Western Cape Provincial Government to intervene is confined to Section 139 of the Constitution and unless there was a plausible basis for supposing that the commissions report could culminate in lawful intervention under Section 139, there would be no rational connection between the exercise of the power and its purpose.

[79] Section 139 (1) provides that intervention is justified where a municipality "cannot or does not fulfil an executive obligation in terms of the Constitution or legislation" and is the only conceivable provision of this Section which could apply in this case. This Section is concerned with omission or inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased.

[80] It is submitted that Items 1 - 10 of the terms of reference of the Second Erasmus Commission constitute suspected positive misconduct and not any failure to perform an executive obligation. Moreover, the suspected positive misconduct is a past matter rather than continuing misconduct.

[81] It is therefore submitted that the establishment of the Second Erasmus Commission, based upon an exercise by the Premier of his powers in terms of Section 127 (2) (e) of the Constitution and Section 37 (2) (e) of the Western Cape Constitution, cannot be rationally justified as a precursor to intervention under Section 139, because this Section only authorises intervention in respect of ongoing omissions.

[82] It is submitted further that the reference to suspected misconduct in the form of possible criminal contraventions of the Corruption Act in items 9 and 10 of the terms of reference in the Second Erasmus Commission does not assist the Premier, because Section 139 of the Constitution, nor any other legislation, gives the provincial government any function in respect of criminal contraventions by a municipality or its officials.

[83] A reference to Sections 205 (3), 206 (3) and 206 (5) (a) of the Constitution, indicate that it is inconsistent with the constitutional role of the Police and the National Prosecuting Authority, that provincial commissions of enquiry be set up to investigate suspected crimes.

[84] The commission-appointing power of the Premier can only be used for legitimate purposes, which does not include the investigation of crime.

[85] The submission is therefore made that for these additional reasons the Premier did not possess a power independent of Section 106 (2) to establish the Second Erasmus Commission.

85.1 Put differently, as I understand the argument, if the Premier possesses a power to appoint a commission of inquiry to investigate the affairs of a municipality independently of Section 106, his conduct was not justified in the present case, because of the absence of a

rational connection between his decision and any envisaged action as a result thereof.

[86] Mr. Heunis submits that although the Premier has made it clear that the intention of the Commission has never been as a precursor to intervention under Section 139 of the Constitution, this does not mean there is no possible action which the provincial government can take, based upon the outcome of the commissions. He submits that the City may want to use the report to follow up on disciplinary action against particular councillors or officials, or the report may simply be handed to the City to decide what future action to take.

He submits that there is no need for the Premier to have a preconceived idea as to what he is going to do with the information in any report that is produced.

[87] Although these submissions are advanced in the context of the need for a rational connection between the information before the Premier and his decision to establish a commission, and not in answer to the present argument, it seems to me that the Premier's contentions are relevant in the present context.

[88] The contention of Mr. Heunis, as I understand it, is that the report does not have to be one which could rationally result in some

legitimate action by the Premier or the Provincial Government against the Municipality. In my view this cannot be so. When the constitutional autonomy of local government under the constitution is given proper weight, it is vital that there be a rational connection between the decision and some envisaged action to be taken as a consequence by the Premier or the provincial government, in respect of the particular municipality.

[89] When regard is had to the fact that any commission appointed by the Premier in terms of the Western Cape Provincial Commissions Act, is automatically vested with coercive powers, the principle of legality demands such a rational connection. In other words, before the Premier may lawfully decide to establish a commission with coercive powers to investigate the affairs of a municipality, the subject matter of the investigation must be of such a nature, that intervention by the Province in terms of Section 139 of the Constitution, could rationally result from the commissions report.

[90] This does not require that the Premier is obliged to predict the outcome of a commissions report. It simply demands that the subject matter to be investigated could rationally result in such intervention. The fact that the report in the end result does not justify such intervention, would not necessarily mean *ex post facto*, that no rational grounds existed at the outset to establish the commission.

[91] On such an approach, the investigation of criminal conduct by a commission could not be rationally justified, unless the nature of such suspected conduct was relevant to establishing conduct on the part of a municipality, as envisaged in Section 139 of the Constitution.

[92] In regard to the issue of the commission investigating possible criminal conduct, Mr. Heunis submits that:

92.1 The Commission will not usurp police investigative functions. The monitoring function of the province clearly includes an interest in the underlying conduct, not merely because such action may constitute a crime, but also because it affects governance.

92.2 In terms of Items 9, 10 and 11 of the Second Erasmus Commission terms of reference, the Commission is merely required to "advise" whether the provisions of the Prevention and Combating of Corrupt Activities Act 2004 have been breached. The Commission is not asked to make definitive findings and certainly not to institute criminal proceedings.

[93] In my view, the investigation of criminal conduct as a primary task by a commission of inquiry is inherently undesirable for the

reason that it leads to a blurring of the functions of the executive and the police. For reasons which I will deal with later in this judgment, the independence of the Police and the National Prosecuting Authority is a vital component in any democratic state.

[94] In my view therefore, and assuming contrary to the view I have expressed above, that the Premier possesses a power to appoint a commission of inquiry to investigate the affairs of a municipality independently of Section 106, the subject matter of the investigation must be of such a nature that intervention by the province in terms of Section 139 of the Constitution, could rationally result from the commissions report. On the facts of the present case, and regard being had to the terms of reference of the Second Erasmus Commission, such intervention could not rationally result from its report.

Is the Premier's appointment of the Second Erasmus Commission vitiated on the constitutional principle of legality, as a result of an ulterior motive on the part of the Premier?

[95] Consequently, even if the Premier possesses such an independent power, he was not entitled on the facts of this case, to appoint the Second Erasmus Commission.

[96] Turning to the challenge based upon the ground that the Premier's appointment of the Second Erasmus Commission is vitiated on the constitutional principle of legality, as a result of an ulterior motive on the part of the Premier.

[97] It is clear that the decision by the Premier to appoint the Second Erasmus Commission, does not constitute "administrative action" in terms of the Promotion of Administrative Justice Act No. 3 of 2000, because the definition in this Act expressly excludes the provincial executive powers contained in Section 127 of the Constitution. The decision therefore is not reviewable in terms of this Act.

[98] The decision by the Premier does however have to conform with the constitutional principle of legality. The principle is as stated in

Masethla v President of the RSA and another
2008 (1) SA 566 (C) at 594 paragraphs 79 - 81

The official must act within the law and in a manner consistent with the Constitution. He, or she, must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of

the power would, in effect, be arbitrary and at odds with the rule of law.

[99] The basis of the challenge is that the Premier did not hold the honest belief that the establishment of the Second Erasmus Commission was warranted for any lawful purpose and he had the intention to use the Commission for the ulterior and improper purpose, of attempting to embarrass or discredit political opponents.

[100] It is clear that if the Premier did not hold such an honest belief, and possessed the alleged ulterior and improper purpose, his decision would not be rationally related to the purpose for which the power was conferred and it would be arbitrary and unlawful. The decision would therefore fall to be set aside as unlawful.

[101] The crux of the matter therefore is the state of mind of the Premier when he decided to establish the Second Erasmus Commission. Did he honestly believe that its establishment was justified? Did he possess such an ulterior and improper purpose?

[102] Mr. Rogers submits that since the issue relates to state of mind, the factual conclusion must rest upon inferences being drawn from the objective facts. In such a case the value of oral evidence

and cross-examination in arriving at the truth should not be exaggerated, as the Premier would continue to deny the implication and the matter would essentially remain one of inference from objective facts.

[103] The response of Mr. Heunis is as follows:

103.1 In order to find an absence of an honest belief that the establishment of the Commission was warranted, this Court would first have to find that there were no objectively good reasons for the actions of the Premier.

103.2 If this were found to be so, this Court would then have to go further and find that not even the Premier subjectively believed that he had any good reasons.

103.3 Even if this Court were to find that some or even all of his concerns were wrong, there can be no justification for finding that the Premier did not subjectively believe he had any good reasons, particularly in the absence of oral evidence. This would require a factual finding that the Premier was positively motivated by some malice towards the City and would require a rejection of the Premier's factual assertions, that he was not biased and acted for what he believed were good reasons. To do so the Premier's assertions would have to be rejected as concocted.

103.4 As regards the issue of the hearing of oral evidence and the assertion that the Premier would simply continue to deny any bad faith, he submits that the fact remains that the Court has been deprived of the opportunity to hear evidence and make its own credibility findings.

[104] The fact remains however, that neither the City nor the DA have sought to refer the issue to oral evidence, and consequently any factual disputes must be resolved in accordance with the dicta in

Plascon-Evans Paints (Pty) Ltd. v Riebeek Paints (Pty) Limited 1984 (3) SA 623 (A) at 635 C

In this regard the City submits that the Premier's assertions are far-fetched or clearly untenable and may be rejected on this basis.

[105] What must be considered at the outset is the correct approach in drawing inferences on the evidence as to the Premier's state of mind.

[106] In this regard valuable guidance may be found in those decisions in the field of contract, dealing with what conduct constitutes fraud in the context of false representations, made by one party to the other. Certain dicta are particularly relevant in the context of determining the state of mind of a person who makes a false representation. I do not regard the use of such dicta in the present context as inappropriate, because they deal with the issue of drawing inferences as to an individual's state of mind, from the objective facts.

[107] As stated in

R v Myers 48 (1) SA 375 A at 383A

"absence of reasonable grounds for belief in the truth of what is stated may provide cogent evidence that there was in fact no such belief".

[108] The principle was followed in

Hamman v Moolman 1968 (4) SA 340 (A) at 347 A

where the following was stated:

"The fact that a belief is held to be not well founded may, of course, point to the absence of an honest belief but this fact must be weighed with all the relevant evidence in order to determine the existence or absence of an honest belief".

[109] The Premier has asserted that he was not biased and acted for what he believed were good reasons. The challenge by the City and the DA is that he did not hold such an honest belief. In other words, the Premier has misrepresented his own state of mind. In my view, the correct approach is as follows:

109.1 The enquiry is whether the evidence reveals reasonable (and therefore objective) grounds for a belief by the Premier, that he had good reason for establishing the Second Erasmus Commission. If it is found that none, or insufficient, reasonable grounds existed for holding such a belief, this may (considered together with all of the relevant evidence) point to the absence of an honest belief on the part of the Premier. As pointed out in Myer's case ***supra***, this may provide "cogent" evidence that the Premier did not hold such a belief.

109.2 The finding of an absence of an honest belief by the Premier in the reasons for establishing the Second Erasmus Commission, would then have to be considered together with all of the relevant evidence, to decide whether he, in addition, possessed the ulterior purpose of attempting to discredit or embarrass political opponents, by establishing the Second Erasmus Commission. However, a finding of an absence of an honest belief by the Premier, is not necessarily a prerequisite for finding that the Premier possessed an ulterior motive. If the evidence establishes the presence of such an

ulterior motive, this would constitute cogent evidence of the absence of an honest belief on the part of the Premier.

109.3 I therefore do not agree with the submission of Mr. Heunis that even if it is found that there were no reasonable grounds for the belief held by the Premier, a finding that the Premier did not subjectively hold such a belief would not be justified, in the absence of oral evidence, unless a factual finding could be made that the Premier was positively motivated by malice towards the City and his assertions that he believed he acted for good reasons, could be rejected as concocted. Such an approach ignores the fact that the absence of reasonable grounds for the professed belief, may in itself provide "cogent" evidence that the belief itself was not honestly held, without having to find that the Premier was motivated by malice towards the City. The issue of malice would be relevant to the issue, of whether the Premier possessed the ulterior purpose of discrediting, or embarrassing, political opponents.

[110] A further consideration which is relevant to the issue of whether the Premier possessed an honest belief that good reasons existed for the establishment of the Second Erasmus Commission, is the effect of any failure by the Premier to make enquiries to ascertain the true state of affairs. Again, although expressed in the context of false representations in the field of contract, dicta dealing with this

principle can, in my view, be applied in the present dispute, for the reason I have already given.

