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

CASE NO.

In the matter between:

THE CITY OF CAPE TOWN	Applicant
and	
THE PREMIER OF THE WESTERN CAPE	First Respondent
THE MINISTER FOR LOCAL GOVERNMENT AND HOUSING IN THE PROVINICAL GOVERNMENT OF THE WESTERN CAPE	Second Respondent
THE HONOURABLE MR JUSTICE NATHAN ERASMUS N.O.	Third Respondent
GEORGE PAPADAKIS N.O.	Fourth Respondent
HERDIE VERMEULEN N.O.	Fifth Respondent

AFFIDAVIT

I, the undersigned

JACOB DIEDERIK SMIT,

do hereby make oath and say:

[A] INTRODUCTION AND PARTIES

1. I am the chairperson and speaker of the applicant's council as contemplated in s 36(1) of the Local Government: Municipal Structures Act 117 of 1998 ("the Structures Act"). I am duly authorised by the applicant to make this affidavit. The facts are within my personal knowledge save where the context indicates otherwise, and are true. Submissions are based on legal advice.

2. The applicant is the City of Cape Town , a municipality with legal personality duly established as a category A municipality in accordance with the Structures Act. Its principal offices are at the Civic Centre, 12 Hertzog Boulevard , Cape Town . I shall refer to the applicant as the City.

3. The first respondent is the Premier of the Western Cape , Ebrahim Rasool, with his office at 27 Wale Street , Cape Town . I shall refer to him as the Premier. He has the power in terms of s127(2)(e) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") read with s37(2)(e) of the Constitution of the Western Cape, 1997 Act 1 of 1998 ("the WC Constitution") and s1(1) of the Western Cape Provincial Commissions Act 10 of 1998 ("the WC Commissions Act") to establish commissions of inquiry.

4. The second respondent is the Minister for Local Government and Housing in the Provincial Government of the Western Cape ("the

WCPG"), Mr Qubudile Richard Dyantyi, with his office at 27 Wale Street , Cape Town . The second respondent is, in relation to the Western Cape , the *"MEC"* referred to in s106(1) of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"). I shall refer to him as the MEC.

5. The third respondent is the Honourable Mr Justice Nathan Erasmus in his capacity as chairperson of the commissions of inquiry to be referred to hereunder, care of the office of the secretary to the commissions, Mr Z. Twala, at Attorneys Cliffe Dekker, 8th Floor Cliffe Dekker Place , 11 Buitengracht Street , Cape Town . The third respondent is a Judge of the Cape Provincial Division of the High Court of South Africa, having been appointed to that office in terms of s 174 of the Constitution of the Republic of South Africa Act (Act No. 108 of 1996).

6. The fourth and fifth respondents are the other two members of the said commissions, namely Mr George Papadakis (a forensic accountant, and the managing director of Gobodo Forensic and Investigative Accounting (Pty) Ltd) and Ms Herdie Vermeulen (an attorney, described in the media as a local government expert). They are both cited care of the office of the secretary to the commissions, Mr Z. Twala, at Attorneys Cliffe Dekker, 8th Floor Cliffe Dekker Place , 11 Buitengracht Street , Cape Town .

7. No relief is sought against the third to fifth respondents unless they should oppose the application.

[B] PURPOSE OF APPLICATION

8. The purpose of this application is to set aside:

8.1 the Premier's establishment on 19 March 2008 of a commission of inquiry with the third to fifth respondents as its members, insofar as concerns paragraphs 1 to 10 of its terms of reference;

8.2 an earlier decision by the MEC, made on or about 27 November 2007, to appoint the said respondents as investigators under s106(1)(b) of the Systems Act and the related decision of the Premier, made on or about 29 November 2007, to establish a commission of inquiry with the said persons as its members;

8.3 the appointment of a commission of inquiry under the chairmanship of the third respondent in respect of paragraphs 1 to 12 of the terms of reference published in Proclamation No. 5 of 2008 in the Western Cape Provincial Gazette Extraordinary 6510, on 19 March 2008, on the grounds of constitutional

incompatibility with the principles of the independence of the judiciary and the separation of powers.

9. I shall refer to the commission established on 29 November 2007 as the first Erasmus Commission and the commission established on 19 March 2008 as the second Erasmus Commission. The Premier disestablished the first Erasmus Commission when appointing the second Erasmus Commission. However, for reasons which will become apparent it is necessary to deal at some length with the establishment of the first Erasmus Commission and to have it formally set aside on grounds to be set out later. Where I refer hereunder to the setting aside of the second Erasmus Commission, I mean the said Commission insofar as concerns paragraphs 1 to 10 of its terms of reference.

10. The first Erasmus Commission was appointed to enquire into the City's investigation of one of its councillors Badih Chaaban ("Chaaban"), in particular the City's engagement of a firm of private investigators George Fivaz & Associates ("GFA"). The City's investigation (which spanned the period June-September 2007) culminated in a finding by the disciplinary committee of the City's council on 19 October 2007 that Chaaban was guilty on six counts of misconduct and in a decision by the council itself on 31 October 2007 that in terms of clause 14(2)(e) of the Code of Conduct for Councillors

(Schedule 1 to the Systems Act) the MEC be requested to remove Chaaban from office.

11. The said request was made to the MEC on 5 November 2007, but the MEC has failed to remove Chabaan from office and instead, only on 26 March 2008 advised the City Manager that he had elected to appoint junior counsel to perform an investigation in accordance with clause 14 of the Code of Conduct for Councillors, Schedule 1 to the Systems Act. The MEC's advices are not a little peculiar in the sense that the investigation commissioned by him appears to be parallel to the investigation that the Commission appointed on 19 March 2008 has been mandated to undertake.

12. The WCPG is controlled by the African National Congress ("the ANC"), which currently has a majority in the Western Cape provincial legislature. The MEC and the Premier are members of the ANC.

13. The City's council is currently led by a coalition of the Democratic Alliance ("the DA"), the Independent Democrats ("the ID"), the African Christian Democratic Party (ACDP), the Freedom Front Plus ("the FF+"), the United Democratic Movement (UDM) and the Universal Party (UP). The councillors of these parties collectively constitute a majority in the City's council. The DA has the largest representation on council among the coalition members.

14. The City's executive mayor, Helen Zille, is a member of the DA and its national leader. I am a member of the FF+.

15. At provincial and local government level, the Western Cape and the City represent a major political battleground between the ANC and the DA. The ANC, which previously controlled the City, is anxious to wrest control of the City back from the DA-led coalition. Conversely, there is a credible prospect that the DA (either on its own or in coalition) will take control of the Western Cape at the next general election in 2009, and the ANC is obviously anxious that this should not occur.

16. The City contends, for reasons to be detailed below, that the MEC and the Premier acted unlawfully and irregularly in establishing the first Erasmus Commission. The City submits that there are substantial grounds for reaching this conclusion without determining the subjective considerations which caused the MEC and Premier to act as they did. Nevertheless, the City avers that they were motivated by party-political considerations and by a desire to embarrass or discredit the political parties which make up the coalition, in particular the DA. In so doing, the MEC and Premier abused their powers and were not acting in good faith.

17. The terms of reference of the second Erasmus Commission cover substantially the same matters as the first Commission and some

additional matters. The City contends, again for reasons to be detailed below, that the Premier acted unlawfully and irregularly in establishing the second Erasmus Commission. These reasons include the fact that its establishment is tainted by the same improper motives which led to the establishment of the first Erasmus Commission.

18. The conduct of the MEC and Premier in establishing the first and second Erasmus Commissions is not only unlawful and irregular, but is highly prejudicial to the City's ratepayers and to the inhabitants of the City and the Western Cape . As I shall show in due course, large sums will be wasted during the course of the Erasmus Commission's inquiry, all for the ostensible purpose of ascertaining whether the City was guilty of irregularly expending sums which are trifling in comparison to those which have been and will in the future be occasioned by the establishment of the Erasmus Commission.

[C] LEGAL BACKGROUND

19. The legal position is primarily a matter for argument. However, to understand the City's application it is necessary briefly to make reference to the relevant statutory framework.

[C1] *Local government*

20. The City is a municipality in the sphere of local government. The WCPG is a government in the sphere of provincial government. The Constitution contains various provisions which recognise the autonomy of these different spheres of government, notably ss 40 and 41. This constitutional position is reinforced in s 52(1) of the WC Constitution and s 3 of the Systems Act. A provincial government cannot interfere in local government without a constitutionally-sourced mandate.

21. In terms of s 18(1) of the Structures Act a municipality must have a municipal council. In terms of s 22 the members of a municipal council (i.e. its councillors) must be elected by registered voters in accordance with the prescribed statutory regime. Section 54 of the Systems Act states that the Code of Conduct for Councillors ("the Code") set out in Schedule1 to the Act applies to members of a council.

22. As noted, Chaaban was (and, by virtue of the MEC's inaction, still is) a councillor. He was elected at a time when he was a member of the African Muslim Party. He was (and while he remains a councillor remains) bound by the Code.

23. The chairperson of a municipal council is called the speaker, and he or she is elected by the council (s 36 of the Structures Act). As

previously stated, I am the chairperson of the City's council and thus its speaker.

24. In terms of clause 13(1) of the Code the chairperson of a municipal council must, if he or she is, on reasonable suspicion, of the opinion that a provision of the Code has been breached, authorise an investigation of the facts and circumstances of the alleged breach; give the councillor a reasonable opportunity to reply in writing to the alleged breach; and thereafter report the matter to a meeting of the council. In terms of clause 13(3) the chairperson must also report the outcome of the investigation to the MEC. In relation to the City, I am the person on whom these statutory duties rest.

25. Clause 14 of the Code provides that the council may investigate and make a finding on any alleged breach of the Code, or appoint a special committee to so investigate and to make appropriate recommendations to the council. (In relation to the City, such investigations and recommendations would be made by a special committee constituting the council's disciplinary committee.) If a councillor is found to have breached the Code, various sanctions are available to the council, one of which is (clause 14(2)(e)) to request the MEC to remove the councillor from office. Clause 14(6)(b) authorises the MEC so to remove the councillor if the MEC is of the opinion that the councillor breached the Code and that the breach warrants removal.

26. The Code sets out various forms of misconduct. A fundamental duty imposed on councillors by clause 2 is to perform the functions of office in good faith, honestly and in a transparent manner, and at all times to act in the best interests of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

[C2] ***Provincial government intervention in local government***

27. In certain limited circumstances the Constitution authorises intervention by a provincial government in the affairs of a municipality – I refer to s 139. This is the case where a municipality *"cannot or does not fulfil an executive obligation in terms of the Constitution or legislation"* (s 139(1)) or fails to approve a budget or a revenue-raising measure necessary to give effect to the budget (s 139(4)) or where the municipality, as a result of a *"crisis in its financial affairs"*, is *"in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments"* (s 139(5)).

28. The interventions authorised in the case of s 139(1) are the issuing of a directive describing the extent of the failure to fulfil the executive obligation and stating the steps required to meet the obligation (s 139(1)(a)); assuming responsibility for the relevant obligation to the extent necessary to meet the objectives set out in sub-

paragraphs (i), (ii) or (iii) of s 139(1)(b); or dissolving the municipality and appointing an administrator (s 139(1)(c). Other similar interventions are authorised in the case of ss 139(3) and 139 (5): I refer to s 139(4) and s 139(6) respectively.