[111] In Myer's case ***supra***, Greenberg J.A., referring to Halsbury stated that a belief is not honest which:

"though in fact entertained by the representor may have been itself the outcome of a fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires, and is determined to, and afterwards does (in a sense) believe"

Myers case supra at page 382

[112] In examining the evidence relevant to the present enquiry, regard must be had not only to the information before the Premier at the time of the establishment of the Second Erasmus Commission of Inquiry, but also to the information before the MEC at the time of the initiation of the Section 106 (1) (b) investigation and before the Premier as to the establishment of the First Erasmus Commission of Inquiry. This is because the Premier states that this was the information that informed his decision to establish the Second Erasmus Commission of Inquiry. The fact that I have declined to examine the lawfulness of the MEC's Section 106 (1) (b) investigation and the lawfulness of the establishment of the First Erasmus

Commission of Inquiry, for the reasons set out above, can of course have no bearing on this aspect.

[113] I propose dealing at the outset with the issue of whether the Premier wilfully failed to make enquiries, to ascertain the true state of affairs, before establishing the First and thereafter the Second Erasmus Commission, and if so, whether any inference may as a result be drawn on the evidence of the presence or absence of an honest belief on his part, that good reasons existed for the establishment of the Second Erasmus Commission.

[114] Of relevance to this issue is the assertion by the Premier that the City was unco-operative in dealing with the concerns of the MEC and himself. The initial queries by the MEC in terms of Section 106 (1) (a) of the Systems Act were in writing dated 26 October 2007 and 14 November 2007. They were both directed at the City Manager. In respect of the letter dated 26 October 2007, the City Manager replied by letter dated 29 October 2007. The Speaker of the City also replied by way of his letter dated 01 November 2007, because the City Manager was unable to respond to certain of the queries raised, and referred them to the Speaker for reply. In my view, the queries raised by the MEC were fully and properly replied to by both the City Manager and the Speaker. The City Manager and the Speaker both stated that they trusted that they had fully answered the MEC's queries.

[115] The MEC then addressed the further query to the City Manager dated 14 November 2007. In the letter he did not express any reservations about the co-operation he was receiving from the City Manager, or the Speaker. The Premier however states that it appeared that the Speaker and the City Manager "did not intend to co-operate with the MEC". He also states that it was "clear" that the Speaker was "not willing to co-operate with the MEC". In my view there is no factual basis for such an assertion.

[116] The reply of the City Manager to the MEC's query is dated 21 November 2007. In my view he replied fully in a lengthy letter to the queries raised by the MEC. In his letter he also makes the following significant statement:

"I give you my further assurance that I am committed to resolve and address any corrupt or fraudulent activities or any maladministration that might have been committed (if any) in the procurement of and payment for services of George Fivaz & Associates (GFA)"

[117] There is no basis for any contention that the City was not prepared to co-operate. The response however, on 27 November 2007, was the decision by the MEC to establish the Section 106 (1) (b) investigation, with persons to be designated as members of a

commission, followed by the establishment of the First Erasmus Commission by the Premier on 04 December 2007.

The willingness of the City to co-operate is also illustrated by the fact that even after the announcement by the MEC of the appointment of a commission, the Acting City Manager wrote to the MEC on 29 November 2007, setting out further information and possible remedial steps he intended taking.

[118] As regards the establishment of the Second Erasmus Commission, the City had provided details of its challenge to the validity of the First Erasmus Commission and the Premier had responded by saying that he would obtain an evaluation of the evidence by the evidence leader of the information collected for the First Erasmus Commission. He added that if the evaluation of the evidence indicated an exercise in futility, he would be inclined to abandon the Commission.

[119] However, the most obvious source of information to re-evaluate the need for the establishment of a commission, namely the City, was ignored. It must have been patently obvious that the City had been given inadequate opportunity to address the concerns of the MEC and the Premier, before the First Erasmus Commission was established. There could be no concern that the Mayor would not co-operate in dealing with any queries, because as pointed out above, I

have accepted the Premier's assertion that he believed that the Mayor and the City would co-operate with the establishment of the Second Erasmus Commission, and the Mayor would be pleased at the widening of the Commission's terms of reference, to include the conduct of Chaaban. If the Premier believed that the Mayor would co-operate with the commission, then he must have believed that the Mayor would co-operate in dealing with any queries, the object of which would be to re-evaluate the need for such a commission.

[120] The fact that tension existed between the City and the Premier, as a consequence of the establishment of the First Erasmus Commission, compounded as it was by political animosity, in the light of the above was insufficient reason for maintaining the City would not co-operate.

[121] The enquiry at this stage is directed at determining what evidence the Premier had before him in regard to the concerns he had before establishing the Second Erasmus Commission. It then has to be decided whether the nature of the evidence was such as to lead to the inference that a failure to seek information from the City in regard to these concerns was wilful, and not merely negligent. This is so because a "wilful abstention" is required

Myer's case supra at page 382

The issue is whether such wilful abstention was motivated not only by a suspicion that enquiries might be an avenue to the truth, with the express purpose of not having any doubt thrown upon his concerns or beliefs, but also by the wish to embarrass political opponents. In addition, the enquiry is also directed at determining what facts would have been revealed to the Premier, by enquiries directed to the City and whether these facts should reasonably have allayed his concerns.

[122] The Premier annunciates his concerns, which appeared from the information before him, as follows:

122.1 The investigation which the City commissioned from George Fivas & Associates (GFA) was not tailored to suspected breaches of the Code for Councillors of the City by Chaaban, but was a sprawling investigation to investigate every aspect of Chaaban's personal life. This raised the reasonable suspicion that the true intention was to identify councillors who met with Chabaan and collect politically damaging information.

122.2 That unlawful surveillance methods were used in contravention of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (the “Communications Act”). This indicated that, at the very least, the investigation was not one in terms of the Code, which in terms of Item 14 (7) of the Code, was required to follow the rules of natural justice.

122.3 A reasonable suspicion existed that the City was paying for the investigation which was for the benefit of the DA.

122.4 The City did not follow the usual supply chain management process in appointing GFA and also paid for work performed before it was appointed. Invoices appeared to have been manipulated and the tasks performed by GFA broken up, so as to fall below any threshold which would have necessitated a more rigorous appointment process.

122.5 The urgent appointment and re-appointment of GFA was justified by the City Manager and the Speaker, on the basis that Chaaban posed a threat of "human injury or death" to the City's Mayor, Speaker and others, but this was not however addressed in the scope of GFA's initial quotation to the City, dated 01 June 2007. The City failed to report any threats to the SAPS, which was inconsistent with the City's own policies for the protection of councillors. The basis for the urgency of GFA's initial appointment therefore appeared fabricated.

122.6 The additional services offered by GFA both before and during the floor-crossing period, appeared to be a full scale surveillance project supposedly to protect the Mayor and the Speaker. The security of councillors should have been dealt with by the SAPS. However, the City ignored its own policies in this regard.

[123] The response of the City to these concerns is as follows:

123.1 As regards the concern raised in paragraph 122.1 ***supra,*** the City states that the quotations from GFA shows that it was GFA's view, as the investigative experts, that these sorts of enquiries were relevant to the issues which the Speaker wanted to investigate.

In the first quotation, the background investigation on Chaaban's business links etc., was specifically related to Chaaban's conduct concerning the bribing of politicians. In the second quotation, the investigation into Chaaban's connections, friends and financial resources, his influence in crime syndicates were linked to threats and intimidation by him against councillors and were aimed at ascertaining the credibility of the threats and Chaaban's ability to carry them out.

The City therefore submits that the investigation was directed at the legitimate concerns of the Speaker, and it was not for the Premier to dictate how the Speaker should go about his duties under Item 13 of the Code for Councillors.

123.2 As regards the concern that unlawful surveillance methods were being used, it is clear that before the Premier established the Second Erasmus Commission, he had access to the report of the evidence leader, which is erroneously referred to as an "interim report". I will in due course deal with the appropriateness of his receipt of

such evidence, but for present purposes the following is said at paragraph 11.3.8:

"I have found no evidence to date that 3rd party monitoring of conversations took [place] without the permission of one of the parties to the conversation"

The significance of this lies in the fact that the legality of the monitoring of telephonic and other communications between persons is governed by the Communications Act, which primarily regulates "third party monitoring" but the recording of a communication by one of the parties to a communication, is lawful unless such person is a law enforcement officer.

123.3 The City submits that there is no evidence in the Premier's affidavit, nor the so-called "interim report", that any other form of unlawful surveillance occurred. All that is stated by the Premier is that some of the surveillance equipment, found in the possession of an employee of GFA, one du Toit, "appeared to contravene legal requirements" but no further details of the legal requirements in question, nor the nature of the equipment, are furnished.

As regards the Premier's concern that such surveillance was in breach of a statutory duty to observe natural justice in accordance with Item 14 (7) of the Code, the City submits that:

123.3.1 The Premier has misunderstood the provisions of Item 14 (7) which states that an investigation "in terms of this item"

(Item 14) must be in accordance with the rules of natural justice. The investigation in question is one contemplated by Item 14 (1), i.e. an investigation by the council culminating in a finding, or an investigation by a council sub-committee, culminating in a recommendation to the council.

123.3.2 The investigation by the Speaker, which included a covert element, was conducted under Item 13 (1) (a). A provision corresponding with Item 14 (7) is noticeably absent. It is submitted that an Item 13 (1) (a) investigation is a preliminary fact finding exercise by the Speaker, to which the rules of natural justice do not apply, except to the limited extent encapsulated by Item 13 (1) (b), in terms of which the councillor in question must be given a reasonable opportunity to reply in writing regarding the alleged breach.

123.3.3 In terms of the Speaker's report, he conducted his investigation under Item 13 (1) (a). He afforded Chaaban the right of reply required by Item 13 (1) (b). The Speaker then referred the matter to the Council in terms of Item 13 (1) (c) for action in accordance with Item 14. It was in relation to that further process by the Council's disciplinary sub-committee that Item 14 (7) applied.

123.3.4 It is submitted that there is nothing unlawful about covert investigation pursuant to Item 13 (1) (a), because it may be that the only way for the Speaker to procure evidence of wrongdoing by the councillor is through such an investigation. It is submitted that ratepayers are entitled to be governed by councillors who observe a high standard of conduct, and the Speaker ought not to be unduly fettered in an investigation aimed at vindicating this public right.

123.4 The next concern is that the City was paying for an investigation which was for the benefit of the DA. The Speaker Smit alleged in his founding affidavit, that he gave the investigative instruction to GFA, which was not denied by the Premier in reply.

The City submits that this constituted performance by the Speaker of the obligation imposed upon the Speaker in terms of Item 13 (1) of the Code of Conduct for Councillors, being schedule 1 to the Systems Act. The Speaker was obliged to investigate Chaaban, if he held a reasonable suspicion that Chaaban had breached the Code. Smit held such a reasonable suspicion, because there was evidence from councillors that Chaaban was offering bribes and making threats, as part of a campaign to induce councillors to change political allegiance during the floor-crossing period. This would violate Item 2 of the Code, which required councillors to perform their functions in good faith, honestly, in a transparent manner and at all times to act in the

best interest of the municipality, and in such a way that the credibility and integrity of the municipality were not compromised.

123.5 The City also submits that a reference to paragraph 10.1.1 of the "interim report" reveals that Mr. Selfe of the DA, met with Mr. du Toit of GFA, on 04 June 2007 and asked whether there was any link to Mr. Chaaban in respect of a certain murder. The response as recorded in the "interim report" was as follows:

"According to Mr. Selfe when he put the question, Mr. du Toit quickly put him in his place and told him that he was not acting for the DA, but for the City and he could not give Mr. Selfe any information and they parted ways shortly thereafter. Upon listening to the recording of the meeting between Mr. Selfe and Mr. du Toit it appears that Mr. du Toit did inform Mr. Selfe that he could not give any feedback to Mr. Selfe as he is only meant to give feedback to Mr. Smit".

123.6 It is also noted in the interim report that

"Mr. du Toit would introduce himself to the people he will interview as an investigator from the Speaker's office".

123.7 The City submits that in the light of these facts, there could be no reasonable suspicion that the Speaker's engagement of GFA was a front for the DA. The fact that the DA was considering hiring GFA to investigate Chaaban before the City did so, was expected because the activities of Chaaban had also come to the attention of the DA, and were also of legitimate concern to the DA. There was nothing sinister in the fact that GFA was recommended to Smit, the

Speaker, by Selfe of the DA, or that the DA should have abandoned its own plans for an investigation when the Speaker decided (as he was statutorily obliged to do) to conduct his own investigation.

123.8 It appears that the concern of the MEC, and thereafter the Premier, that the client of GFA was a "party" and not the City was referred to by the MEC in his press statement of 27 November 2007, based on the GFA quotations. The Acting City Manager, in his letter dated 29 November 2007, referred to above, addressed to the MEC, stated that all of the quotes were addressed to a Mr. Barnie Botha, advisor to the Speaker, and were not addressed to any political party. He explained that GFA were first approached by the DA for a quote, which they furnished but the quote was not accepted. The first quote furnished thereafter to the City, he assumed was along similar lines to the quote furnished to the DA. Due to an administrative error on the part of GFA, the quote was not properly amended and still referred to a "party".

I23.9 In this context the Premier states that in considering the evidence "the penny finally dropped" that despite her remonstrations to the contrary, the Mayor may not have been removed from the process of appointing GFA. In other words, the Mayor acting with the interests of the DA at heart, in her capacity as its national leader.

123.10 The City states that this allegation is based upon statements by the Premier that the Mayor may have been involved in regular Monday morning meetings with GFA operatives, and that her telephone records indicated personal contact with GFA. It is submitted that the Premier's sources of this information appear to arise from information disclosed to him by Commissioner Petros, following raids on the home of du Toit of GFA and information contained in the "interim report".

123.11 The City submits that in regard to the information disclosed to the Premier by Commissioner Petros, the Premier does not say that any audio clips were played for him of discussions to which the Mayor was a party. He also does not say that Petros told him that there was evidence of such discussions, or evidence the Mayor had met with GFA operatives.

123.12 No mention is made in the "interim report" of any telephonic contact between the Mayor and du Toit of GFA. Van Heerden, of GFA's telephone records, apparently reflect a twenty four second contact on 13 June 2008. Nothing is said in the "interim report" as to the nature of this contact, which was several weeks after GFA had been appointed, and two days after GFA had submitted its first report.

The Mayor states that this was a call that she missed and that her cell phone records confirm no telephonic contact at all with du Toit until 04 October 2007, after he was arrested. This was also the first time

she spoke on the telephone with van Heerden. The first time she met du Toit and van Heerden was in August 2007.

123.13 The "interim report" contains no evidence of meetings between the Mayor and GFA operatives.

123.14 The next area of concern was that the City did not follow the usual supply chain management process in appointing GFA. The City's response is that as regards the issue that GFA was not on the City's list of approved suppliers, this was not apparent to anybody until it was raised in the "interim report". The GFA company which is on the City's list as an approved supplier, has a different registration number from the GFA company which submitted tax invoices to the City. Simply put, GFA's Mossel Bay Franchise submitted these invoices to the City. The GFA quotations and reports did not reflect a company number, and the City only realised when it was pointed out in the respondent's answering papers, that the company whose details appear on these invoices was not the approved company. It is submitted that this was an oversight which occurred in good faith.

123.15 The next concern of the Premier was that the City paid GFA for work performed before it was appointed. The City Manager addressed this concern of the MEC in his letter dated 21 November 2007, stating that he was seeking clarity from GFA and that the amount involved was R3,500.00. In his letter of 29 November 2007, the Acting City Manager annexed correspondence he had had with

GFA and stated that an option available to the City was to "initiate legal action against GFA if I conclude that they enjoyed unjustified enrichment in such amount". He undertook to advise the MEC of any decision he took in that regard.

123.16 The next concern of the Premier was that invoices from GFA appeared to be manipulated and the tasks to be performed by GFA, which related to a single investigation, were deliberately broken up into smaller amounts, to avoid topping any threshold which required greater scrutiny in the appointment of GFA.

123.16.1 The City denies this and points out that this was never raised as a concern by the MEC. The City Manager, in his letter dated 21 November 2007 to the MEC, dealt in detail with the quotations received from GFA, why he had approved payment of them and the deviations he had authorised in that regard.

123.16.2 Related to this issue, is an allegation that the cost centre which was to fund the appointment of GFA had insufficient funds. The City points out that the deviation approval documents, which were annexed to the City Manager's letter dated 21 November 2007 and sent to the MEC, show that there were surplus funds left after the requested approval for deviations, in order to pay the

quotes received from GFA. The City submits that the MEC and the Premier have misunderstood these documents, and instead of the MEC querying the supposed anomaly in these documents, by way of a further letter, the Premier's response was to establish the First Erasmus Commission.

123.17 Turning to the concern of the Premier that although the urgent appointment and re-appointment of GFA was justified by the City Manager and the Speaker, on the basis that Chaaban posed a threat of "human injury or death" to the City's Mayor, Speaker and others, this concern was not addressed in the initial quote from GFA to the City dated 01 June 2007. Because the City failed to report any threats to the SAPS, the basis for the initial appointment therefore appeared to be fabricated.

The response of the City is that the MEC had been given access by Commissioner Petros to the first GFA report, which stated in paragraph 1.1, that at GFA's first meeting with the Speaker on 31 May 2007, the issues raised were that Chaaban was approaching councillors with lucrative offers "and also intimidated as [*sic*] to remain silent about his actions" and that he had boasted about his connections in the Mafia. Paragraph 2.2 of the report recorded that the primary objectives of the first investigation had been *inter alia* to establish "who he has threatened should his plans or attempts to upset the floor-crossing in September comes to light". One of the conclusions of the first

investigation was that Chaaban had threatened councillors with assault.

As regards the alleged failure to report the matters to the SAPS, the City points out that:

123.17.1 On 25 June 2007, three weeks after the appointment of GFA, Van Heerden of GFA informed Superintendent Siegelaar that the City wished to lay a charge with the SAPS concerning Chaaban.

123.17.2 On 26 June 2007, Du Toit of GFA and acting on behalf of the Speaker, met with Superintendent Siegelaar and handed him a transcript and statements, asking Siegelaar to investigate.

123.17.3 The Speaker contacted Siegelaar to ascertain progress. On being told that nothing was being done, he asked Siegelaar to call at his office, which Siegelaar did.

123.17.4 At the meeting the Speaker insisted on being given a reference number for the investigation, even though Siegelaar claimed that there was not enough to justify charges.

123.17.5 On 11 July 2007, the Speaker attended at Cape Town Police Station with an attorney to lay charges, and handed additional statements to Siegelaar.

123.17.6 Frustrated at the lack of progress for more than eight months, the Speaker wrote to the National Minister of Police on 17 March 2008 about the matter.

123.18 It is submitted that the first time the issue was raised was in the departmental report of 27 November 2007, to the MEC on the day he decided to establish an investigation in terms of Section 106 (1) (b) of the Systems Act. The report merely stated "this raises the question whether the matter was reported to the SAPS and when".

123.19 The Mayor's public statement of 31 October 2007 was that charges had been laid and the Mayor complained of police inaction.

123.20 The next issue of concern to the Premier was that the additional services offered by GFA before and during the floor-crossing period, appeared to be a full scale surveillance project, supposedly to protect the Mayor and the Speaker. The security of councillors should have been dealt with by the SAPS. However, the City ignored its own policies in this regard.

123.20.1 The City's submissions in this regard are that the evidence before the MEC and therefore the Premier, was that GFA submitted a third quotation dated 20 August

2005, which provided that the City had requested GFA to submit a proposal for surveillance during the cross-over period and post cross-over period. The objective was to establish the movements and plans of Chaaban and to monitor his activities, keeping the security of individuals such as the Speaker and the Mayor in mind, and regarding it as their utmost priority. However, in the letter of the City Manager, referred to above, dated 21 November 2007 sent to the MEC, he referred to this quotation stating that he had authorised the necessary deviation and further appointment. However, he added the following - "I am led to believe by the Speaker's office that no further services have been rendered".

123.20.2 The City states that the statement by the City Manager is borne out by the fact that GFA produced no further report, submitted no further invoice and received no further payment. The City points out that the quotation indicates that the focus was to be on the risk Chaaban posed to the personal security of the Mayor and the Speaker.

123.21 A further concern of the Premier, which arose after the establishment of the First Erasmus Commission, but before the establishment of the Second Erasmus Commission, was the issue of possible financial inducements paid to Councillor Arendse in Cape Town, to resign from the Independent Democrats (ID) and to stand for the DA. He states that evidence arose that Arendse may have

been offered a position as a sub-council chair as an inducement to resign from the ID. A contract purportedly prepared by an attorney at the behest of the DA's provincial leadership was prepared for Councillor Arendse. The Mayor was aware of this corruption, which it appears she used as a basis to refuse to elevate Councillor Arendse to a sub-council chair, after he was elected as a DA Councillor. It is alleged the Mayor failed to report this corruption for almost a year and a half, and no investigation was undertaken to ascertain whether there had been a breach of the Code. The Mayor only did so to pre-empt the Erasmus Commission in order that she would not have to explain her failure to comply with her fiduciary duties. The Premier maintains that this incident illustrated that the Mayor and the DA, may have been complicit in the type of actions for which it condemned Chaaban.

123.21.1 The response of the Mayor is that after Arendse was elected as the DA candidate, he approached her with an agreement apparently signed by the DA's provincial chairperson, Kent Morkel, in which Arendse was promised a sub-council chair. She states she rejected this out of hand, believed the attempted corruption had been thwarted and nothing more needed to be done. However, when in February 2008 the disaffected Arendse and Morkel, began to speak publicly about their wrongdoing she concluded if they wanted a public ventilation of their behaviour, it would be best for this to

be dealt with by the courts, rather than a commission of inquiry, and she therefore laid a charge with the police.

123.22 A further concern of the Premier which again arose between the establishment of the First Erasmus Commission and the Second Erasmus Commission, was evidence of inducements being paid to councillors in George to secure their loyalty in the floor-crossing period. The Premier alleges that the information was that several dissatisfied DA councillors in George, had been held *incommunicado* in a resort near Wilderness, in order to prevent them from exercising their right to cross the floor. The Premier states that after they were released, they were each paid R15,000.00, supposedly as an unsolicited gift. The Premier states that this was patently not credible and the "gifts" were not reported by the councillors in terms of the Code as they should have been. A further concern was that GFA had been called in to determine the source of an SMS, distributed amongst councillors in George after the election of Alderman Zille as the leader of the DA.

123.22.1 The response of the DA to these concerns is that certain councillors in George, at their own initiative, chose to remove themselves from George during the 2007 floor-crossing window period, to escape what they contended was the remorseless pressure brought to bear on them to cross over. The time was spent work-shopping in seclusion at a resort outside George. They were subsequently each compensated and re-imbursed with an

amount of R15,000.00 for the two week exercise. The necessary declarations, it is alleged have been signed by the councillors concerned in respect of the remuneration received. The DA states that it has instituted a full investigation and if there is any evidence of criminal misconduct, the DA will refer the matter to the SAPS.