29. In terms of s 155(6) of the Constitution, a provincial government is required, *"by legislative or other measures"*, to provide for *"the monitoring and support of local government"* in the province and to *"promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs"*. This duty is mirrored in s 54(1) of the WC Constitution. In terms of s 156(5) of the Constitution a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

30. I am not aware of any Western Cape provincial legislation relating to such monitoring, but s 106 of the Systems Act and various provisions of the Local Government: Municipal Finance Management Act 56 of 2003 ("the Finance Act") are aimed at placing provincial governments in possession of information concerning municipalities.

[C3] ***Section 106 of Systems Act***

31. Section 106 of the Systems Act, which is of particular importance in this application, reads as follows:

"(1) If an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must –

(a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

(b) if the MEC considers it necessary, designate a person or persons to investigate the matter.

(2) In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 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).

(3) An MEC issuing a notice in terms of subsection (1)(a) or designating a person to conduct an investigation in terms of subsection (1)(b), must submit a written statement to the National Council of Provinces motivating the action."

32. Since the investigation which the first Erasmus Commission was required to undertake was said by the MEC and Premier to relate to *"maladministration, fraud, corruption or any other serious malpractice"* rather than a failure by the City to fulfil a statutory obligation, I highlight three requirements which must in terms of s 106(1) be met for the valid appointment of an investigation into such matters under s 106(1)(b):

32.1 Firstly, the conduct which the MEC wishes to have investigated must be of the level of seriousness indicated by the words *"maladministration, fraud, corruption or any other serious malpractice"*.

32.2 Secondly, the MEC must have *"reason to believe"* that such conduct has occurred or is occurring in the municipality. Mere suspicion is not enough. The rationality of the MEC's belief is objectively justiciable.

32.3 Thirdly, the MEC must consider it *"necessary"* to appoint an investigation under s 106(1)(b) (as opposed to enquiring into or resolving the matter in some less intrusive fashion).

[C4] ***Commissions legislation***

33. Section 106(2) of the Systems Act states that in the absence of *"applicable provincial legislation"*, ss 2 to 6 of the Commissions Act 8 of 1947 ("the national Commissions Act") apply to an investigation in terms of s106(1)(b).

34. Sections 2 to 6 of the national Commissions Act are part of an Act regulating commissions appointed by the President. That power of appointment, which I am advised was previously a prerogative power of the head of state, now vests in the President as a constitutional power conferred by s84(2)(f) of the Constitution. The provisions of the national Commissions Act do not apply automatically to a presidential commission. For that to occur, the President must in terms of s 1(1)(a) of the national Commissions Act declare the provisions of the said Act to be applicable. This he may do only if the commission has been appointed by him to investigate a matter of *"public concern"*. If he makes such a declaration, he may then (in terms of s 1(1)(b)) make regulations with reference to the commission.

35. Sections 2 to 6 of the national Commissions Act (where they have been declared by the President to be applicable) pertain to the place of the commission's sittings, its powers to subpoena witnesses, access by the public to its proceedings, a prohibition against interfering with or hindering the commission's work, and offences by witnesses.

36. As noted in the introduction, at provincial level the Premier has the power to appoint commissions in terms of s 127(2)(e) of the Constitution, a power repeated in s 37(2)(e) of the WC Constitution. The Western Cape legislature has enacted the WC Commissions Act. This Act, unlike the national Commissions Act, is automatically applicable where a provincial commission is appointed – it does not have to be declared by the Premier to be applicable, nor is the applicability of the WC Commissions Act made conditional on the matter for investigation being one of *"public concern"*.

37. Section 1(1)(a) of the WC Commissions Act repeats the Premier's power to appoint a commission. The rest of s 1(1) empowers the Premier to define the commission's terms of reference and to make regulations with reference to the commission. Subject to the differences already highlighted, s 1 of the WC Commissions Act is broadly modelled on s 1 of the national Commissions Act.

38. The subject matter of ss 2 to 6 of the national Commissions Act is covered, with some modifications, in ss 2 to 6 of the WC Commissions Act.

39. The import of s 106(2) of the Systems Act is a matter for legal argument. It has been the subject of recent consideration by the Supreme Court of Appeal ("the SCA") in *Minister of Local Government,*

Housing and Traditional Affairs (Kwazulu-Natal) v Umlambo Trading 29 CC and Others [2007] SCA 130 (RSA); 2008 (1) SA 396 (SCA).

40. I am advised that the import of s 106(2) of the Systems Act as interpreted in *Umlambo* is as follows:

40.1 The *"applicable provincial legislation"* in s 106(2) is the provincial commissions legislation (if any).

40.2 The phrase *"with the necessary changes as the context may require"* in s 106(2), a phrase which qualifies the operation of the national Commissions Act when it is made applicable by s 106(2), does not operate where there is applicable provincial commissions legislation.

40.3 The whole of the provincial commissions legislation applies and not only the portions which cover the same ground as ss2 to 6 of the national Commissions Act. (I am advised that this was not specifically stated in the SCA's judgment but that it is necessarily implicit in the reasoning and outcome.)

40.4 Accordingly, and if provincial commissions legislation such as the WC Commissions Act exists and if the MEC wishes his designated investigators to have the powers of commissioners under the WC Commissions Act, he has to

approach the Premier with a request for the appointment of a commission under the WC Commissions Act.

41. In the *Umlambo* case, so I am advised, the Premier of KZN had not been involved and no commission had been appointed, and the SCA thus held that the investigators had no power to subpoena witnesses.

42. On the basis of the law as laid down in *Umlambo*, one is dealing in a sense with two decisions, not one: there is the MEC's appointment of an investigation under s 106(1)(b) of the Systems Act, and the Premier's decision to appoint a commission of inquiry under s 106(2) of the Systems Act read with s1 of the WC Commissions Act. However, the City contends that if the Premier has any power at all to appoint a commission to investigate the conduct of a municipality, such power is located in s 106(2) as interpreted in *Umlambo*. It follows that if the MEC's s 106(1)(b) decision is invalid, the Premier's ancillary decision to appoint a commission is also invalid. Stated differently, a valid decision by the MEC under s 106(1)(b) is a jurisdictional prerequisite for the lawful exercise by the Premier of his power under s106(2) read with s1 of the WC Commissions Act.

43. On the facts of the present case (to be recounted more fully below), it is clear that the Premier indeed exercised his power to appoint the first Erasmus Commission as an adjunct to (i.e. to give

effect to) the MEC's s 106(1)(b) decision. I assume the Premier did so on legal advice, perhaps based on the recent *Umlambo* decision.

44. However, and to the extent that the Premier may claim to have exercised his commission-appointing power independently of s 106(2), the City contends that no such independent power exists in relation to investigations into the affairs of a municipality and that any invocation of the power by the Premier would in any event be flawed and inconsistent with the facts. (This is one of the reasons why, in the applicants' submission, the establishment of the second Erasmus Commission is bad. The Premier has attempted, in appointing the second Erasmus Commission, to evade the constraints of s 106 of the Systems Act by purporting to act independently of that section. The applicant submits that he has no such power.)

[C5] ***Commissions and municipal financial misconduct***

45. Since the terms of reference of the first Erasmus Commission expressly included possible breaches of the Finance Act, and since several items in the terms of reference of the second Erasmus Commission in substance concern supposed acts of municipal financial misconduct, it is necessary to mention that the provisions of s 32 of the Finance Act place a duty on the City Manager to investigate and report on allegations of financial misconduct. The City Manager is obliged to report allegations of irregular expenditure that constitute a criminal

offence to the South African Police Services. To my knowledge the City Manager has investigated the allegations and decided that no evidence exists disclosing a criminal offence. In the context of the first Erasmus Commission, the City Manager indicated, in an affidavit submitted to the Commission, that he had investigated the matter and found that any oversights which existed not only were rectifiable by him, but furthermore were of such a minor kind that they did not amount to serious malpractice, fraud, mal-administration or corruption. He further indicated that he would revisit the issue if additional facts of which he was not aware came to light in the context of the Commission's investigation. The City contends that in the absence of cogent indications that the City Manager has failed to discharge his functions, the appointment of the Commission is an unwarranted interference by the WCPG in the affairs of the City. The interference is of a nature that offends against the provisions of Chapter III of the Constitution. A contention that the City Manager was refusing to fulfil his statutory functions under the Finance Act would be grounds for the MEC to act in terms of s 106 of the Systems Ac or s 139 of the Constitution. No such contention has been advanced.

[C6] ***Commissions and criminal investigations***

46. Because certain terms of reference of the second Erasmus Commission concern the question whether any persons contravened the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("the

Corruption Act"), it is necessary to consider whether a provincial premier may establish a commission of inquiry to investigate suspected contraventions of that Act. In the applicant's submission the answer is no.

47. The Corruption Act creates, in ss 3 to 25 thereof, a number of statutory offences relating to corruption ("the corruption offences").

48. In terms of s 22 of the Corruption Act the National Director of Public Prosecutions ("the National Director") is given the power, if he has reason to suspect certain matters, to give written directions that a particular Director of Public Prosecutions or a Special Director of Public Prosecutions shall have the power to institute an investigation in terms of Chapter 5 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"). This applies where the National Director has reason to suspect (I summarise) that property which may have been used in or facilitated the commission of a corruption offence or be the proceeds of a corruption offence is located in any building, receptacle or place or is in the possession, custody or control of any person.

49. In terms of s 23(1) of the Corruption Act the National Director (or a person authorised by him in writing) may apply to a judge in chambers for the issuing of an investigation direction under s 23(3). Such an application must address the matters listed in s 23(2), including the grounds on which the application is made, full particulars

of the facts and circumstances alleged to support the application, and the basis for believing that relevant evidence will be obtained through the investigation. A judge may issue the investigation direction only if satisfied on the matters listed in s 23(3) and if satisfied that there are reasonable grounds to believe the matters specified in s 23(3)(b)(ii).

50. Apart from these specific investigative powers relating to corruption offences, there exist the ordinary State powers to investigate crime:

50.1 In terms of s 205(3) of the Constitution, the objects of the South African Police Service include the duty to prevent, combat and investigate crime.

50.2 The police have powers of search and seizure under Chapter 2 (ss 19-36) of the Criminal Procedure Act 51 of 1977 ("the CPA").

50.3 In terms of s 205 of the CPA, a witness to a suspected crime can be examined before a judge or magistrate. An examination under s 205 can, however, be initiated only at the request of a Director of Public Prosecutions or an authorised public prosecutor, and the order can be made only if the person to be summoned is likely to be able to give material or relevant information as to an alleged offence.

50.4In relation to offences contemplated in s 7(1)(a)(iii) of the NPA Act ("s7 offences"), there exist powers of search and investigation under Chapter 5 (ss 26-31) of the NPA Act. An investigation under s28 can be conducted by the Investigating Director (an official in the office of the Director of Special Operations – commonly known as the Scorpions) if he has *"reason to suspect"* that a s 7 offence has been or is being committed or attempted. The investigation takes place *in camera*. The Investigating Director may summon and question witnesses and require the production of documents.

50.5If a third party (which for present purposes would include the Premier) has *"reasonable grounds to suspect"* that a s 7 offence has been or is being committed or attempted, he may in terms of s 27 report the matter to the head of the Investigating Directorate by means of an affidavit specifying the nature of the suspicion, the grounds on which it is based and all other relevant information known to him. This may lead to an investigation under s 28.