123.22.2 As regards the issue of the SMS and the retention of GFA to investigate this issue, the DA states that this issue relates to an SMS allegedly circulated by Councillor P. Hill of the City, at the National Congress of the DA in 2007, where the Mayor was elected as the National Leader of the DA. The SMS was seen as mischievous and there was doubt whether in fact it originated from Councillor Hill. Mr. Selfe of the DA states that Mr. Theuns Botha, the leader of the DA in the Western Cape, has confirmed that on his own initiative he requested Mr. van Heerden of GFA, to ascertain whether or not the SMS had been circulated by Councillor Hill. Neither the DA, nor the George Municipality, were responsible for this service of GFA, which was carried out as a favour to Botha. Selfe alleges that a telephone call by the Premier would have revealed the true state of affairs.

123.23 A consideration of the concerns of the Premier together with the responses of the City and the DA in my view, reveals that any concerns of the Premier should have been allayed if he had directed

the appropriate enquiries to the City and the DA, because their responses show that:

123.23.1 The nature and ambit of the investigation was determined by GFA as the experts.

123.23.2 The "interim report" indicated that no unlawful surveillance had occurred.

123.23.3 GFA was engaged by the City and the City was not paying for an investigation which was for the benefit of the DA.

123.23.4 The Mayor was not involved in appointing GFA, only had telephonic contact with the representatives of GFA on 04 October 2007 and only met representatives of GFA in August 2007.

123.23.5 There was nothing sinister in the appointment of GFA's Mossel Bay Franchise and not the GFA company which was an approved supplier and that this was caused by an administrative oversight.

123.23.6 There was nothing sinister in the payment of an amount of R3,500.00 to GFA for services rendered before being

appointed by the City, and that steps would be taken to recover this amount if payment was unjustified.

123.23.7 Invoices were not manipulated and the approved deviations resulted in sufficient funds being available to pay GFA.

123.23.8 The initial quote by GFA, as well as GFA's first report, dealt with the physical threat posed by Chaaban.

123.23.9 Chaaban's conduct had been reported to the SAPS.

123.23.10 The third quote by GFA, focused on the risk posed by Chaaban to the personal security of the Mayor, but no work was done by GFA in respect of this quote.

123.23.11 There was no need for the Speaker to observe natural justice in the investigation he conducted in terms of Item 13 (1) (a) of the Code.

123.23.12 The Mayor had laid criminal charges against Arendse and Morkel in connection with the election of Arendse, and the Premier was already in possession of the material facts, including the issue of any delay on the part of the Mayor in doing so.

123.23.13 The investigation by GFA of the so-called SMS allegedly sent by Councillor Hill, was not at the behest of the DA, or the George Municipality.

123.23.14 On the papers before me, there is no evidence to cast doubt upon the veracity of these responses. Consequently, in my view, as the responses deal directly and fully with the Premier's concerns, they should have been allayed by appropriate enquiries.

123.24 What I find to be of particular importance however (and leaving aside what the Premier could have established by making appropriate enquiries), is that before establishing the Second Erasmus Commission the Premier in fact had the following evidence before him:

123.24.1 The interim report which stated that there was no evidence of illegal third party monitoring of conversations, and contained clear evidence that GFA were conducting the investigation at the behest of the City and not the DA. In addition, the interim report contained no evidence of meetings between the Mayor and GFA operatives, nor any telephonic contact between the Mayor and GFA operatives.

123.24.2 The first quotation of GFA which made it clear that the ambit and nature of the investigation had been formulated by GFA.

123.24.3 The letter dated 29 November 2007, written by the Acting City Manager, which gave a clear and reasonable explanation as to the reference to a "party" in the quote by GFA. The issue of whether GFA was paid for services rendered before being appointed by the City and what could be done about it, was clearly and fully dealt with in the letter of the City Manager dated 21 November 2007. This letter also clearly explained the deviations which had been authorised in respect of the appointment of GFA, and that no services had been rendered by GFA in respect of the third quotation.

123.24.4 The first report of GFA which made it clear that the issue of intimidation and threats by Chaaban was one of the primary objectives of the first investigation, therefore justifying their urgent appointment.

123.24.5 The Mayor had made a public statement on 31 October 2007, stating that charges had been laid and complained of police inaction.

123.24.6 The Mayor had laid criminal charges against Morkel and Arendse, albeit that the Premier believed that this had

been done to pre-empt any investigation by a commission of inquiry.

123.24.7 The report and findings of the so-called "Jordaan Report". On 08 November 2007, the Mayor had appointed Advocate Jordaan, S.C. to investigate the following issues:

The appointment of GFA to investigate Chaaban.

Compliance by the City and/or councillors with the supply chain system in procuring the services of GFA.

The payment of GFA by the City.

The use of public funds for procuring the services of GFA.

Alleged payments by the City to GFA for services rendered by it to the DA.

123.24.8 Advocate Jordaan found no evidence of any wrongdoing by the City in respect of any of these issues, albeit that the Premier's view of this report was that his terms of reference were too narrow and he was not given access to sufficient information. The conclusion of the Premier was that this report was neither conclusive, nor the "final word" on the concerns arising from the investigation of

Councillor Chaaban and that further investigation was required.

[124] The evidence before the Premier was therefore of relevance and importance, and contrary to any beliefs or concerns he held in regard to:

124.1 The ambit and purpose of the investigation.

124.2 That the investigation was being carried out at the behest of the DA and not the City.

124.3 Payments made to GFA, deviations which had been authorised to pay them, as well as the need for their services.

124.4 The reporting of the matter to the SAPS.

[125] The evidence therefore cried out for further elucidation by the one source of such information, namely the City, by way of appropriate enquiries directed to the City on these issues, before the drastic step of appointing a commission of inquiry was taken.

[126] However, the issue of whether the Premier wilfully abstained from directing any enquiries to the City, in the light of this evidence,

has to be considered together with the further issues of whether he held the suspicion that to do so would result in doubt being thrown upon his beliefs, and whether he harboured the ulterior motive of embarrassing political opponents by establishing the Second Erasmus Commission. This is because all of these issues are linked, as they bear upon the one enquiry, namely whether the Premier possessed an honest belief that good reasons existed for establishing the Second Erasmus Commission.

This issue however, cannot be determined until the lawfulness of two of the Premier's main sources of information have been considered.

[127] I have made reference above to the so-called "interim report" which is in essence a detailed summary by the evidence leader of the First Erasmus Commission, of the evidence collected under the auspices of that Commission.

[128] This so-called "interim report" was furnished by the third respondent, Erasmus J. to the Premier, under cover of a letter dated 05 March 2008 which reads as follows:

"As Chairperson of the Commission, and in consultation with my fellow Commissioners, M/s Vermeulen and Mr. Papadakis, I have requested the evidence leader to prepare a progress report in which he sets out all the work done to date as well as provide a summary of evidence received to date. This I

have done in terms of the Commissioners' internal arrangements, as we are entitled to do. Advocate Petersen, the evidence leader, has now made that report available to me, and I now enclose under cover hereof a copy thereof for your perusal and records".

[129] In regard to this "interim report" the Premier stated the following:

"I must make it plain that I did not demand such an interim summary of the evidence, and did not seek any opinion on the information before the Commission. I accepted that such evidence could only be ascribed any probative value once it was tested in public hearings. I understood that the summary of evidence was a document prepared by the evidence leader primarily for his own use, to keep track of the burgeoning documentary evidence before the First Erasmus Commission, and that in any event the information had largely been made public".

[130] The City submits that in the light of the covering letter of Erasmus, J., together with the content and form of the report itself, as well as the history of how it came about that such a report was produced, the Premier's statement that he thought that the "summary of evidence was a document prepared by the evidence leader primarily for his own use" to keep track of documentary evidence is not the truth.

[131] The City submits that the evidence clearly establishes that the Premier solicited the report and it would not have been prepared if he had not asked for it on the following grounds:

131.1 On 07 February 2008 the Mayor wrote to the Premier initiating dispute resolution in respect of the City's attack on the validity of the First Erasmus Commission, and demanded that the proceedings be suspended pending this process.

131.2 On 11 February 2008 the Premier requested the First Erasmus Commission to postpone its hearings to allow him to take legal advice.

131.3 On the same day the Premier was reported in the press as follows:

"He said that though the Commission's public oral hearings had been suspended its other work including evaluating, gathering and pronouncing on evidence would continue. Based on what had already been done, there was room for an interim report, an issue he had raised with Erasmus. "He said it is possible" Rasool said".

The Premier did not dispute that this report was accurate.

131.4 In his letter dated 22 February 2008, sent to the Mayor, the Premier stated

"Hence, I have suggested that the Commission furnish us with a preliminary evaluation of the information at its disposal"

[132] In the light of the aforegoing it is quite clear that the "interim report" was prepared at the request of the Premier and could by no stretch of the imagination be regarded, even initially, as a summary of the evidence by the evidence leader for his own use.

[133] The City also submits that the Commission had no business in furnishing the "interim report" to the Premier, who had no right to ask for it in the first place on the following grounds:

133.1 Section 7 of the Western Cape Commissions Act provides that a provincial commission must report to the Premier in accordance with its terms of reference, or such further period as the Premier may grant. The Premier must make the report available to the provincial parliament. The First Erasmus Commission was obliged to submit its report by 31 January 2008, and only one report was contemplated.

133.2 The so-called "interim report" is not a report as contemplated in the Western Cape Commissions Act or the proclamation.

133.3 Paragraph 3 of the Regulations made by the Premier provides as follows

"Every person employed in the execution of the functions of the Commission, including any person appointed or designated to take down or record the proceedings of the Commission in writing or by mechanical means, or employed

to transcribe the record so taken down, must help preserve secrecy with regard to any matter or information that may come to his or her knowledge in the performance of his or her duties in connection with the said functions, except in so far as the publication of such matter or information is necessary for the purpose of the report of the Commission".

[134] It is quite clear that the so-called "interim report" was never intended to be a report of the Commission in the formal sense of the word.

[135] Paragraph 4 of the Regulations provides as follows:

"No person may communicate to any other person any matter or information which may have come to their knowledge in connection with the enquiry of the Commission, or suffer or permit any other person to have access to any records of the Commission, except in so far as it is necessary in the performance of their duties in connection with the functions of the Commission or by order of a competent court"

Paragraph 3 of the Regulations, read together with Paragraph 4 quite clearly prohibits the communication or publication of any "matter or information" by every person "employed in the execution of the functions of the Commission" acquired in connection with the enquiry of the Commission unless such publication or communication is "necessary for the purposes of the report of the Commission" or "in connection with the functions of the Commission" or "by order of a competent court".

[136] Such prohibition clearly applies to the members of the commission, being Erasmus J, together with the fourth and fifth respondents, because they are all "employed in the execution of the functions of the Commission". Furthermore, the information contained in the "interim report" clearly came to their knowledge in the performance of their duties, in connection with the functions of the Commission. The publication of this information by furnishing it to the Premier, was in no way necessary for the purpose of the report of the Commission.

136.1 The fact that Erasmus J requested the evidence leader to prepare "the report" in terms of the Commissioners' internal arrangements, did not obviously justify its publication to the Premier, contrary to the provisions of the Commission's regulations. In the circumstances, Erasmus J, with respect, was not entitled to, and acted contrary to the regulations governing the Commission, in furnishing the information contained in the report, to the Premier.

[137] The Premier, who promulgated the Regulations, must also, in my view, have appreciated that his request for the summary of evidence flew in the face of these very Regulations, that he was not entitled to the information requested, and his receipt of the information was therefore unlawful.

137.1 I cannot accept that the information detailed in the summary "had largely been made public" as alleged by the Premier. Even if this was the case, it would not justify a contravention of the Regulations.

137.2 Mr. Heunis submits that the issue of whether the receipt of such evidence was unlawful is irrelevant, because the City did not in its notice of motion attack this issue and cannot now do so collaterally. In addition, the City, after complaining in a letter to the Premier dated 12 February 2008, that the use of such summary of evidence by the Commission would be irregular, did nothing further after the Premier replied by way of his letter dated 22 February 2008, stating that the information would be used to assist him in deciding whether to continue with the Commission.

137.3 In my view, these do not constitute grounds which preclude this Court from considering whether the receipt of this information was unlawful. The absence of a substantive challenge to the lawfulness of its receipt, and the fact that the City took no formal steps to prevent the Premier from receiving the information, cannot preclude this Court from considering this issue, particularly where it is relevant to determining the Premier's state of mind, when establishing the Second Erasmus Commission.

[138] Consequently, the information contained in the summary of evidence was obtained by the Premier unlawfully.

[139] The second main source of information relied upon by the Premier was the police in the form of Commissioner Petros who, during October 2007 disclosed to the Premier information discovered at the home of du Toit of GFA, during a search conducted at du Toit's home.

[140] This information included audio recordings of conversations found on du Toit's computer, which were played to the Premier, as well as electronic copies of quotations and invoices from GFA.

[141] At the request of the Premier, Commissioner Petros addressed the Provincial Cabinet on the evidence he had shown the Premier. Commissioner Petros did not show the members of the cabinet the evidence, but talked them through it. As a consequence, it was decided that the MEC should address a Section 106 query to the City.

[142] The City submits that the sharing of this information by the police with the Premier, was unlawful and this would have been realised by any senior political figure with a modicum of appreciation for constitutionality and the rule of law, on the following grounds:

142.1 A search warrant constitutes an invasion of the individual's fundamental right of privacy. According to the City, as alleged in its replying affidavit, du Toit was arrested on 20 September 2007 on suspicion of hijacking and a warrantless search was conducted at his home, which Commissioner Petros attended. A further search at du Toit's home, on a warrant issued in respect of suspected illegal monitoring and interception, was conducted by the Organised Crime Unit. Documents and audio recordings were seized.

142.2 A search warrant is issued for a purpose and in the case of du Toit, to investigate the suspected crime of illegal monitoring. The documents and recordings, being the private documents and property of du Toit, could be used for no other purpose than the criminal investigation. In accordance with the constitutionally mandated invasion of privacy required for criminal investigations, it is implicit in the search provisions of the Criminal Procedure Act No. 51 of 1977 that documents or articles seized under a search warrant must be used only for the mandated purpose.

142.3 On this basis it is submitted that the disclosures made by Commissioner Petros to the Premier were unlawful.

142.4 It is also submitted that a consideration of the Constitution reveals that it was improper of Commissioner Petros to do so.

142.4.1 The objects of the police service are listed in Section 205(3), and do not extend to sharing with the executive government information seized in criminal investigations.

142.4.2 Section 206 (3) sets out the province's powers in respect of policing, and the province does not have an entitlement to receive information from the police on specific criminal investigations.

142.4.3 Section 206 (9) empowers the Provincial Legislature to require the provincial commissioner to appear before it, or any of its committees to answer questions and in terms of Section 207 (5) the provincial commissioner must report annually to the Provincial Legislature.

It is submitted these provisions are in keeping with the view that the relationship of the police with government should be politically neutral. If the provincial commissioner is to give information, it should be to the Legislature (in which all parties are represented), not the executive. The Premier is given no constitutional power to require a provincial commissioner to answer his questions.

142.4.4 Section 199 (7) provides that neither the security services, which includes the police service, nor any of its members, which includes Commissioner Petros may, in

> the performance of their functions, prejudice a political party interest that is legitimate in terms of the Constitution, nor "further in a partisan manner, any interest of a political party".

142.5 The City has referred us to a number of Commonwealth cases, where the need for independence between the police and the executive, when it comes to criminal investigations has been emphasised.

142.6 In the case of

R v Metropolitan Police Commissioner Ex parte Blackburn [1968] 1 All ER 763 (CA) at 769

Lord Denning had the following to say

"I have no hesitation, however, in holding that, like every constable in the land he [the Commissioner of Police] should be, and is, independent of the executive".

142.7 In similar vein, in the Canadian case of

R v Campbell [1999] 1 SCR 565 paragraph 27

is the following dictum

"The Crown's attempt to identify the RCMP [Royal Canadian Mounted Police] with the Crown for immunity purposes misconceives the relationship between the police and the executive government, when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes"

and at paragraph 29 the following was said

"It is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown. In this appeal, however, we are concerned only with the status of the RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was recognised by this Court in relation to municipal forces as long ago as ***McCleave v City of Moncton (1902) 32 SCR 106"***.

142.8 With regard to the conduct of the police, and in particular Commissioner Petros, in providing to the Premier and the Provincial Cabinet, the information which had been obtained as a result of the searches conducted at du Toit's home, with and without warrant, we have been referred by the City to the following cases.

142.9 In

Marcel v Commissioner of Police [1991] 1 All ER 845 (Ch)

Sir Nicholas Browne-Wilkinson V.C. (as he then was) stated the following:

"Powers conferred for one purpose cannot lawfully be used for other purposes without giving rise to an abuse of power. Hence in the absence of express provisions the 1984 Act cannot be taken to authorise the use and disclosure of seized documents for purposes other than police purposes".

142.10 In the later case of

Morris v Director of the Serious Fraud Office
[1993] 1 All ER 788 (Ch)

Sir Donald Nicholls V.C. said the following at ***795 (a - b)***

"The compulsory powers of investigation exist to facilitate the discharge by the Serious Fraud Office (SFO) of its statutory investigative functions. The powers conferred by Section 2 are exercisable only for the purpose of an investigation under Section 1. When information is obtained in the exercise of those powers the SFO may use the information for those purposes and purposes reasonably incidental thereto and such other purposes as may be authorised by statute, but not otherwise. Compulsory powers are not to be regarded as encroaching more upon the rights of individuals than is fairly and reasonably necessary to achieve the purpose for which the powers were created. That is to be taken as the intention of Parliament, unless the contrary is clearly apparent".

142.11 These views were followed by the High Court of Australia in

Johns v Australian Securities Commission
[1993] HCA 56

where Brennan J said the following in paragraph 14

"A person to whom information is disclosed in response to an exercise of statutory power is thus in a position to disseminate or to use it in ways which are alien to the purpose for which the power was conferred. But when a power to require disclosure of information is conferred for a particular purpose the extent of dissemination or use of the information disclosed must itself be limited by the purpose for which the power was conferred"

and the following was also said

"A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains the information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature"

Dawson J agreed with this approach, stating the following at paragraph 3 of his Judgment

"There is also a general rule that where a body has statutory powers to compel the provision of information to it, it should not disclose the information except for the purposes for which the powers were conferred".

[143] In the light of the aforegoing the City submits that the use by the Premier and the MEC, of information obtained by the police in searches conducted at the home of duToit was unlawful.

[144] I agree with this submission. The independence of the police in the investigation of crime is a vital aspect of the rule of law and the separation of powers. The vesting of powers of search and seizure in police officers, in terms of Section 21 of the Criminal Procedure Act, encroaching as such powers do upon the rights of individuals, have to be exercised in a fair and reasonable manner, with the sole object of achieving the purpose for which such powers were conferred, namely the investigation of crime by the police. The use of information obtained as a result of the exercise of such a power, for any other purpose would be unlawful.

[145] If the information obtained as a result of the searches at du Toit's home revealed the commission of any crimes by du Toit, or anybody else, this should have been fully investigated by the police

and then handed to the Director of Public Prosecutions for the appropriate action.

Such information should not have been supplied to the executive branch of government, in the form of the Premier, for investigation by a commission of inquiry. Even if such information carried an implication of maladministration on the part of the City, in relation to any suspected criminal conduct, this did not justify the disclosure of what had to be regarded as confidential information in the hands of the police, which had to be used for one purpose, namely the investigation and prosecution of any crimes revealed by its contents, by the appropriate prosecuting authority.

Once any criminal prosecution had been finalised, if evidence of maladministration emerged during such process, that would be the appropriate stage for such evidence to be handed either to the City for disciplinary purposes, or to the MEC for possible action in terms of Section 106 of the Systems Act.

[146] We are advised in the City's heads of argument, which has not been disputed, that du Toit has not had any charges put to him and that the Organised Crime Unit has stated that the case against him cannot proceed until the findings of the Erasmus Commission are finalised.

This is an intolerable situation, where a private citizen has to wait for a commission of inquiry, (which for reasons I will deal with below, has no business investigating the specified criminal offences), to achieve finality in respect of criminal charges which may or may not be preferred against him, depending upon the outcome of the investigation of the Erasmus Commission.

[147] The City submits that the inference is inescapable that the conduct of Commissioner Petros in supplying this information to the Premier, had as its object the furthering of the interests of the ANC in the Western Cape, in a partisan manner and that the Premier knew and intended that Petros should do so. Such conduct would be a violation of the provisions of Section 199 (7) of the Constitution.

[148] Although I find it strange indeed that a police official of the seniority of Commissioner Petros, would find it necessary to attend a raid on du Toit's home, and I have a grave suspicion that Commissioner Petros may have had such an objective in mind in furnishing the information to the Premier, I cannot on these papers, find as a fact that this was his objective.

[149] An important point made by the City is that a provincial commission under the Western Cape Commissions Act, has the power to issue *subpoenas*, but has no power to issue search

warrants, or to cause search warrants to be issued. Consequently, the search powers of the police, under the Criminal Procedure Act, which are conferred solely for the purposes of criminal investigation by the police, have been used to provide extensive information to the Commission.

In my view therefore, the furnishing by Commissioner Petros of this information to the Premier, was unlawful and this should have been appreciated by an official of the seniority of the Premier.

[150] Before deciding the issue of whether the Premier wilfully abstained from directing any enquiries to the City, it is appropriate in this context to deal with the dispute as to whether the investigation of criminal offences is an appropriate function for a commission of inquiry.

[151] The issue arises in the context of the terms of reference of the Second Erasmus Commission, where possible contraventions of the Corruption Act are to be investigated.

[152] The City argues that the Premier has no power to establish a commission to investigate suspected criminal acts. In accordance with the argument advanced by the City as to the independence of the police to investigate suspected criminal activities, it is submitted that the power to do so resides solely with the SAPS, together with the National Director of Public Prosecutions and the Directorate of Special Operations.

It is submitted that it is inconsistent to allow the Premier as a "political functionary" to "authorise coercive criminal investigations" and that this opens the door to "abuse for party political gain".

[153] The response of the Premier and the MEC is that

153.1 The Commission will not usurp police investigative functions. The monitoring function of the Provincial Government of the Western Cape in relation to local government clearly includes an interest in potentially criminal conduct. This is reflected in Section 106 of the Systems Act, which entitles the MEC to look into *inter alia* "fraud" and "corruption".

153.2 The interest of the Premier and the MEC is in the underlying conduct, not merely because such action may constitute a crime, but also because it affects governance.

153.3 The Second Erasmus Commission is only tasked to "advise" whether provisions of the Corruption Act have been contravened, not to make definitive findings and certainly not to institute criminal proceedings or carry out necessary functions incidental to instituting criminal proceedings, which is the main function of the National Prosecuting Authority in terms of the Constitution.

[154] In my view, the reasons advanced above in support of the principle that the police should function independently of the executive, when carrying out their role of investigating crime, apply with equal force in the present context. To vest a commission of inquiry with the primary task of investigating criminal conduct, is as pointed out above, inherently undesirable as it leads to a blurring of the functions of the executive and the police.

154.1 In the present case, it is quite clear, however that the power of the MEC, or the Premier, respectively to appoint investigators, or a commission of inquiry in terms of Section 106 of the Systems Act, to investigate issues of corruption and fraud in a municipality is strictly circumscribed, as set out above.

154.2 In my view, this also indicates a concern on the part of the Legislature to ensure that the circumstances under which a commission of inquiry should be appointed to investigate crimes of fraud and corruption, in relation to a municipality are carefully

controlled. As pointed out above, the object of the Legislature was to strike a balance between the constitutional obligation imposed on the provinces to monitor local government in terms of Section 155 (6) (a) of the Constitution, and the circumstances under which the constitutional autonomy of local government could be impaired by a commission.