51. The City submits that it is inconsistent with the constitutional role of the police and the NPA (including the Directorate of Special Operations) for commissions of inquiry to be set up to investigate suspected crimes. The police and the NPA are intended

constitutionally and by statute to be independent institutions which execute their mandates in the investigation and prosecution of crime without fear, favour or prejudice. Their investigative powers, as summarised above, are subject to various constraints designed to strike a balance between the interests of the State on the one hand and those of potential witnesses and suspects on the other.

52. The premier of a province, by contrast, is a political functionary. It would be inappropriate for such a functionary to be entrusted with the power to authorise coercive criminal investigations. The potential for abuse for party-political gain is manifest and has indeed (in the City's submission) come to pass in the current matter.

53. Moreover, a Premier's power to establish a commission of inquiry is not legislatively circumscribed in the way which would be appropriate and expected for criminal investigations.

54. The City thus submits that among the proper range of matters which can form the subject of a provincial commission of inquiry, the investigation of crime must necessarily be excluded. The commission-appointing power can be used only for a legitimate purpose. If the Premier suspects that a corruption offence or any other offence has been committed, he should like any other citizen report the matter to the police or the Investigating Directorate and leave them to investigate it in an independent fashion.

55. Alternatively, the establishment of a commission of inquiry to investigate suspected crime is, at best for the Premier, generally undesirable and indeed most unusual. The Premier's exercise of his commission-appointing power for that purpose in the present case is thus an important factor in assessing his *bona fides*.

[C7] ***Intergovernmental disputes***

56. The effect of s 41(1) of the Constitution is *inter alia* that the WCPG must perform its powers and functions so as not to encroach on the geographical, functional or institutional integrity of the City; and that both the WCPG and the City must co-operate with each other in mutual trust and good faith by fostering friendly relations; by assisting and supporting one another; by informing one another of, and consulting one another on, matters of common interest; by co-ordinating their actions and legislation with one another; by adhering to agreed procedures; and by avoiding legal proceedings against one another.

57. Section 41 (2) requires an Act of Parliament to establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes. Such legislation was enacted in 2005: the

Intergovernment Relations Framework Act 13 of 2005 ("the Framework Act").

58. Section 41(3) of the Constitution requires that an organ of state involved in an intergovernmental dispute must make *"every reasonable effort"* to settle the dispute by means of the mechanisms and procedures provided for that purpose (i.e. as now contained in the Framework Act), and must exhaust all other remedies before it approaches a court to resolve the dispute. Section 41(4) provides that if a court is not satisfied that the requirements of s 41(3) have been met, the court *"may"* refer the dispute back to the organs of state involved.

59. As regards the Framework Act, I mention the following:

59.1 The term *"intergovernmental dispute"* is defined in s 1 in such a way as would include a dispute between the WCPG and the City concerning the exercise by the MEC of his powers under s 106(1) of the Systems Act and the exercise by the Premier of his powers under s 106(2) and/or the WC Commissions Act.

59.2 Section 40(1) imposes on the WCPG and the City the reciprocal duty (a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory

functions (b) to settle intergovernmental disputes without resorting to judicial proceedings.

59.3 Sections 41 to 44 establish formal mechanisms and procedures for declaring and settling intergovernmental disputes.

59.4 Section 45(1) 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 s 41 and all efforts to settle the dispute in terms of Chapter 4 of the Framework Act were unsuccessful.

60. The constitutional duties of the WCPG in this regard are reinforced by ss 7, 52(1), 52(2) and 54(1)(a) of the WC Constitution and by s 3(2) of the Systems Act.

61. I am advised that on a proper interpretation of ss 41(3) and (4) of the Constitution, an organ of state is obliged only to make *"every reasonable effort"* to settle an intergovernmental dispute by means of the mechanisms and procedures contained in the Framework Act, and that even if every reasonable effort has not been so made a court has a discretion to deal with the case rather than referring it back for implementation of the procedures contained in the Framework Act.

62. The City contends for reasons to be explained more fully below:

62.1 that the MEC (in relation to the first Erasmus Commission) and the Premier (in relation to both Erasmus Commissions) violated their duties under these constitutional and statutory provisions relating to intergovernmental relations by exercising their aforesaid powers in the manner they did;

62.2 that the City has made every reasonable effort to resolve the resultant dispute in accordance with the Framework Act, alternatively that this Court should nevertheless in its discretion adjudicate the dispute.

[D] FACTUAL BACKGROUND

[D1] *The Chaaban Investigation*

63. Chaaban, as a member of the Africa Muslim Party, was originally part of the DA-led coalition governing the City. In January 2007 his party was dismissed from the coalition.

64. Thereafter and over the period approximately late March – May 2007 it came to my attention that certain councillors complained of

feeling threatened by Chaaban, and felt that their lives were in danger, including the Mayor. (The Mayor made public statements at the time to the effect that she would not allow Chabaan to intimidate her into acting contrary to what the multi-party coalition intended, but these statements did not detract from her personal concerns about the safety of her person and that of her family.) In addition, I was informed that Chaaban was allegedly approaching coalition councillors (including ID and DA councillors) with offers of bribes to change political allegiance, with the evident intention of toppling the coalition by unlawful means. This was in advance of the September 2007 floor-crossing period. I understand that these allegations were also known to the DA.

65. I understand now from subsequent events and having read an affidavit prepared by James Selfe ("Selfe"), a DA Member of Parliament and chairperson of its Federal Executive (which affidavit was delivered to the first Erasmus Commission), that he felt that these allegations warranted investigation by the DA, since criminal conduct appeared to be involved. I understand further that Selfe and several other DA members of the Provincial Parliament met with GFA's Niel Van Heerden ("Van Heerden") and Mr Philip Du Toit ("Du Toit") on 21 May 2007 to discuss the possible engagement of GFA on the DA's behalf. GFA was to furnish the DA with a quote for the proposed services.

66. I now understand further that on 25 May 2007 GFA furnished to the DA the quote annexed hereto as "**DS1**". In terms of the DA's financial approval guidelines (so I understand from Selfe's affidavit), this quote could not be accepted without the approval of the DA's Chief Executive Officer and Director of Finances. Selfe sent the quote to them. However, and because the DA's proposed investigation was overtaken by the City's investigation referred to hereunder, I understand further that Selfe took the matter no further, and GFA's quote to the DA was never accepted.

67. As appears from "**DS1A**", GFA's covering letter to the DA said that a period of at least three weeks should be allowed for positive results. Paragraph 4 of the quote set out rates but not a total fee.

68. Selfe has stated that the second bullet point in paragraph 3.4 of the quote has no relevance to the DA's proposed engagement of GFA and that he does not know who *"MC"* is. He infers that this item in the quote, as with several other paragraphs therein, was electronically copied from an earlier unrelated quote which GFA used as a template when creating "**DS1**".

69. Independently of the DA's proposed investigation (which I did not then know about), I came to the conclusion that as chairperson and speaker of the council I was under a statutory duty in terms of clause

13 of the Code to investigate Chaaban's conduct, since the allegations (if true) pointed to serious breaches by him of the Code.

70. On 28 May 2007 I called at the mayor's office to inform her of my intentions, and found her in discussion with Selfe. I said to them that I considered myself under an obligation to investigate Chaaban's alleged activities and that for reasons of confidentiality I wanted to make use of private and independent investigators. Selfe then mentioned to me that he could recommend a person for the City and then recommended du Toit to me and gave me his telephone number. I later met Du Toit, who handed me his business card from which I understood that he represented GFA .

71. I was subsequently fortified in my resolve to investigate the allegations which had been made against Chaaban when Yuri "the Russian" Ulianitski ("Ulianitski") was shot dead on the night of 29 May 2007. Chaaban had acknowledged a relationship with Ulianitski, a known member of the criminal underworld, and in the media he had acknowledged using the services of Ulianitski in the past. Ulianitski's violent death made me doubly determined to check out all allegations of intimidation of councillors.

72. In early June 2007 GFA was engaged on the City's behalf. Upon completion of the investigation into Chaaban I prepared a report as required by clause 13(1)(c) of the Code and furnished same to the

MEC (as required by clause 13(3) of the Code) under cover of a letter dated 24 August 2007 . I annex the letter and accompanying report as "**DS2**". The report could have left the MEC in no doubt that Chaaban had *prima facie* been guilty of serious misconduct justifying his expulsion.

73. Charges were put to Chaaban. A hearing by the council's disciplinary committee took place in late September 2007 and a decision by the committee, dated 10 October 2007 was produced by the Chair of the Committee. A copy is annexed as **DS3**. The committee communicated its findings to the council in a report dated 19 October 2007 . A copy of the report is annexed as **DS4**. As noted earlier, the council resolved on 31 October 2007 to request the MEC to remove Chaaban as a councillor, and the request to the MEC was made on 5 November 2007 ("**DS5**"). I may mention that the ANC councillors voted against the resolution (this despite the fact that the Premier had – in an article published the previous day – described Chaaban as a *"disservice to governance"*..

74. Since many of the relevant facts in this regard appear from an exchange of correspondence between the MEC and the City, I annex at this stage the following: letter from the MEC to the City Manager in terms of s 106(1)(a) of the Systems Act dated 26 October 2007 ("**DS6**"); reply from the City Manager dated 29 October 2007 ("**DS7**"); reply (with attachment) from me dated 1 November 2007 ("**DS8**");

further letter (with attachment) from the MEC to the City Manager in terms of s106(1)(a) dated 14 November 2007 ("**DS9**"); detailed reply (with attachments marked "A" to "O") from the City Manager dated 21 November 2007 ("**DS10**"); letter from the MEC to the City Manager dated 27 November 2007 ("**DS11**"); letter (with attached press statement and background document) from the MEC to the mayor dated 27 November 2007, notifying her of his decision to order a s106(1)(b) investigation ("**DS12**"); letter (with attachments) from the Acting City Manager to the MEC dated 29 November 2007 commenting on the MEC's letter of 27 November 2007 ("**DS13**"); letter from GFA to Acting City Manager dated 30 November 2007 ("**DS14**").

75. I also annex as "**DS15**" a copy of a proclamation which appeared in the *Provincial Gazette* on 29 November 2007 announcing the appointment by the Premier of the first Erasmus Commission and setting out *inter alia* its terms of reference. The proclamation records that same was signed on 29 November 2007 by the Premier and the MEC.

76. The MEC's first intervention was his request in terms of s106(1)(a) dated 26 October 2007 ("**DS6**"). This was shortly after the council's disciplinary committee had on 19 October 2007 found Chaaban guilty on six counts of misconduct (the disciplinary committee's report is part of attachment "L" to annexure "**DS10**") and a few days before the council resolved on 31 October 2007 to request

the MEC to remove Chaaban (the minutes of the council meeting are also part of the said annexure "L"). In "**DS6**" the MEC asked certain questions in the light of press reports. He claimed that because of the *"seriousness"* of the matter it needed to be disposed of as soon as possible.