154.3 The object of the Legislature was also, in my view, to strike a balance between the autonomy of the police and the prosecuting authority respectively to investigate and prosecute crime on the one hand, and performance by the province of the constitutional obligation to monitor local government, on the other.

[155] A power on the part of the Premier to appoint a commission to investigate suspected criminal conduct in relation to a municipality, independently of the provisions of Section 106 of the Systems Act, would again result in the provisions of this Section becoming superfluous. In such an event the Premier would be entitled to appoint a commission to investigate suspected criminal conduct of whatever nature and not merely fraud and corruption, in relation to a municipality. This would not only intrude upon the autonomy of the police to perform such a function, but also the autonomy of local government.

[156] In my view, the effect of Section 106 of the Systems Act is to limit the power of the Premier to appoint a commission of inquiry with

coercive powers, to investigate only the crimes of fraud and corruption, in relation to a municipality.

In light of the fact that the Premier did not act in terms of Section 106 of the Systems Act, the Premier was, in addition, not entitled to vest the Commission with the tasks set out in Items 9, 10 and 11 of the terms of reference of the Second Erasmus Commission.

[157] The Premier was accordingly not entitled to task the Commission with investigating the issues relating to the George Municipality set out in Item 11 of the Second Erasmus Commission.

[158] Returning now to the issue of whether the Premier wilfully abstained from directing any enquiries to the City, and did so because he had a suspicion that to do so would cast doubt upon the beliefs he held as to the grounds for a commission of inquiry, and harboured the ulterior motive of embarrassing political opponents by establishing the Second Erasmus Commission.

[159] As pointed out above, the evidence before the Premier clearly contradicted any concerns or beliefs he professes to have held on the major issues set out in paragraph [124] ***supra,*** and cried out for further elucidation by the one source of that information, being the City, by way of appropriate enquiries directed to the City on these

issues, before the drastic step of appointing a commission of inquiry was taken.

[160] In addition the Premier relied upon two main sources of information in deciding to establish the Second Erasmus Commission, which were unlawful. In the case of the so-called "interim report" he must have appreciated that the furnishing of the information to him by the Commission flew in the face of the Regulations he had promulgated.

In the case of the information furnished to him by Commissioner Petros, I find it inconceivable that an official occupying the position of the Premier of a province, did not appreciate that the furnishing of such information to him was unlawful.

[161] These factors have to be considered against the political tensions and rivalry between the DA and the ANC in the Western Cape. What emerges clearly from the papers is a high degree of acrimony and mistrust between these political opponents. The battle lines have clearly been drawn between the Premier and the MEC as senior members of an ANC provincial government on the one hand, and the Mayor of the City who is the DA's national leader, and the leader of a DA-led coalition which governs the City, on the other. The prize in this contest is control of the City, which was previously led by the ANC.

[162] What also has to be considered is what the Premier and the MEC, maintain was the true purpose of the Second Erasmus Commission.

162.1 Mr. Rogers submits that in this regard a distinction has to be drawn between **what** it was the Premier supposedly wanted to find out and **why** he wanted to find it out. When the Premier refers to his "concerns" and "suspicions" he is identifying the "what". When dealing with the allegation that the Premier possessed an ulterior motive, the focus is ultimately on the "why".

162.2 As pointed out above, in my view, it is vital that there be a rational connection between the decision of the Premier to appoint a commission and some envisaged action to be taken as a consequence by the Premier, or the provincial government, in respect of the particular municipality. The object is to inform the Premier with regard to future lawful action, which he could rationally take.

162.3 It is submitted that the Premier cannot lawfully establish a commission to investigate "concerns" as an end in itself, as that would

be purposeless and irrational. The Premier has said that intervention in terms of Section 139 was not the purpose, but that other valid responses **could** be to use the Commission's report to ask the City to

take disciplinary action against councillors or officials, or simply hand it to the City for it to decide what further course of action to follow.

162.4 It is submitted that the City has alleged what the Premier's improper purpose was, but the Premier, apart from denying the allegation, has not positively stated what his purpose was, other than to state that it was not to assess possible Section 139 intervention.

162.5 It is submitted that the establishment of a commission without any actual purpose in mind would be irrational and not authorised by Section 127 (2) (e) of the Constitution.

162.6 Mr. Rogers then submits that if one elevates what the Premier has said "could" be the purpose of the Second Erasmus Commission, to an assertion of the Premier's actual purpose, i.e. an assertion as to "why" the Premier wanted to find out the "what" two questions arise.

162.6.1 Would these purposes, if true, be rational and lawful purposes?

162.6.2 Should the Premier be believed that these **were** his purposes?

162.7 As regards the first question posed, it is submitted that it reveals no action the Premier could take. The said purposes reveal that the **Premier** was undertaking a coercive investigation for the

City's benefit, so that the **City** could act on the report. It is submitted that this is not a rational and lawful purpose, particularly as the City has not requested "assistance".

162.8 Regard being had to the autonomy of municipalities, it is no function of the Premier to require, or even ask a municipality, to take disciplinary action against its officials and councillors.

162.9 As regards councillors, the scheme of the Systems Act and the Code, read within the framework of Section 41 of the Constitution, is that the MEC may investigate a councillor's conduct in terms of Item 14 (4) of the Code, but only in response to a request from the municipal council to remove the councillor. If the council fails to take action against the councillor, and if the MEC has reasonable grounds for believing this failure to constitute serious maladministration, the MEC may be entitled to have recourse to Section 106.

Van Wyk v Uys NO 2002 (5) SA 92 (C) at 98 D – 100C

The legislative scheme is entirely inconsistent with the use of a provincial commission to uncover facts relevant to possible disciplinary proceedings by a municipality against the councillor.

162.10 As regards possible misconduct by and disciplinary action against officials, this is dealt with in Item 14 and 14A of Schedule 2 to the Systems Act, read with Section 67 (1) (h) of the Act. As appears

from these provisions, discipline in relation to staff is an internal matter.

162.11 It is submitted that the use by the Premier of a coercive commission to establish possible misconduct on the part of councillors and staff, with a view to getting the municipality to take action against councillors and staff, is likely to violate the obligation of natural justice (which in the case of councillors, the council must observe in terms of Item 14 (7) of the Code) and fair labour procedures (which in relation to officials, the municipality is obliged by Section 67 (1) and (2) of the Systems Act to observe.)

162.12 It is submitted that a provincial commission established by an outsider, being the Premier, simply has no place in the municipal disciplinary process, and its establishment might, far from assisting the municipality, make it impossible for the municipality to take fair action against the councillor or official.

162.13 The second question posed is whether, if these purposes are rational, they can be believed. The alternative, it is submitted, is that the Premier had the improper purpose alleged by the City, or no rational purpose at all.

162.14 It is submitted that the factual basis for the Premier's version is virtually non existent, as he has not actually asserted that the "other valid responses" were in mind when he established the Commission.

162.15 I agree with the submission that if the Premier's purpose in establishing the Second Erasmus Commission, was purely to use the Commission's report to ask the City to take disciplinary action against councillors or officials, or simply hand the report to the City to decide what to do, this would not, for the reasons set out above, be a rational or a lawful purpose. In addition the Premier does not positively assert that this was in fact his purpose, he merely says the report "could" be used for this purpose.

162.16 I agree with the submission that it is scarcely credible that the Premier could have believed that the expense of the Commission, and the political tension it would cause, was justified merely to obtain a report which the Premier could then pass on to the City, to do with it as it saw fit.

162.17 What then was the Premier's purpose? If due regard is paid to the above factors, namely, evidence the Premier was aware of which contradicted concerns or beliefs he professed to hold on major issues, his reliance upon two sources of information which he must have appreciated was unlawful, as well as the political background against which the Commission was established, as well as the absence of any credible purpose advanced by the Premier for establishing the commission, I am driven to the conclusion that his purpose was the improper one of embarrassing political opponents and more specifically the DA.

162.18 Finding that the Premier possessed such an improper purpose also leads to the reasonable inference that the Premier therefore wilfully refrained from directing enquiries to the City, because he had a suspicion that to do so, would cast doubt upon the beliefs or concerns he professed to hold, as to the grounds for a commission of inquiry. For what other possible reason would he refrain from doing so when, as I have found, the evidence he had before him cried out for further elucidation by the one source of that information, namely the City? The evidence he had before him, which contradicted his beliefs, did not reasonably call for elucidation by way of a commission of inquiry, but by way of reasonable enquiries directed to the City. As I have pointed out above, such enquiries would have resulted in any reasonable concerns on his part being addressed.

162.19 The Premier's contention that he acted for what he believed were good reasons is accordingly rejected as being clearly untenable.

[163] The Premier therefore did not possess an honest belief that good reasons existed for establishing the Second Erasmus Commission and possessed such an ulterior motive. As a result his decision was not rationally related to the purpose for which the power was conferred, was arbitrary and therefore unlawful. Consequently, the decision of the Premier to establish the Second Erasmus Commission falls to be set aside.

[164] Even if the issue of whether the Premier wilfully failed to make enquiries is ignored, and the enquiry is directed at establishing whether the evidence available to the Premier showed that objective reasonable grounds existed for a belief by the Premier that he had good reason for establishing a commission and if not, whether it is established that the Premier did not hold an honest belief that such grounds existed, the same conclusion is reached.

[165] As pointed out above, the evidence available to the Premier contradicted any concerns or beliefs he professes to have held on the major issues set out in paragraph [124] ***supra***.

165.1 In the face of this evidence there could be no reasonable grounds for the Premier continuing to harbour such concerns, or hold such beliefs.

165.2 The absence of reasonable grounds, when considered together with the Premier's reliance upon two unlawful sources of information, is cogent evidence that he did not hold an honest belief, that reasonable grounds existed for establishing the Second Erasmus Commission.

165.3 When the absence of an honest belief on the part of the Premier is considered, together with the evidence of the political

rivalry and antagonism between the ANC and the DA in the Western Cape, and the competing claims of these political parties respectively to regain and retain control of the City of Cape Town, as well as the absence of any credible purpose advanced by the Premier for establishing the Commission of Inquiry, his only motive on the evidence in establishing the Second Erasmus Commission, must have been to embarrass or discredit political opponents, particularly the DA.

165.4 On this basis again, the Premier's contention that he acted for what he believed were good reasons falls to be rejected as clearly untenable.

[166] On this alternative approach the Premier's decision again falls to be set aside as unlawful, as it was not rationally related to the purpose for which the power was conferred and was arbitrary.

Was the appointment of a serving judge to chair the Second Erasmus Commission, incompatible with the separation of powers and therefore unlawful and invalid?

[167] Turning to the final substantive challenge raised by the City and the DA as to the lawfulness of the establishment of the Second Erasmus Commission. In the light of the conclusions I have reached in regard to the other substantive challenges raised it would appear

unnecessary to do so. I will however, in the light of the views of the Constitutional Court expressed in the case of

S v Jordan and others (Sex Workers Education and Advocacy Task Force and others as Amici Curiae) 2002(6) SA 642 (CC) at para 21.

[168] It was stated that where the constitutionality of a provision is challenged on a number of grounds and the Court upholds one such ground, it is desirable that it should also express its opinion on the other challenges. This was necessary in the event of the Constitutional Court declining to confirm on the ground upheld by the High Court. In the absence of the judgment of the High Court on the other grounds, the proper course to follow may be to refer the matter back to the trial Court, so that it can deal with the other challenges. This could result in unnecessary delay in the disposal of a case. Although the constitutionality of a particular “provision” is not under scrutiny in the present case, I consider the Constitutional Court’s reasoning of equal relevance in the present case, should the conclusions I have reached come under scrutiny by that Court.

[169] The challenge raised is that the appointment of a serving judge to chair the Second Erasmus Commission was incompatible with the separation of powers ordained in the Constitution and therefore unlawful and invalid.