77. The MEC's third, fourth and fifth questions related to financial matters and were thus answered directly by the City Manager ("**DS6**"). The first two questions were referred by the City Manager to me, and I replied to them in "**DS8**":

> 77.1I confirmed to the MEC that I had indeed conducted an investigation into Chaaban's conduct in terms of clause 13 of the Code. I furnished the MEC with the notice I had given to Chaaban in terms of clause 13(1)(b) (this notice is an attachment to "**DS7**"). I also reminded the MEC that on 24 August 2007 , and as required by clause 13(3), I had furnished him with a copy of the report showing the outcome of my investigation (see "**DS2**" above).
>
> 77.2As to the investigative methods used, I stated that I had been assured by GFA that all work undertaken by them for the City had been lawful and fell within the parameters of relevant legislation.

78. I confirm the truth of what I told the MEC. As to investigative methods, I must emphasise that any electronic surveillance and conversation-recording was done by GFA, not by City officials. The City never asked nor mandated GFA to do anything unlawful. If it should transpire that GFA did infringe the law in any way, this was not conduct of the City but of a third party.

79. In his reply on financial aspects ("**DS7**"), the City Manager stated that the payments to GFA had complied with the Finance Act, that the City Manager himself had authorised payment, and that the procurement of GFA's services had been in accordance with applicable regulations and policy. The City Manager also asked the MEC for a copy of the MEC's report to the National Council of Provinces ("the NCOP") as required by s106(3).

80. On 14 November 2007 the MEC directed a follow-up query to the City Manager in terms of s106(1)(a) ("**DS9**"). The MEC attached to his letter his written statement to the NCOP. This written statement pertained to the s106(1)(a) queries posed by the MEC in his letter of 26 October 2007 .

81. In the follow-up query the MEC said he required *"further elucidation"* on the City Manager's responses. I note the following in this regard:

81.1The MEC directed no further queries to me concerning his first two questions in "**DS6**" nor concerning my replies. His further queries in "**DS9**" were confined to the financial aspects.

81.2The MEC in "DS7" did not pose further questions for answer. He simply asked for certain documents.

81.3The requested documents were confined to the engagement of GFA.

82. In his reply of 21 November 2007 ("**DS10**") the City Manager provided all the documents requested by the MEC and also furnished additional information.

83. As appears from "**DS10**", by the time the City Manager wrote that letter (21 November 2007) the following further steps had been taken by the City:

83.1The mayor had appointed a senior counsel at the Cape Bar, Adv SA Jordaan SC , to investigate the matters which appeared to be troubling the MEC ("the Jordaan investigation").

83.2The City Manager had, independently of the Jordaan investigation, embarked upon a process of gathering relevant information and taking any necessary remedial or corrective action (thereby complying with his obligations under the Finance Act).

84. As to the first of these steps, I mention the following:

84.1The mayor had publicly announced on 31 October 2007 that she was in the process of appointing Adv Geoff Budlender to determine whether the City had paid a GFA account which it should not have done or which should have been paid by the DA; whether there had been an instruction to GFA to investigate any other political party or person; and to investigate her own actions throughout the matter. She announced that Adv Budlender's findings would be made public.

84.2She also publicly announced that any amounts still owing by the City to GFA would be withheld pending the outcome of the investigation.

84.3This public statement was published in the press at the DA's expense. I attach a copy as "**DS16**".

84.4I understand that after 31 October 2007 Adv Budlender disclosed a possible conflict of interest, and this resulted in Adv Jordaan SC replacing Adv Budlender.

84.5I annex as "**DS17**" the terms of reference for the Jordaan investigation as determined by the mayor on 8 November 2007.

84.6On 29 January 2008 Adv Jordaan SC finalised his report and same has been made public. He found no evidence of any wrongdoing by the City.

[D2] ***The first Erasmus Commission***

85. The City Manager's letter of 21 November 2007 ("**DS10**") and its attachments speak largely for themselves, I thus wish merely to highlight the following aspects appearing therefrom:

85.1The City Manager confirmed that he had approved the quotes furnished by GFA to the City.

85.2GFA had rendered and been paid two invoices (attachment "D" dated 15 June 2007 for R47 990 exclusive of VAT; and attachment "G", dated 13 August 2007 for R86 517,50 exclusive of VAT).

85.3The first four items in the first invoice (R3 500 out of R47 990) pre-dated by a few days (21-31 May 2007) my first meeting with GFA on 1 June 2007 , which was also the effective date of GFA's engagement by the City.

85.4The City Manager dealt with these four items in paragraphs 8.8, 8.12 and 8.13 of his letter. He said that the date discrepancy had only come to his attention subsequent to his approving the invoice for payment. He had on 8 November 2007 requested an explanation from GFA (attachment "I") but had not yet received GFA's response. He emphasised that he had no reason to believe that the services rendered prior to 1 June 2007 had not been for the City's benefit but that he would,

as soon as he was in a position to do so, take the necessary remedial action to regularise the matter. This might include the possible recovery of any payments not due to GFA.

85.5The five items in the second invoice (making up the total amount thereof) were entered against the identical dates as the first five items of the first invoice (21 May – 1 June 2007). The numbers of hours reflected in the *"quantity"* column obviously made it impossible for any of those items to have been rendered on a single day. Given that this was a later invoice covering the work set out in GFA's second quote, there had obviously been an error.

85.6The City Manager dealt with this in paragraphs 8.10 and 8.11, and attached as "H" a letter of explanation from GFA dated 28 October 2007 . The explanation was to the effect that the second invoice had been prepared electronically, using the first invoice as a template, but that the dates in the first invoice had erroneously not been amended.

85.7I respectfully submit that this explanation is inherently plausible, and indeed it is impossible to suppose that the services reflected in the second invoice had been rendered on or prior to 1 June 2007 .

85.8The MEC would also have learnt, in passing, from paragraph 4 of attachment "H" that GFA had furnished a quote to the DA in late May 2007 but that same had never been accepted by the DA.

85.9The City Manager concluded by stating that the information available to his office did not reveal any maladministration, fraud, corruption or other serious malpractice.

85.10 The City Manager nevertheless gave his assurance (in paragraph 4) that he was committed to resolving and addressing *"any corrupt or fraudulent activities or any maladministration that might have been committed (if any) in the procurement of and payment for services of GFA"*. As there was no question of any possible wrongdoing being ongoing (paragraph 5), the City Manager accordingly requested, in paragraph 7, that the MEC hold off any further action until the City Manager had reported on the outcome of the steps which he had initiated.

[D3] ***The first Erasmus Commission***

86. On 27 November 2007 ("**DS11**") the MEC informed the City Manager that, due to the supposed *"seriousness of the issues"*, he would not be acceding to the City Manager's request to put his course of action on hold pending the finalisation of the City Manager's own process. On the same day, and by way of "**DS12**", the MEC notified the mayor that he had decided to proceed with an investigation in terms of s106(1)(b) of the Systems Act *"read with"* the WC Commissions Act. He said he was in the process of designating persons *"as members of the commission"*. He attached a press statement and background document:

86.1In the press statement the MEC claimed to be *"extremely concerned"* about what he had read in the information supplied by the City.

86.2He identified as his concerns (a) that the City Manager had identified *"discrepancies"* in the GFA invoices (b) that one such discrepancy was an invoice for a consultation with one Botha which had taken place on 21 May 2007, before GFA's first quote of 1 June 2007 (c) *"more worryingly"* that the GFA quotes identified the client as a *"party"* and not the City (d) and that the documentation suggested that the investigation was *"for intelligence purposes"* rather than assessing compliance with the Code.

86.3The MEC went on to say in the press statement that the s106 investigation would *"take the form of"* a commission appointed by the Premier. He said, though, that he (the MEC) would designate three commissioners and announce their names within a week.

86.4In the attached background document the MEC stated that the terms of reference of the commission would be as set out in the twelve bullet points commencing at the foot of page 3 of that document. The commission was to report to him (the MEC) by 31 January 2008.

87. I point out that the MEC took the decision reflected in his letter of 27 November 2007:

87.1without having directed any further queries to me and without having asked to speak with me;

87.2without having directed any further queries to the City Manager and without having asked to speak with him;

87.3without awaiting particulars as to GFA's reply to the questions asked concerning the first invoice in the City Manager's letter to GFA of 8 November 2007 ;

87.4without awaiting the outcome of the investigation which the City Manager said he was undertaking, and which might (depending on the outcome) have led to remedial action (despite having been expressly asked by the City Manager to do so);

87.5without awaiting the outcome of the Jordaan investigation appointed by the mayor;

87.6without having ever raised with the City his supposed concerns (a) that the quotes reflected the client as a political party rather than the City (b) that the documents suggested that the City's investigation had been *"for intelligence purposes"* (whatever that might mean) rather than for the purpose I had affirmed in my letter to the MEC;

87.7without ever having raised with the City most of the matters in the commission's proposed terms of reference (only points 3, 6, 7 and 8 out of the twelve bullet points in the background

document could be said to have been raised directly or indirectly in the correspondence).

88. Two days later (29 November 2007) the proclamation establishing the first Erasmus Commission, "**DS15**" was signed (it was published in the *Provincial Gazette* on 4 December 2007):

88.1The heading of the proclamation and the introductory part of numbered paragraph 1 (containing the Commission's terms of reference) stated that the Commission had been established to inquire into *"the possible occurrence of maladministration, corruption, fraud or other serious malpractice"* in the City.

88.2The opening (un-numbered) paragraph of the proclamation recorded that the MEC had designated Judge NC Erasmus, Mr G Papadakis and Ms H Vermeulen to conduct an investigation in terms of s106(1)(b) of the Systems Act and that the said investigation would be conducted in terms of that Act.

88.3The said opening paragraph went on to state, against this background, that the Premier was appointing the same persons as the members of the Commission.

88.4The proclamation recorded the Premier's appointments of Mr Z Twala ("Twala") as the Commission's secretary and Mr F Petersen ("Petersen") as its leader of evidence. Twala is an attorney with a large national law firm, Cliffe Dekker. Petersen is with KPMG Forensic Services.

88.5The terms of reference of the Commission were set out in the introductory part of numbered paragraph 1 as particularised in sub-paragraphs 1.1 to 1.8. The terms of reference there set out are similar but not identical to those recorded in the background document annexed to the MEC's letter of 27 November 2007 . In particular, the formulation of paragraphs 1.3, 1.4 and 1.5 of the proclamation extends beyond the corresponding paragraphs in the MEC's background document. Conversely, there are items in the MEC's document which are not repeated in the proclamation.

88.6The Commission was to report to the Premier by 31 January 2008 .

88.7The Premier made the regulations in the schedule attached to the proclamation.

89. I am advised that the validity of the decisions of the MEC and Premier in relation to the first Erasmus Commission must, insofar as same concerns their states of mind, be assessed on the facts known to them as at 27 and 29 November 2006 respectively. Nevertheless, and for the sake of completeness, I have annexed as **DS13** and **DS15** two subsequent letters.

90. **DS13** is a letter from the Acting City Manager (written in the temporary absence of the City Manager) to the MEC dated 29 November 2007. This letter was written before the Acting City

Manager knew of the proclamation. In this letter the Acting City Manager commented on the MEC's claim in his press statement of 27 November 2007 that the GFA quotes reflected that a political party rather than the City was the client:

90.1The Acting City Manager pointed out that GFA's quotes had been addressed to the City and he commented on the only portion of the quotes (para 2.1 of the first quote – attachment "B" to **DS9**) which the MEC might have had in mind.

90.2The said paragraph 2.1 reads as follows:

"It is suspected that [Chaaban] *attempted on several occasions to 'purchase' the vote or lure members of Icosa and Independent Democrats (ID) by means of financially bargaining with them for their vote. This was confirmed as several members of your party had approached you and explained to you that this held substance as they had been approached by* [Chaaban]*."*

90.3The Acting City Manager inferred that the reference in the above passage to *"your party"* had in all likelihood come about because GFA had used its earlier unaccepted quote to the DA as a template in creating the quote to the City.

91. The Acting City Manager also informed the MEC of the status of the City's query to GFA concerning the first four items in GFA's first invoice:

91.1He attached a GFA reply dated 27 November 2007 . In paragraph 5 of that reply GFA acknowledged that they had not yet received their instruction from the City as at those dates but stated that the information ascertained on those dates had assisted in the Chaaban investigation.

91.2In response to the City's query as to how the City had benefited from those attendances, GFA stated that *"due to reasons of confidentiality"* they could *"not go into too much detail"* but assured the City that these attendances *"formed a critical part into the Chaaban investigation, especially in the primary phase of the investigation"*.

91.3The Acting City Manager informed the MEC that he regarded this response as inadequate and attached his further letter of 29 November 2007 to GFA. He stated that depending on GFA's response, the options available to the City included recovering the sum of R3 500 from GFA if the latter had been unjustifiably enriched.

[D4] ***Subsequent events relating to first Erasmus Commission***

92. On 12 December 2007 the Commission published a notice in the press calling for submissions from interested parties by 28 December 2007.

93. Due to the unavailability of witnesses and other difficulties, the Commission agreed to extend this deadline pending a meeting with interested parties. This meeting took place at the High Court on 14 January 2008. At this meeting the evidence-leader (Petersen) handed to the various parties' legal representatives a list of 20 witnesses whom he wanted to question (copy annexed as "**DS18**") but said that there might be as many as 40 witnesses. The list of 20 included five current councillors (including me, the mayor and Mr Simon Grindrod) and several senior City officials (including the City Manager).

94. During this meeting certain procedural arrangements were agreed between the Commission and the legal representatives. There was a misunderstanding as to what these arrangements were, and this led to a further meeting at the High Court on 24 January 2008. In terms of the revised arrangements, written submissions were to be filed by 31 January 2008 and made available to all other parties. By 6 February 2008 Petersen was to make available to the parties a bundle of the documents he intended to use and a discovery affidavit listing further documents in his possession but which he did not intend using. The following two weeks would be used to hear any interlocutory

applications, relating to access to documents and the like. Formal examination of witnesses would commence over the period 25 February to 7 March 2008 and continue in the period 31 March to 4 April 2008. Further time would be scheduled thereafter. Petersen would lead all witnesses but cross-examination from counsel would be allowed.

95. Pursuant to the meeting on 14 January 2008, where the parties' legal representatives had indicated a willingness to tender the voluntary cooperation of the witnesses represented by them, Twala (the secretary to the Commission) requested that interviews be arranged with eleven City officials during the course of the week commencing 21 January 2008, and that vast numbers of documents be provided before or at those interviews. A copy of Twala's letter, dated 16 January 2008 (the *"2007"* in the date is an obvious error), is annexed marked **DS19**. Petersen began to interview certain witnesses informally, including City officials and Van Heerden and Du Toit of GFA. The style of questioning was, I am informed, aggressive and confrontational and was thought by the witnesses' legal representatives to have strayed beyond the Commission's terms of reference. This led to interventions by counsel and eventually to the termination of voluntary cooperation.

96. At both the meetings of 14 and 24 January 2008 the City's legal representatives reserved their right to contend that the Commission

had been invalidly established. This was further confirmed in writing to the Commission by attorneys Fairbridges on 31 January 2008.

97. The relevant parties were represented in the first Erasmus Commission's proceedings as follows:

97.1City councillors (including the mayor and myself) were represented by Fairbridges, who instructed Advocates Webster SC, Farlam and Mayosi.

97.2City officials (including the City Manager) were represented by Mallinicks, who instructed Advocates Jamie SC and Paschke.

97.3Van Heerden and Du Toit were represented by an independent advocate, one Johan Nortje.

97.4The DA was represented by Minde Schapiro & Smith, who instructed Advocate F Van Zyl SC.

97.5Chaaban was represented by Cornel Stander, who instructed Advocate W King.

98. After taking legal advice, the City concluded that the establishment of the first Erasmus Commission was unlawful. Although the City was advised that in the circumstances of the case an immediate application

to court without prior compliance with the Framework Act would probably be permissible, the City decided to pursue a non-litigious resolution of the matter in accordance with the Framework Act.

99. I am advised that in terms of s45(2) of the Framework Act all discussions under s41 and reports under s42 are privileged and may not be used in judicial proceedings. I thus simply record the following:

99.1 The Mayor wrote to the Premier regarding the issue on 7 February 2008.

99.2 The Premier replied on 11 February 2008, indicating *inter alia* that he was seeking counsel's opinion.

99.3 In the same letter the Premier notified the Mayor that to enable him to take and consider legal advice and to explore with the City the scope of inter-governmental dialogue he had requested the Commission to postpone its hearings.

99.4 On 19 February 2008 the MEC wrote to the Mayor stating that he too was taking counsel's opinion on the matter.

99.5 Nothing further happened in regard to dispute resolution. The next development was the public announcement by the Premier on 19 March 2008 that he was disestablishing the first

Erasmus Commission and establishing the second Erasmus Commission.

100.I annex as **DS20** the press report which appeared on 11 February 2008 concerning the postponement of the hearings of the first Erasmus Commission. I highlight two aspects of this report::

100.1 Both the Premier and the Commission's secretary were reported as saying that the postponement of hearings would not affect the Commission's other work, "*including the evaluating, gathering and pronouncing on evidence*".

100.2 The Premier was reported as having said that there was "*room for an interim report*", an issue which he had apparently raised with Judge Erasmus.

101.The City was dissatisfied on both scores, and accordingly the Mayor wrote to the Premier on 12 February 2008 as per **DS21**. She objected to the Commission continuing with further work pending a dispute-resolution process which might result in the Commission's discontinuance. She also objected to the production of an interim report, stating that in law the Commission was obliged to obtain and evaluate evidence in public hearings. (Paragraph 8 of **DS21** has been blanked out as it relates to the privileged dispute-resolution process.)

102.On the following day (13 February 2008) the City's attorneys, Fairbridges, wrote to the Commission as per **DS22**, submitting that it would be irregular for the Commission to furnish an interim report until it had received evidence at public hearings.

103.On 20 February 2008 the Commission's secretary advised Fairbridges that he had referred Fairbridges' letter to Judge Erasmus and hoped to be able to report by the end of the day (**DS23**). That did not happen.

104.On 22 February 2008 the Premier responded to **DS21** (see "**DS24**"), stating that he had met the Mayor's minimum demand by postponing the Commission's hearings. As regards an interim report, he said he had "*suggested*" that the Commission furnish him with a "*preliminary evaluation of the information at its disposal*". He said this could assist in assessing whether the information was compelling enough to continue the Commission's work. He also foreshadowed the possibility of remedying any shortcomings in the establishment of the Commission. (Again, the last paragraph of **DS24** has been blanked out because it relates to privileged matter.)

105.When Fairbridges had not heard from the Commission by 26 February 2008, they addressed the further letter annexed as **DS25**. On 28 February 2008 the Commission's Secretary replied as per **DS26**. In this letter it was stated:

105.1 that although the Premier had not sought an interim report in any written mandate or request, the furnishing of such a report had been "*discussed*" with the Premier;

105.2 that the commissioners had, in terms of their own internal arrangements, requested the evidence-leader to prepare a "*progress report*" summarising the evidence presented;

105.3 that the Commission did not intend dealing with the merits of any evidence;

105.4 that the progress report would be made available to the Premier.

106.The City considered the preparation of an interim report by whatever name and its furnishing to the Premier to be irregular and potentially wasteful (since the City, the Premier and the MEC were engaged in a process which might have resulted in the demise of the Commission). The City also viewed with deep suspicion the Premier's apparent desire for an interim report. The Premier was meant to be engaged in a dispute-resolution process in which the City was contending that the Erasmus Commission had been unlawfully established. The Premier was awaiting legal advice as to whether or not this was so. If the City was wrong in so contending, there was no

need for an interim report – the Commission could simply proceed with its work and provide the final report contemplated by the proclamation of 29 November 2007. If, conversely, the City was right, the Premier (if he was *bona fide*) had no legitimate business obtaining information from an unlawfully established commission. (The device of a so-called 'progress report' is not contemplated by the WC Commissions Act (or indeed the national Commissions Act) and there is no provision for it in the regulations made pertaining to the Commission. The procedure avoids the publicity that is required to attend reports to the Premier. Section 7(2) of the WC Commissions Act requires the Premier to submit any report received by him to the Provincial Parliament for consideration by the relevant standing committee.)

107.However, the City concluded that there was very little it could do at a practical level to prevent what it perceived as an abuse, and so matters rested until 19 March 2008.

[D5] ***The second Erasmus Commission***

108.I annex as **DS27** and **DS28** two proclamations which were published in the *Provincial Gazette* on 19 March 2008. I also annex as **DS29** the Premier's media statement of the same date.

109.In terms of "**DS27**" the proclamation of 4 December 2007 ("**DS15**") establishing the first Erasmus Commission was repealed. In terms of

"**DS28**" the second Erasmus Commission was established. It has the same members, secretary and evidence-leader as the first Erasmus Commission. Save for minor differences of formulation, the terms of reference contained in paragraphs 1 to 7 of "**DS28**" cover the same ground as paragraphs 1.1 to 1.7 of "**DS15**". The matters in paragraphs 8 to12 of "**DS28**" are new:

109.1 Paragraph 8 concerns possible breaches of the "*sanctity of the precincts of*" the City's council and/or the provincial parliament.

109.2 Paragraph 9 concerns the resignation of Councillor S Arendse and his subsequent re-election as a councillor representing the DA, and possible corruption in that regard.

109.3 Paragraph 10 concerns possible corrupt actions by Chaaban.

109.4 Paragraphs 11 and 12 relate to the George Municipality , and the City has no legal interest in an investigation into those matters.

110.In terms of "**DS28**" the Commission's chairperson is to report the Commission's findings to the Premier by 30 June 2008.

111.“**DS28**” concludes with the following:

“*The Commission of Inquiry established by Proclamation 18 of 2007 published in Provincial Gazette 6485 on 4 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. Furthermore, I hereby make the regulations in the Schedule with reference to this Commission*”.

112.The Proclamation was apparently signed in Cape Town by the Premier and the MEC on 19 March 2008.

113.The regulations forming part of “**DS28**” are substantially the same as those which applied to the first Erasmus Commission.

114.It will be noted that the new proclamation (“**DS28**”) omits the introductory unnumbered paragraph which had appeared in the earlier proclamation and also the introductory part of numbered paragraph 1 thereof. In other words, the second Erasmus Commission has supposedly been established independently of, and not pursuant to, s106 of the Systems Act, and it is no longer stated that the topics for investigation constitute “*maladministration, corruption, fraud or other serious malpractice*” within the City.

115.This omission was highlighted by the Premier in the concluding paragraph of his media statement, "**DS29**". In that paragraph he stated that the new proclamation had been promulgated "*to avoid any possibility of a legal challenge*".