[170] The starting point for a consideration of this challenge must be the decision of the Constitutional Court in the case of

SA Association of Personal Injury Lawyers v Heath
2001(1) SA 883 (CC)

which dealt with the constitutional compatibility of the appointment of a High Court judge, to lead a special investigation unit, established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996.

[171] In this case the Constitutional Court stated :

171.1 That there can be no doubt that the Constitution provides for a separation of powers (at 897B).

171.2 The separation of the Judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the courts under the Constitution (at 898G).

171.3 Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has

a wide power to delegate legislative authority to the Executive, there are limits to that power (at page 898G).

171.4 Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent (at page 899A).

171.5 The separation required by the Constitution between the Legislative and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution will be undermined (at page 899 B).

171.6 The principle of separation of powers is not necessarily compromised whenever a particular judge is required to perform non-judicial functions. The performance of functions incompatible with judicial office would however not be permissible (at page 899 E).

171.7 Criteria which are relevant to considering whether or not under our Constitution, it is permissible to assign a non- judicial function to a judge, are whether the performance of the function :

171.7.1 Is more usual or appropriate to another branch of government

171.7.2 Is subject to executive control or direction

171.7.3 Requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law

171.7.4 Creates a risk of judicial entanglement in matters of political controversy

171.7.5 Involves the judge in the process of law enforcement

171.7.6 Will occupy the judge to such an extent that he or she, is no longer able to perform, his or her usual judicial functions (at page 899 H – 900 B).

171.8 These criteria should be given a weight appropriate to the nature of the function that the judge is required to perform and the need for that function to be performed by a person of undoubted independence and integrity (at page 900 D).

171.9 It is undesirable, particularly at this stage of the development of our jurisprudence concerning the separation of powers to lay down rigid tests for determining whether or not the performance of a particular function by a judge is, or is not, incompatible with the judicial office (at page 900 E).

171.10 The question in each case must turn upon considerations such as those set out above and possibly others, which come to the fore because of the nature of the particular function under consideration (at page 900 F).

171.11 Ultimately the question is one calling for a judgment to be made as to whether or not the functions that a judge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge, will not be harmful to the institution of the Judiciary, or materially breach the line that has to be kept between the Judiciary and the other branches of government in order to maintain the independence of the Judiciary (at page 900 F – G).

171.12 In dealing with the question of judges presiding over commissions of inquiry much may depend on the subject matter of the commission. In appropriate circumstances judicial officers can no doubt preside over commissions of inquiry without infringing the separation of powers. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information and the giving of a decision on the basis of a consideration of relevant information (at page 901 F – 902 A).

[172] What should be noted at the outset is that in determining whether or not a particular judicial function by a judge, is incompatible with the judicial office depends upon the outcome of two enquiries namely :

172.1 Is the function in all of the circumstances, objectively assessed incompatible with the judicial office

172.2 Is the function of "such a nature that public confidence in the independence or impartiality of a judge to carry out judicial functions is threatened" – as stated by McHugh J in the High Court of Australia in

Grollo v Palmer (1995) 184 CLR 348 at paras 21 - 23

[173] McHugh J in **Grollo**'s case supra, at para 22 also had the following to say "In determining whether incompatibility exists, the appearance of independence and impartiality is as important as its existence. It is trite to say that justice must not only be done but must be manifestly seen to be done."

[174] Activities which are incompatible with the judicial function "… could 'sap and undermine' both the reality and the appearance of the independence of the Judicature which is made up of the courts constituted by individual Judges."per Kirby J in the High Court of Australia case of

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR at 44 – 45

quoted with approval by the Constitutional Court in **Heath**'s case supra at page 904 H. Similar sentiments were expressed in Canada in the case of

Ell v Alberta [2003] 1 SCR 857 at para 2 – 23

where Major J stated

"A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to 'claim any legitimacy or command the respect and acceptance that are essential to it.'"

Closer to home and in similar vein, in the case of

Van Rooyen v de Kok NO and others

2003(2) SA 317 (T) at 323 D – E

Bosielo J said

"In my view, it is imperative that in every modern democratic society, particularly ours which is still relatively young and nascent, that the Judiciary as a whole must not only claim, or purport to be, but must manifestly be seen to be truly independent. I venture to say that the attributes of judicial independence and impartiality lie at the very heart of the due process of the law."

[175] The importance of the appearance of the independence of the judiciary in this context, is graphically illustrated again by the words of Kirby J in **Wilson**'s case where he said the following :

"…the Executive may not borrow a Federal Judge to cloak actions proper to its own functions with the 'neutral colours of judicial action'".

[176] Having found that the Premier did not possess an honest belief that good reasons existed for establishing the Second Erasmus Commission, and acted with the ulterior motive of embarrassing political opponents, these words assume even greater significance on the facts of this case. In this context I find the inference irresistible that one of the reasons why the Premier appointed a judge to chair the commission, was in order to cloak his ulterior motive with the neutral colours of the judicial office.

177.1 A finding that the Premier appointed a judge to chair the commission with such an ulterior motive, in my view, would be sufficient grounds to set aside the appointment as not being in accordance with the constitutional principle of legality. The Premier's decision to appoint a judge to chair the commission again would not be rationally related to the purpose for which the power was conferred upon the Premier, in terms of section 1(1)(e) of the Western Cape Provincial Commissions Act 10 of 1998. The decision would be arbitrary and unlawful and fall to be set aside as such. For the sake of completeness I will nevertheless deal with the challenge raised on the grounds that the appointment of a judge was incompatible with the doctrine of separation of powers.

177.2 I wish to make it absolutely clear that I do not suggest that Erasmus J was in any way a party to such conduct, but what this starkly illustrates is the care which must be exercised by any judge, in deciding whether or not to accept an appointment to chair a commission, at the behest of a representative of the executive.

[178] Before accepting an appointment to chair a commission of enquiry a judge would have to be satisfied, after carefully examining the subject matter of the commission, as set out in the terms of reference, that the functions he or she is called upon to perform, are not incompatible with his or her judicial office. In doing so regard would have to be paid to the criteria of the Constitutional Court, as set out in para 171.7 supra, as well as any others which may come to the fore, because of the nature of the particular function under consideration. If such functions are incompatible then I would, with respect submit that, any countervailing factors that suggest that the performance of such functions will not be harmful to the institution of the Judiciary (as alluded to by the Constitutional Court in **Heath**'s case supra at page 900 F – G), would have to be of a compelling nature, to justify participation in the functions of the commission.

[179] In addition, a Judge would have to be satisfied that his or her participation in such a commission was not of "such a nature that public confidence in the independence or impartiality" of the judge to carry out his or her judicial functions is threatened. (**Grollo**'s case supra at paras 21 – 23)

[180] In order to assess this aspect, I with respect, agree with the following dicta of McHugh J in **Grollo**'s case supra at paragraph 22.

"When a person who holds judicial office contemporaneously exercises executive power as persona designata, members of the public may have great difficulty in seeing any separation of those functions. The greater the association between the judicial status of the persona designata and the executive functions that he or she performs, the greater is the likelihood that the judicial and non-judicial functions of that person will seem to be fused. In that situation, it is likely that members of the public will fail to distinguish between the judicial functions of the judge and the executive function of that person as persona designata and will conclude that the judge is neither independent of the executive government, nor impartial when dealing with actions between the citizens and the government and its agencies."

181.1 The following dictum at para 23 is also apposite :

"If therefore, reasonable people, not trained to discover 'distinctions without differences' might reasonably apprehend that the functions undertaken by a judge as persona designata impaired his or her ability to carry out judicial functions or conflicted with the judge's independence or impartiality, those non-judicial functions cannot constitutionally be invested in a person who is a member of a federal court."

181.2 In the context of assessing whether the requirements for judicial independence of the courts had been satisfied, the Constitutional Court formulated the test of whether they were independent in the eyes of the reasonable person observing the conduct of the courts and added the following :

"In the circumstances prevailing in the RSA this observer had to be sensitive to the complex social realities of the RSA, in touch with the evolving pattern of constitutional development and guided by the Constitution, its values and the distinction it draws between different courts."

Van Rooyen and others v S and others (General Council of the Bar intervening)

2002(8) BCLR 810 (CC) at 812 A – B

[182] In my view the test is therefore objective ie would a reasonable member of the public, not trained to discover "distinctions without differences" reasonably apprehend that the participation of the judge in the commission would impair his\her ability to carry out judicial functions, or conflict with the judge's independence or impartiality.

[183] Depending upon the subject matter of the particular commission and its terms of reference it may be no easy task for a judge to satisfy him or her self, after examining both aspects of the enquiry, that his or her participation in such a commission, would not be incompatible with the judicial office and not threaten public confidence in his or her ability to carry out judicial functions.

[184] With great respect to the views of the Constitutional Court, that judges may in "appropriate circumstances" preside over commissions of inquiry without infringing the separation of powers, the problem lies in deciding in any particular case whether it is "appropriate" for a judge to involve him or her self, in the particular commission. The facts of the

present case starkly illustrate the problem. As will become apparent in this judgment the City and the DA contend that the appointment of Erasmus J contravenes the guidelines laid down by the Constitutional Court in **Heath**'s case supra, namely, there is a risk of judicial entanglement in matters of political controversy, the judge will be involved in the process of law enforcement and the function to be performed is more appropriate to another branch of government. This however is hotly disputed by the Premier.

[185] Regardless of the outcome of this dispute, the unsavoury fact remains that a dispute as to the suitability of a judge to chair a commission rages between senior members of different levels of the executive branch of government, being on the one hand the Mayor of the City of Cape Town and on the other the Premier of the Western Cape. The situation is aggravated by the fact that they are political opponents. My abiding concern is that the ultimate loser in this dispute, will be the administration of justice, in the form of a loss of confidence on the part of the general public, in the independence of the judiciary

[186] The Constitutional Court has emphasized in **Heath**'s case supra, the vital role to be played by a judiciary which is independent and seen to be so, in ensuring that the limits placed upon the exercise of public power by the executive are not transgressed. The Constitutional Court has also stated that it is undesirable at this stage of our jurisprudence concerning the separation of powers to lay down

rigid tests for determining whether the performance of a particular function by a judge is, or is not incompatible with the judicial office.

[187] With great respect to the views of the Constitutional Court, it seems to me that at this early stage of our fledgling democracy, and with the vital object of preserving public confidence in the independence of the judiciary, active judges should as a matter of principle, not chair commissions of inquiry. This would eliminate the risk of judges becoming embroiled in disputes such as the present and the need to define in what circumstances a judge could "appropriately" chair a commission of inquiry.

[188] The fact that presiding over a commission of inquiry calls for qualities and skills possessed by judges and identified by the Constitutional Court as independence, the weighing up of information, the forming of an opinion based on the information and the giving of a decision on the basis of a consideration of relevant information, does not with great respect, render the performance of such a role the sole preserve of active judges. Active judges do not possess a monopoly over these attributes, which in my experience, are possessed in equal measure by many senior members of the legal profession, both at the Bar and the Side Bar.

[189] The words of Edwin Cameron, uttered in the pre-constitutional era and before his elevation to the bench are still apposite today :

"The use of judges to sit on commissions of enquiry has long been a controversial aspect of South African political life. It is often suspected that commissioners are selected to make findings and recommendations which would suit the government. When judges are used in this process the discrediting effect on the judicial system is severe."

Edwin Cameron, Nude Monarchy : The Case of South African Judges (1987) 3 SAJHR 338 at 342

[190] I find it of significance that in Australia, according to Professor Gerard Carney, writing in The Constitutional Systems of the Australian States and Territories (Cambridge University Press 2006) at page 367

"Although the joint majority [in Wilson supra] indicated that the appointment of federal judges to head royal commissions and non-judicial bodies such as the Administrative Appeals Tribunal is not necessarily incompatible because they are required to act independently or judicially, Wilson has dissuaded the Commonwealth Executive from appointing federal judges to persona designata positions."