116.It is apparent from the media statement that the Premier is justifying his establishment of the second Erasmus Commission on the basis of an "*overview*" of the information collected by the first Erasmus Commission, as assembled by its evidence-leader.

117.Based on press reports indicating that the Commission had furnished a report to the Premier and that same had found its way to the *Mail and Guardian*, Fairbridges on 17 March 2008 wrote to the Commission's secretary requesting a copy of same ("**DS30**"). (The letter was preceded by a conversation between the City's attorney, Ms Fiona Stewart of Fairbridges, with Mr Nic Dawes of the *Mail and Guardian* newspaper in which the latter confirmed to Ms Stewart that he had had sight of the 'progress report' together with a copy of the Mayor's telephone records. Dawes was not willing to disclose where he had seen these documents or to say who had shown them to him.) The Commission's secretary replied on 19 March 2008 ("**DS31**"), indicating that the report was an "*internal*" document which had been made available to the Premier but would not be disclosed to anybody else. The secretary stated, further, that the *Mail and Guardian* had not obtained the report from the Commission but may well have obtained it

from the Premier's office. (I reiterate that the provision of documentation and reports by the Commission to the Premier in *res medias* the Commission's work is something that is not contemplated in terms of the relevant legislation. Even were this conduct permissible, which I submit it is not, I contend that the conduct has special significance in relation to the point advanced later in this affidavit - at paragraphs 190 - 202 - about the constitutional incompatibility of a judge chairing a commission that acts at the behest of the executive in the manner just discussed. Whatever the motivation for such conduct and whatever the role of the Chairperson may or may not have been in it, it conduces to subvert the characteristics of independence and impartiality that are an important attribute of public confidence in the judiciary.)

118.In a further letter dated 27 March 2008 ("**DS32**") the Commission's secretary advised as follows:

> 118.1 The progress report had been a "*internal report*" by the evidence-leader, constituting "*merely a summary of all the evidence collected and collated to date*".
>
> 118.2 The report (despite being described as "*internal*") had been furnished to the Premier "*in the week of the 4th of this month*", which I take to mean the week starting Monday 3 March 2008.

118.3 It was recorded that Fairbridges was welcome to request a copy of the progress report from the Premier. (In other words, the Commission itself persisted in its refusal to disclose it.)

118.4 The deadline for further submissions to the second Erasmus Commission was noon on 11 April 2008. Hearings would take place over the period 14-25 April 2008 and 5 -29 May 2008.

119.For the sake of completeness I annex letters dated 2 April 2008 addressed by Fairbridges to the Commission ("**DS33**") and to the Premier ("**DS34**"). In "**DS34**" the Premier has been asked for the progress report and all its annexures. "**DS33**" deals with an issue relating to the Mayor's personal cell phone records.

120.There has been no reply as yet to "**DS33**" and "**DS34**".

[E] GROUNDS OF REVIEW: FIRST ERASMUS COMMISSION

[E1] *Invalidity of MEC's decision*

121.The City contends that the MEC's decision, taken on or about 27 November 2007, to designate the members of the Erasmus

Commission to conduct an investigation in terms of s106(1)(b) of the Systems Act was invalid and should be set aside.

122.I am advised that an MEC's decision in terms of s106(1)(b) constitutes *"administrative action"* in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). This is a matter for legal argument. The review of the MEC's decision is thus brought in terms of the relevant provisions of PAJA to be identified below.

123.Alternatively, and if the decision is not *"administrative action"* as defined in PAJA, the exercise of power under s106(1)(b) is still constrained, so I am advised, by the constitutional principle of legality and can be set aside if unlawful or if the power was exercised not in good faith or under a misapprehension as to the power or if its exercise infringes any provision in the Bill of Rights. All or most of the City's complaints would be justiciable on this alternative basis.

[E1.1] ***Reasonable belief***

124.As noted earlier, a valid exercise of the MEC's power under s106(1)(b) requires *inter alia* that the conduct he wishes to have investigated should be of the seriousness inherent in the words *"maladministration, fraud, corruption or any other serious malpractice"* and that he should have *"reason to believe"* that such conduct has

occurred or is occurring. The City avers that neither element was satisfied in the present case

125.In what follows on this point, I shall assume, without accepting, that the MEC genuinely held the beliefs he has claimed. In a later section I shall say why the City alleges that he did not genuinely hold such beliefs and why he acted in bad faith.

126.In the present case, the MEC's supposed concerns are set out in his media statement attached to his letter of 27 November 2007 ("**DS12**"). The statement indicates that his concerns purportedly arose from what he had read in the information supplied by the City. He does not say that he had obtained information from any other sources. One can thus assess the reasonableness of his belief with reference to the letters and their attachments. I shall take the identified concerns in turn.

127.One concern was that a GFA invoice referred to a consultation with a Mr Botha on 21 May 2007, before the date of GFA's first quotation:

127.1 The facts before the MEC showed that GFA's quote was submitted on 1 June 2007 and approved by the City Manager on 4 June 2007 .

127.2 It is not in dispute that GFA met with Mr Theuns Botha and certain others of the DA on 21 May 2007 (and, for that matter, that GFA also did other work on 22, 28 and 31 May 2007).

127.3 It is not in dispute that GFA's first invoice (dated 15 June 2007) billed R3 500 for the meetings and work done in the period 21-31 May 2007 (out of a total, excluding VAT, of R47 990 charged in that invoice).

127.4 It is not in dispute that the City authorised payment of the said invoice on 28 June 2007 .

127.5 As at 27 November 2007 the MEC knew that on 8 November 2007 the City Manager had, upon noticing the date discrepancy, requested GFA to explain the inclusion of the items dated 21-31 May 2007 and to state (if the services in question were not commissioned by the City) whether, and if so how, the City had benefited from the services.

127.6 Although the City Manager informed the MEC of this query to GFA, he nevertheless stated to the MEC that he had no reason to believe that the City had not benefited from the said services, but that remedial action might include recovery from GFA of any amounts found not to be owing.

127.7 The explanation which the MEC would have received shortly after 29 November 2007 had the proclamation not been promulgated on that date was that GFA had initially been approached by the DA for a quote, and that a meeting had been held in that regard with the DA on 21 May 2007. GFA then began immediately to do certain work, but the DA did not accept the quote. The work was nevertheless of value and use in respect of the investigation subsequently commissioned by the Speaker.

127.8 This aspect raises no issue of serious concern in respect of maladministration or malpractice. Even if the City had knowingly paid R3 500 for a service which had not been authorised and which was not of benefit to the City (which is not the case), the incident would not have been of the requisite severity.

127.9 However, on the facts known to the MEC the discrepancy had been detected by the City Manager and an explanation had been sought from GFA. The MEC had no reason to reject the City Manager's statement that if the City had not authorised or benefited from the work, the overpayment would be reclaimed.

128.The above concern was mentioned by the MEC as an example of a more general concern as to supposed "*discrepancies*" in GFA's invoices:

128.1 The only other "*discrepancy*" was in the second invoice dated 13 August 2007 , where the five items of that invoice were billed against the dates 21, 22, 28 and 31 May 2007 and 1 June 2007 .

128.2 Even without explanation, it is obvious that the work in question could not have been done on those dates, that the dates duplicated those on the first invoice (in respect of which the description of the work had been different), and that some clerical error must have occurred.

128.3 In the City Manager's letter of 21 November 2007 a full explanation was given, based on GFA's letter to the City dated 28 October 2007 (a copy of which the City Manager supplied to the MEC). The work in question related to the period 15 June–13 August 2007 , and this was borne out by GFA's report of 20 August 2007 . Due to a clerical error the dates on the first invoice (which had been used as a template to create the second invoice) were not altered.

128.4 The MEC had no basis for doubting this explanation, which was inherently plausible.

129.The next concern was that the GFA quotes supposedly referred to the client as a "*party*" rather than as the City. The MEC's implication seems to have been that in truth the DA was the client but that the City was paying:

129.1 Both the City Manager and I confirmed in letters to the MEC that the City had indeed engaged GFA.

129.2 The MEC did not suggest in the correspondence that the conduct of Chaaban was not a serious and proper matter for investigation by the City. Accordingly, an assertion by the City that the City had decided to investigate Chaaban's behaviour ought not to have evoked surprise in the MEC. He would or should have appreciated that the speaker had a statutory duty to launch an investigation.

129.3 GFA's first quote was in response to a request for same from the City under reference 101/2007.

129.4 The said quote (dated 1 June 2007) was addressed by GFA to Mr Barnie Botha in his capacity as advisor to me as speaker.

129.5 The body of the quote repeatedly referred to "*your office*" as the client (i.e. my office as speaker).

129.6 The reference which the MEC had in mind was apparently to be found in paragraph 2.1 of the quote, which I cited earlier.

129.7 The quoted statement (drafted not by me but by GFA) conveys nothing more than that I had supposedly been approached by several members of the party to which I belonged with information which corroborated the concerns about Chaaban's behaviour.

129.8 There is nothing remotely sinister in the quoted paragraph. The quotation affords no basis for a rational belief that the City was being made to pay for an investigation in truth commissioned by a political party. The reference to my having purportedly been approached by several members of my party was also clearly wrong: the FF+ has only one councillor on the City's municipal council (namely me).

129.9 I do not know what *"party"* GFA had in mind in the quoted passage. The councillors who had given information about Chaaban's approaches belonged to the DA and the ID.

If it be assumed that GFA intended the *"party"* to be a reference to the DA and/or the ID, the paragraph cannot bear the weight which the MEC apparently wishes to ascribe to it. GFA could have been referring loosely to members of the parties in the coalition by which the City is headed and by virtue of which I as speaker hold office, or there could have been some other explanation (including error or inaccuracy on GFA's part).

129.10 On 29 November 2007 (the same date as the proclamation "**DS15**" was signed) the Acting City Manager wrote to the MEC suggesting that paragraph 2.1 of the quote may have been copied electronically from the earlier quote given by GFA to the DA and that the word "*party*" may have remained through inadvertence. It is possible that this letter did not reach the MEC before the proclamation was signed, but it reflects the sort of innocent explanation which might have been forthcoming had the MEC bothered to ask the City about this wording instead of precipitously proceeding with a s106(1)(b) investigation. (I point out that by 27 November 2007 the MEC knew that GFA had given a quote to the DA which the latter had not accepted – see annexure "H" to the City Manager's letter to the MEC dated 21 November 2007 . Thus, the way in which the error might have come about [if there was one] is not hard to discern.)

129.11 The MEC's press statement of 27 November 2007 refers to references to the "*party*" in GFA's "*quotations*" (plural). It is incorrect that the second and third quotes contain any similar reference to *"a party"*. The later quotes, like the first one, made it clear that such quotes were directed to the City.

130. The final concern was that the documents supposedly suggested that the investigation was "*for intelligence purposes*" rather than assessing compliance with the Code of Conduct:

130.1 I do not know what the MEC intended to convey by the phrase "*for intelligence purposes*".

130.2 What is clear from the documents is that GFA was engaged by the City to investigate whether Chaaban was guilty of misconduct. In the event, GFA's investigation convinced me that there was a proper basis for disciplinary proceedings to be instituted against Chabaan. This resulted in Chaaban being charged, found guilty and his expulsion recommended.

131. The terms of reference in the proclamation went beyond the concerns articulated in the MEC's press statement. Some of the

additional matters did not relate to suspected maladministration or malpractice at all, for example (a) whether the City engaged any service providers other than GFA in connection with the Chaaban investigation and if so what the scope of their services was and what the cost to the City was (b) whether the City or its officials reported their suspicions of Chaaban's criminal activity to the police. There was no basis on which the MEC was justified in establishing an investigation into these matters.

132.In respect of the other additional aspects of the terms of reference, I do not know whether the MEC will claim to have had reason to believe that there was serious maladministration or malpractice and, if so, on what factual material he will rely:

132.1 According to the terms of reference, the investigation extended to whether any other service providers (i.e. in addition to GFA) were paid for work done before their appointment. The correspondence contains no hint of any such thing. The MEC could in terms of s106(1)(a) have asked the City for information and documentation if he had suspected anything on this score.

132.2 The investigation was also to cover possible transgressions of the Council's policies and structures and whether the Finance Act was contravened in respect of the

Chaaban investigation. To the extent that this relates to the items in the GFA invoices dated 21-31 May 2007, I refer to what I have already said. To the extent that the terms of reference went wider than this, there was no factual basis for the MEC reasonably to have believed that there were other transgressions, let alone serious ones.

132.3 Finally, there was the proposed investigation into whether the City's contract with GFA made provision for intelligence gathering, electronic surveillance and monitoring of councillors and other persons, and if so "*whether this is lawful*":

132.3.1 The City's contract with GFA is evidenced by GFA's quotes as read with the invitation to quote. The contractual terms as such do not call for further investigation.

132.3.2 It is clear from the documentation that GFA's work included the covert gathering of facts.

132.3.3 It is equally clear that there is nothing in the contractual documentation which authorises the use of unlawful means.

132.3.4 It is unclear whether this item in the terms of reference raises the question whether the surveillance methods used by GFA were unlawful or whether the question is rather whether it is ever lawful for a municipality to engage a person to perform surveillance work. The latter is, I am advised, a purely legal question on which no investigation under s106(1)(b) would be needed.

132.3.5 If it should transpire that the MEC had a reasonable factual basis for believing that GFA had used unlawful surveillance methods (which I do not admit), it does not follow that a s106(1)(b) investigation was warranted. Section 106(1)(b) is, I am advised, concerned with wrongdoing by a person holding a position in the municipality, which wrongdoing pertains to the performance of the functions in the municipality to which he or she has been appointed. Section 106(1)(b) cannot thus be used to investigate suspected wrongdoing by GFA. The question is whether the MEC had reason to believe that the City had commissioned unlawful surveillance. Not only is there no evidence to suggest this, but the MEC never directed any questions to the City in that regard

under s106(1)(a) nor did he mention such a concern in his press statement.

133.The City thus contends that the MEC did not, on 27 November 2007 when he made his decision, have the reasonable belief required by s106(1)(b). His decision thus falls to be set aside in terms of ss6(2)(a)(i), 6(2)(b), 6(2)(f)(i) and 6(2)(i) of PAJA, alternatively on the constitutional basis of illegality.

[E1.2] ***Necessity of s106(1)(b) investigation***

134.An MEC can only appoint a s106(1)(b) investigation if he *"considers it necessary"*. The City avers that if the MEC genuinely held such belief (which the City does not accept and which I shall address later), it was not properly held.

135.I submit that the reasons why a s106(1)(b) investigation can be appointed only if the MEC considers such a step *"necessary"* are:

135.1 that investigators so appointed have, or can lawfully be given, coercive powers which make inroads into the rights of individuals (particularly those subpoenaed) and which powers are usually reserved for courts of law;

135.2 that such an investigation, which under commissions legislation is generally public, is an intrusion on the municipality's autonomy (since its councillors and officials would generally be required to testify) and is – both for this reason and because of the imputation of serious misconduct – calculated to create tension between provincial and local government.

136. In the present case, none of the matters which the MEC wished to have investigated was so serious as to render a s106(1)(b) investigation *"necessary"*.

137. As regards the supposed date discrepancies in the two GFA invoices:

137.1 The MEC had already received a full and satisfactory explanation in respect of the second invoice.

137.2 In respect of the first invoice (where only R3 500 was involved), the MEC knew that further enquiries were being made by the City Manager, who had given the MEC the assurance that any amount not properly paid would be recovered. The MEC also knew that the mayor had appointed a respected and very experienced senior counsel (of 35 years standing at the Cape Bar) to investigate the matter.

137.3 The MEC took no steps to interview me or the mayor or the City Manager.

137.4 The outcome of the steps initiated by the City would almost certainly have rendered further investigation at provincial level unnecessary, but at any rate a proper assessment in that regard could not have been made by the MEC prior to the completion of those steps.

138.As to the quotes supposedly showing that the client was a political party:

138.1 The MEC had been given all contractual documents and these showed clearly what the true position was.

138.2 Since the City had responded fully to the MEC's s106(1)(a) queries, he had no reason not to raise this aspect by way of a further s106(1)(a) query. He did not do so.

138.3 The MEC took no steps to interview me or the mayor or the City Manager.

138.4 Again, the MEC knew that the Jordaan investigation was dealing with this aspect. The MEC could thus not properly have

regarded a s106(1)(b) investigation as necessary prior to the completion of the Jordaan investigation.

139.As to the supposed concern that the investigation into Chaaban had been *"for intelligence purposes"*:

139.1 To the extent that this concern is intelligible, it was never raised with the City by way of a s106(1)(a) query.

139.2 The MEC took no steps to interview me or the mayor or the City Manager.

139.3 Moreover, it was again likely to be covered by the Jordaan investigation.

140.As regards the other matters contained in the first Erasmus Commission's terms of reference, the MEC could hardly have thought that they necessitated a s106(1)(b) investigation, since he did not mention them in his press statement of 27 November 2007 when explaining to the public why he was appointing the investigation.

141.In any event, and as to the engagement of service providers other than GFA:

141.1 The MEC had received no documents suggesting anything improper in respect of other service providers.

141.2 The MEC could have asked queries on this score in terms of s106(1)(a).

141.3 He could also have asked to speak with the City Manager or other relevant officials.

142.As to possible transgressions of council policies and structures or of the Finance Act (to the extent that this relates to matters other than the GFA invoices, with which I have already dealt):

142.1 The MEC had received no documents suggesting any other supposed financial transgressions.

142.2 The MEC could have asked queries on this score in terms of s106(1)(a).

142.3 The MEC could also have asked to speak with the City Manager or other relevant officials.

142.4 The City Manager (the designated accounting officer under the Finance Act) had already indicated that he was aware of the allegations and investigating any purported irregularities,

and would keep the MEC informed of the outcome of the process which he had initiated.

143.As to surveillance and intelligence-gathering methods:

143.1 I had informed the MEC that the City had not authorised anything unlawful, and the contractual documentation did not suggest otherwise.

143.2 If the MEC, from other (as yet undisclosed) sources, had information to the contrary, he could and should have posed further questions to the City in terms of s106(1)(a) or simply picked up the phone and spoken with me.

143.3 The MEC also knew that the Jordaan investigation was enquiring into whether the GFA had been instructed to conduct surveillance of other political parties.

144.Accordingly, and if the MEC genuinely considered that a s106(1)(b) investigation was *"necessary"*, such view was reached arbitrarily and capriciously (s6(2)(e)(vi) of PAJA), was not rationally connected to the information before the MEC (s6(2)(f)(ii)(cc)), and was so unreasonable that no reasonable person could have reached that conclusion (s6(2)(h)).

[E1.3] ***Intergovernmental relations***

145.The MEC's constitutional obligations in regard to relations between provincial and local government and the independence and integrity of the local sphere of government obliged him to show restraint in exercising his power under s106(1)(b) of the Systems Act. It is obvious that no municipality would take kindly to imputations of maladministration, fraud, corruption or serious malpractice. Moreover, the public questioning, at the instance of a provincial government, of councillors and senior officials under coercive powers is likely to be viewed by them as demeaning and offensive. It also diverts them from the duties they are appointed to perform in the interests of ratepayers.

146.In the present case, the likelihood of tension and dispute between provincial and local government in consequence of the appointment of a s106(1)(b) investigation was greatly increased by the fact that the MEC is an ANC member in an ANC-controlled provincial government while the City is governed by a DA-led coalition. While this can obviously not preclude an MEC from exercising his s106(1)(b) power in a proper case, it is a feature which called for particular sensitivity and restraint. It was only to be expected that the exercise of the MEC's power would be viewed by the City (as indeed it was) as motivated by improper party-political considerations.

147.That the City would in all likelihood view the MEC's decision as a politically-inspired show of force by a provincial bully must have been anticipated by the MEC. He and the South African public know that there has been widespread corruption, fraud and incompetence in many ANC-led municipalities, a number of which have been virtually paralysed. Nevertheless, interventions under s106(1)(b) by MECs in ANC-controlled provinces have been rare. I only know of four in this province (none of which involved the establishment of commissions) and all pertained to alleged infringements of greater severity than the ones which supposedly concerned the MEC in this instance. One of those s106(1)(b) investigations was moreover set aside by this Court on the basis that the statutory prerequisites for such an intervention had not been present; that case was (like the present matter) a case where the MEC's power was invoked in respect of a DA-led council (I am advised that the case is reported as *Democratic Alliance Western Cape and Others v Minister of Local Government, Western Cape, and Another* 2005 (3) SA 576 (C)).

148.Two instances involving the former ANC-led administration of the City which did not result in a s106(1)(a) request for information, let alone a s106(1)(b) investigation, warrant mention.

148.1 The first involved the sale of valuable land at Big Bay , Bloubergstrand at the end of 2004.

148.1.1 The *Weekend Argus* of 22 January 2005 (annexure “**DS35**”) reported that the City had sold "*chunks of prime land worth millions of Rand at Big Bay , Bloubergstrand, at substantially discounted prices, to a select group of 17 ' black empowerment companies ' , without following a tender process*". The report went on to state that these companies had then immediately put the properties back on the market at nearly double the price and stood to make "*huge profits"* by reselling them.

148.1.2 Subsequent reports in the *Cape Argus*, including one dated January 25, 2005 (annexure “**DS36**”), indicated that, as a result of the "tender" process , the people of the City of Cape Town stood to lose "*some R15 million to R20 million*" on the sales. An article in the following Saturday’s *Weekend Argus* (of 29 January 2005) (annexure “**DS37**”) indicated that there had been a preferential list of "*empowerment companies designated as beneficiaries of the properties in question, one of which had been the main sponsor of a huge ANC victory bash in the City in the wake of the 2004 elections."*

148.1.3 The financial extent of the alleged irregularity ran into millions of Rands . The then Cape Town Mayor Nomaindia Mfeketo also saw fit to institute an investigation into the sales after being approached by the *Weekend Argus* for comment.

148.2 The second incident concerned apparently unauthorized payments to Full Swing Trading CC ("Full Swing Trading") and the City of Johannesburg . A report in the *Cape Argus* on 29 November 2006 (annexure "**DS38**" hereto) referred to the Auditor-General having queried R330 million worth of spending by the City council under the leadership of the ANC's Nomaindia Mfeketo in the 2005/2006 financial year, and that the suspect spending would be investigated by the council's special committee on public accounts (Scopa). It was also reported that among the deals being investigated were a contract for R3.36 million awarded without tender to Full Swing Trading. Almost a year later, on 23 November 2007, a newspaper article (annexure "**DS39**") referred to Scopa having had to clear various top officials of the then-ANC administration in the City in several cases of financial mismanagement because of a loophole, but that Scopa "*was not as forgiving of the possible unauthorised*

payments to Full Swing Trading and the City of Johannesburg", which were under forensic investigation pending litigation.