[191] Mr Rogers submits that the development of a more appropriate sensitivity to the strict maintenance of the constitutional separation of judicial and executive function in Australia, is also testified to in the following remarks of De Jersey CJ, of the Queensland Supreme Court, in an address to the Samuel Griffith Society, in which the Chief Justice was addressing the consequences for the judiciary of the separation of powers.

"There are two other particular avenues of departure from the strictly judicial core function which should I suggest, be approached with care. The first is involvement of Judges in Commissions of Inquiry. Generally speaking this will not create conflict with Chapter III and so much was confirmed in Wilson's case. Nevertheless the issue can be of concern, in the general context I have been advancing. For many years – indeed since 1987 – the Judges of the Supreme Court of Queensland have proceeded on the basis it would be inappropriate for a serving Judge to accept a position to head a Commission of Inquiry conducted under the auspices of executive government. The rationale for that view has been the recognition that the core function of the judiciary is the determination of matters in court, by the delivery of judgments enforceable by process of law, and the fundamental importance of preserving the confidence of the public in the judiciary's discharge of that function, which could be impaired were Judges to be unnecessarily involved in the political controversy which often surrounds such inquiries. A similar approach has for a long time been taken by the Supreme Court of Victoria."

[192] I, with respect, agree with the views of Chief Justice de Jersey. As will become apparent later in this judgment, the facts of this case starkly highlight the rationale advanced by the Chief Justice why Judges should not be involved in Commissions of Inquiry. Simply put, the involvement of Erasmus J in the Commission has unnecessarily involved the judge in the political controversy surrounding the commission, which may damage the confidence of the public in the judiciary's core function of determining matters in court.

[193] Mr Heunis however cautions that reference to foreign authorities is an exercise in legal transplantation, which is inevitably fraught with danger. This is so he submits as the Constitutional Count pointed out in

De Lange v Smuts N O 1998(3) SA 785 (CC) at para 60

that our courts would over time develop a distinctly South African model of separation of powers.

[194] In my view however, the core function of the judiciary, in any jurisdiction, is as set out above. A loss of public confidence in that function carries the same serious consequences. In addition, the approach to be adopted in deciding whether a particular task is incompatible with the judicial function is the same. The views of a reasonable member of the public on this issue, are also given consideration. In addition, the rationale advanced for judges not to chair commissions of inquiry, is equally valid.

[195] Before turning to the substantive challenges raised as to the appointment of a judge to chair the commission, I must initially deal with the issue of whether any challenge is raised by the City or the DA as to the personal suitability of Erasmus J to chair the commission.

[196] Mr Heunis submits that a challenge is raised on this basis for the following reasons.

196.1 It is a matter of public record that the Mayor has publicly stated that Erasmus J is "one of those Judges who allows himself to be used".

196.2 The Mayor in the City's replying affidavit states that the expanded terms of reference of the Second Erasmus Commission

"points strongly in support of my description of the exercise as nothing more than the provision of an ostensibly respectable vehicle for a political witch-hunt."

and also that Erasmus J is

"an individual who prior to his appointment to the Bench was an actual member of the ANC."

196.3 The Mayor in the City's replying affidavit states that her position with regard to the appropriateness of Erasmus J continuing to chair the Commission, if it is to proceed, is renewed.

[197] Mr Rogers' response to this is to deny that the Mayor in her replying affidavit launched an attack on Erasmus J personally. He submits that it has never been the City's case in these proceedings, that Erasmus J is precluded from being the chairperson because he was previously a member of the ANC. The point was a general one concerning the propriety of appointing judges at all. The reference to Erasmus J's prior membership of the ANC was raised specifically not

as a criticism of the judge, but as a factor relevant to the Premier's state of mind ie the choice he made because he thought he would achieve a favourable outcome.

[198] At the hearing of the matter I asked Mr Rogers whether there was any challenge raised as to the suitability of Erasmus J to chair the commission and he replied there was not. There is consequently no challenge before me on this basis which needs to be addressed.

[199] The first challenge raised by the City and the DA is that the appointment of a judge to chair the commission raises the risk of judicial entanglement in matters of political controversy, being one of the criteria enunciated by the Constitutional Court in **Heath**'s case for deciding whether the function was incompatible with the judicial office.

[200] Mr Rogers submits that the basis for paragraphs 1 and 3 of the terms of reference of the Second Erasmus Commission are predicated on the Premier's professed suspicion that the Speaker's investigation of Chaaban was improperly politically driven by the DA and that it entailed the City footing the bill for the DA's private intelligence operation. That these suspicions are nurtured by the Premier as the head of the ANC controlled provincial executive, against senior office bearers in the opposition DA party, which with its coalition partners governs the City, starkly illustrates the political dimension to the investigation. The party political dimension of the matters referred to the Second Erasmus Commission inheres

regardless of whether the Premier's suspicions are well-founded or not. The political significance inherent in any findings made in respect of the matters described in paragraphs 6, 7, 9, 10, 11 and 12 of the terms of reference is axiomatic.

[201] The response of Mr Heunis is that the terms of reference are neutral, even though the political backdrop is not and this is no different to any case involving political parties before a court of law.

[202] The important crucial difference however is that we are not dealing with a court of law, but whether the function to be performed by a judge as chairperson of the commission is "appropriate" and compatible with the judicial office. The subject matter of the commission quite clearly focuses on the conduct of the DA and its office bearers. By no stretch of the imagination can the terms of reference, referred to above, be described as neutral. They are quite plainly political in nature. In addition, it emerges clearly from the papers that even before the appointment of the First Erasmus Commission, the public debate concerning the issues which were later to be investigated by the First and thereafter the Second Erasmus Commission, were overtly political.

[203] It is therefore quite clear that the appointment of a judge to chair the commission created the risk of judicial entanglement in the matters to be investigated which were politically controversial. In addition, a reasonable member of the public viewing the appointment of a judge to chair the commission, having due regard to the subject

matter to be investigated, would reasonably apprehend that the participation of a judge would conflict with the judge's independence or impartiality. As submitted by Mr Rosenberg , who together with Mr Katz, appeared for the DA, the appointment of a judge was highly susceptible to creating the perception that the executive was "pulling the judiciary over to its side against a potential enemy". That the government would want to use judges for their purposes is one matter but that judges should allow themselves to be so used is quite a different one. Once the judges have made their recommendations they have no power to enforce them or even to prevail upon government to reveal them to the public at large. The notion of being used by the executive in this way is anathema to the judicial calling and is the very antithesis of the separation of powers.

[204] The next substantive challenge raised by the City and the DA to the appointment of a judge to chair the commission, is that the judge will become involved in the process of law enforcement being one of the criteria mentioned by the Constitutional Court in **Heath**'s case supra.

[205] In **Heath**'s case supra at para 44 H the Constitutional Court referred with approval to the following passage in **Wilson**'s case supra

"It is not compatible with the holding of federal judicial office in Australia for such an office holder to become involved as 'part of the criminal investigative process'

closely engaged in work that may be characterized as an adjunct to the investigating and prosecutory functions."

[206] The Second Erasmus Commission is tasked with advising the Premier on whether contraventions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 have occurred.

[207] The Premier states in his answering affidavit the following

"I remain convinced that the best way to do this is through a commission with power to summon witnesses and require documents to be produced."

[208] This power is found in section 3(1)(a) of the Western Cape Commissions Act No 10 of 1998, in terms of which a subpoena is authorised by the Commission and issued and signed by the secretary to the commission.

[209] In this regard the words of Le Bel J in the Canadian Supreme Court case of

In re Application under S 83.28 of the Criminal Code [2004] 2 SCR 248 at para 185

are apposite.

"In my view, a reasonable, well-informed person could conclude that the purpose of having a judge at such an investigation is to help the executive branch compel the witness to answer questions. The judiciary's symbolic and legal weight will

assist the police in their investigations. The judiciary will then no longer be playing the role of an independent arbiter."

[210] In a related challenge it is also submitted by the City and the DA that the judge lead commission, tasked as it is with advising whether contraventions of the Corruption Act have occurred trenches upon the role of the investigating directorates, established under Chapter 5 of the National Prosecuting Authority Act 32 of 1998, as well as the power of the National Director of Public Prosecutions. The investigation of "fraud, corruption, maladministration, serious malpractices and other unlawful conduct" by the Second Erasmus Commission, it is submitted, is a function which under section 179 of the Constitution falls within the powers of the National Director of Public Prosecutions.

[211] I find it unnecessary to enter the debate, set out in the heads of the City and the Premier, as to whether and to what extent, the functions and powers of Special Investigating Units established in terms of the Special Investigating Units and Special Tribunals Act No 74 of 1996, are reflected in the functions of the Erasmus Commission and the enabling provisions of the Western Cape Commissions Act. This is because I agree with the submission of Mr Rogers that in the circumstances the Premier has used a commission of enquiry to fulfil roles specifically provided to be undertaken by identified independent and appropriately qualified executive organs, established in terms of the Constitution.

[212] I also agree with the submission of Mr Rosenberg that the argument goes beyond imbuing a judge with executive functions and transports the judge into the realm of the prosecuting authority. Apart from effectively furnishing a judge with prosecutorial powers, which is a gross violation of the principle of separation of powers, it further enables a member of the executive to usurp investigative and prosecutorial powers through his tool, the judge-led commission.

[213] I am therefore satisfied that the appointment of a serving judge to chair the Second Erasmus Commission was incompatible with the separation of powers and therefore unlawful and invalid.

[214] Two further aspects which arose in argument must be dealt with. The first concerns the procedure which was adopted by the Premier in appointing Erasmus J. It is common cause that the Premier invited Erasmus J to chair the commission. In the Premier's answering affidavit he states that before establishing the Erasmus Commission he obtained the permission of the Judge President of the Cape High Court, as well as the Minister of Justice and Constitutional Development, that Erasmus J would be released from his current judicial duties to chair the commission.

[215] In my view, such a procedure is inherently undesirable because it is the representative of the executive who chooses the judge concerned. Such a procedure can lead to suspicion that the judge was chosen because the executive believed he or she would make findings and recommendations, which would suit the

government. The correct procedure would be for the representative of the executive to approach the Judge President of the relevant division of the High Court and request that he provide a judge from his division to chair the commission. The Judge President would then select a judge, due regard being had to the nature of the commission and the particular attributes and experience of the members of his\her bench. The Judge President could in consultation with the other members of his bench also determine whether in all the circumstances, it was appropriate for a judge to chair the commission concerned.

[216] A further aspect is that we were informed that the First Erasmus Commission conducted its sittings in a courtroom of the Cape High Court. I again regard such a process as inherently undesirable, as it only serves to further blur the distinction between a judge performing his judicial functions and his functions as a commissioner, in the eyes of a reasonable member of the public.

[217] As regards the issue of costs we were informed by Counsel that the City and the DA had brought two interdict applications when the Second Erasmus Commission was threatening to proceed. The costs of these applications were reserved. Counsel were agreed that the costs of these applications should be costs in the cause. There was no debate that the number of Counsel employed by each of the parties was inappropriate and no submissions were made to us in that regard. Indeed the matter is complex, vast and of importance to

all concerned. In my view there can be no quarrel with the number of counsel engaged by each of the parties.

I propose that the following order be made : :

1. Proclamation 5\2008 published in Provincial Gazette Extraordinary 6510 on the 19th March 2008, which established the Second Erasmus Commission, is declared to be inconsistent with the Constitution and invalid.

2. The conditional counter application of the First and Second Respondents is dismissed.

3. The First and Second Respondents are ordered, jointly and severally, to pay :-

    3.1 The costs of the Applicant and the Intervening Party, such costs to include in the case of the Applicant, the costs of three counsel and in the case of the intervening party, the costs of two counsel.

    3.2 The costs of the Applicant and the Intervening Party in opposing the conditional counter application, brought by the First and Second Respondents.

    3.3 The costs of the Applicant and the Intervening Party in the two previous interdict applications.

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SWAIN J

I agree and it is so ordered.

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NICHOLSON J

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