149.I believe that if precisely the same information as prompted the establishment of the first Erasmus Commission had come to the MEC's attention in respect of an ANC-led municipality, he would not have appointed a s106(1)(b) investigation.

150.It is also relevant when considering the *bona fides* of the WCPG's conduct in purporting to establish the Commission in the circumstances I have described above to have regard to the history of relations between the ANC controlled Province and the multi-party coalition controlled City since the municipal elections in March 2006. It is a history of attempts to interfere unconstitutionally in the City's municipal government :

150.1 Within the first weeks of assuming office the new municipal government obtained confirmation that the appointment of the erstwhile City Manager, Dr Wallace Mgoqi, had been unlawfully extended by the outgoing mayor, Alderman Nomaindia Mfeketo. In the context of measures taken by the new administration to set aside Mgoqi's unlawful appointment, which were vindicated in a Full Bench decision of this Honourable Court in May 2006, the WCPG at various stages,

without any valid grounds for doing so, threatened to place the City under administration in terms of s 139 of the Constitution.

150.2 Subsequently, the second respondent purported to change the system of government in the City from an executive mayoral system to an executive committee system. In this regard the second respondent singled out Cape Town as a non-ANC governed municipality. He made no moves to alter the executive mayoral systems of municipal government in any of the ANC controlled municipalities in the Province. The attempt to change the system of government was a naked abuse of the second respondent's powers under the Structures Act for purely political purposes. The attempt was eventually abandoned in the context of a settlement brokered by the national Minister for Local and Provincial Government after it had become clear that the City intended to take the issue to the Constitutional Court .

150.3 Thereafter the WCPG sought to oblige the City to institute a system of ward committees in terms of the Structures Act. The Structures Act read with the relevant provisions of Chapter VII of the Constitution made the issue of whether or not to have ward committees a matter of choice for the City. The second respondent's attempt to oblige the City to institute a system of ward committees was plainly an unconstitutional interference in the City's affairs. It too was subsequently abandoned; as was a

measure introduced into the National Assembly to amend the Structures Act.

151.Section 41 of the Constitution and the supporting provisions of the Framework Act, the WC constitution and the Systems Act override party-political considerations. However much political mileage the MEC and the Premier thought they could gain by the establishment of a commission to publicly examine the actions and purported transgressions of a DA-led municipality, they had to put aside such thinking and co-operate with the City in mutual trust and good faith. They had to endeavour to foster friendly relations. They had to exercise their powers with a view to avoiding litigation (including litigation which the exercise of their powers might provoke at the instance of other affected organs of state). Their objectives should have been to respect the City's functional and institutional integrity and not to encroach thereon, and to exercise their executive authority in a manner which did not compromise or impede the City's ability or right to exercise its executive authority.

152.The City contends that compliance with these constitutional and other statutory duties is a legal prerequisite for the lawful exercise of public power, including the MEC's power under s106(1)(b) of the Systems Act. If he deliberately ignored these duties and acted in bad faith, then obviously his decision cannot stand (I return to this later).

But even if he acted in good faith, an objective assessment of his conduct reveals that he did not comply with these duties:

152.1 Even if there was a reasonable belief in respect of at least some conduct which could be categorised as maladministration, fraud, corruption or serious malpractice (which I deny), the evidence was hardly strong nor the suspected conduct particularly serious.

152.2 There were less coercive and offensive ways for the MEC to have set his mind at rest. He could have directed further s106(1)(a) questions to the City. He could have asked to meet with me and/or the mayor and/or the City Manager or other senior officials.

152.3 He did not need to act as precipitously as he did. There was no reason for him not to have awaited the outcome of the City Manager's further investigations and the Jordaan investigation. An honest assessment by him of these further investigations by the City would in all probability have satisfied him that nothing more needed to be done, but he should at least have waited.

152.4 By awaiting the outcome of the City's own investigations (which could have led to a resolution without further intervention

by the MEC), he would have been respecting the City's right to govern its own affairs.

153.His decision of 27 November 2007 was thus unlawful and falls to be set aside in terms of ss6(2)(a)(i), 6(2)(b), 6(2)(f)(i) and 6(2)(i) of PAJA, alternatively on the constitutional basis of illegality.

[E1.4] ***Bad faith and ulterior motive***

154.The City contends that the only inference that can be drawn from the facts of this case is that the MEC had no genuine belief that conduct of the kind described in s106(1)(b) had occurred or was occurring, that he had no genuine belief that a s106(1)(b) investigation was necessary to achieve any lawful purpose contemplated by s106(1)(b), and that he appointed the investigation for the ulterior and improper purpose of attempting to embarrass or discredit political opponents.

155.In summary, the circumstances as already narrated from which the City asks the Court to draw this conclusion are the following:

155.1 the lack of a reasonable foundation for the MEC's supposed concerns;

155.2 the modest sum of money potentially involved in the supposed irregularity;

155.3 the MEC's reliance on supposed concerns which had not been put to the City for comment in terms of s106(1)(a);

155.4 the MEC's failure to make any attempt to engage personally with me and/or the mayor and/or the City Manager;

155.5 his formulation of terms of reference going well beyond either what he had raised with the City in terms of s106(1)(a) or what he mentioned in his press statement as being his supposed concerns;

155.6 his hasty action in appointing the investigation without awaiting the outcome of the City's own investigations;

155.7 the political dynamics in the Western Cape ;

155.8 the fact that the persons likely to be publicly questioned in consequence of the MEC's decision included senior figures in political parties in opposition to the ANC (including the mayor and DA leader, Helen Zille);

155.9 the disparity between the MEC's conduct in relation to the coalition-led City on the one hand (where he ordered a s106(1)(b) investigation) and his conduct in relation to ANC-led municipalities on the other, including the City when under ANC control (where more serious behaviour and maladministration have not resulted in similar investigations under s106(1)(b));

155.10 the MEC's hasty appointment of a s106(1)(b) investigation into the City's conduct, while ignoring for more than three months the City's request that he expel Chaaban for much more serious and sinister misconduct.

156. To the above factors I add the following:

156.1 I am advised that the MEC could not lawfully appoint a s106(1)(b) investigation as an end in itself. The purpose of the appointment had to be to place him in possession of information on the strength of which he could notionally take some lawful action.

156.2 As noted earlier, the powers of a provincial government to intervene in a municipality's affairs are very limited. A s106(1)(b) investigation could only serve a legitimate purpose if it had a prospect of leading to lawful intervention in the municipality's affairs in terms of s139 of the Constitution.

Outside of s139, there is nothing an MEC or provincial government could do with the results of an investigation into a municipality's affairs and there would thus be no legitimate purpose in undertaking the investigation in the first place.

156.3 I submit that there was no prospect whatsoever that the investigation established by the MEC in the present case could, regardless of the content of the Erasmus Commission's ultimate report, have led to lawful intervention by the WCPG in the City under s139 of the Constitution, and the MEC could never genuinely have thought such a prospect existed.

156.4 This reinforces the inference of bad faith and ulterior and improper motive.

157.I also mention that although the MEC's s106(1)(a) queries were made in letters written on 26 October 2007 and 14 November 2007, it is apparent that even before my reply to the first of these queries the MEC and Premier were intent upon a public investigation:

157.1 On 30 October 2007 the Premier placed a self-authored article in *The Argus* containing a personal attack on the mayor and concluding with the assertion that for the reasons set out in his article the mayor could not *"investigate herself"*. I annex a copy of the article as "**DS40**".

157.2 This comment by the Premier was in response to the mayor's intention, which she had already made known prior to her formal public statement of 31 October 2007 , to appoint an independent inquiry into the matters supposedly concerning the MEC.

157.3 It is clear, therefore, that the s106(1)(a) queries were a charade, and that the MEC and Premier had already decided to institute a s106(1)(b) investigation as a commission of inquiry.

158. Finally, it is impossible, except on the supposition of bad faith and ulterior and improper motive, to explain the MEC's willingness to allow such massive expenditure and wastage of resources to be incurred in respect of supposed concerns which are of a relatively minor nature and involve comparatively trifling sums:

158.1 At a financial level, the only City expenditure which remained in some doubt as at 27 November 2007 was R3 500 in respect of GFA's first invoice.

158.2 The appointment of the s106(1)(b) investigation and the related establishment of the first (and now the second) Erasmus Commission has already led to significant expenditure and

diversion of time and energy, and will continue to do so for some months.

158.3 The costs of the Erasmus Commission will be determined by the MEC for Finance and will be appropriated from the Provincial Revenue Fund (see s9 of the WC Commissions Act). I do not know what the remuneration is or will be of the three commissioners, its secretary and its evidence-leader, but I am advised that it is likely that their combined daily remuneration will substantially exceed the sum of R3 500 at issue in GFA's first invoice.

158.4 It was to be expected that the City and others would engage legal assistance. I have already stated how the parties are currently legally represented. The City and others will thus be put to very substantial irrecoverable legal costs.

158.5 There have already been two meetings between Judge Erasmus, Messrs Twala and Petersen and the legal representatives of various interested parties in relation to the operation and functioning of the Commission (14 and 24 January 2008). The Commission formally commenced on 4 February 2008 , albeit only to adjourn to Monday, 25 February 2008 . Fifteen days were reserved for the examination of witnesses during February, March and April 2008, with the

expectation that more days will need to be reserved thereafter. (These dates have now been superseded: the second Erasmus Commission has set aside 14-25 April 2003 and 5-29 May 2008 for hearings.)

158.6 The cost of copying documents for use at the hearings is likely to be large.

158.7 Arrangements will have to be made for the recording of evidence and the typing of transcripts.

158.8 Fairbridges and Mallinicks, who represent the City's councillors and officials respectively, estimate that their combined costs (including disbursements for counsel) will, even if the hearing only lasts about 20 days, exceed R3 million by the end of the Commission's proceedings. (Those costs include, in addition to the hearing days, approximately 10 days of preparation, involving preliminary meetings with the Commission, considering and collating the voluminous documentation apparently thought relevant by the Commission, interviewing witnesses and dealing with any interlocutory skirmishes.)

158.9 Other parties will also incur legal costs.

158.10 Senior city councillors and officials will have to be away from their offices and municipal duties for substantial periods of time while giving evidence and following the proceedings.

158.11 Judge Erasmus will, for a substantial period, be unavailable to hear ordinary civil and criminal cases in the Cape Provincial Division. I am advised that this might either delay the hearing of cases or require the appointment of an acting Judge at additional cost to the State. A large court room in the Cape High Court will also be used for the Commission, and rendered unavailable for court cases. (I contend that the use of the High Court's facilities for the purpose of the Commission is a factor bearing on the grounds of constitutional incompatibility addressed in some detail later in this affidavit - at paragraphs 190 - 202.)

158.12 The Commission has thus far placed notices in the Cape press on at least three occasions (most recently on 1 April 2008). I am advised that, according to the Commission, the cost of one round of notices is about R72 000. I do not for a moment suggest that such notices should not be published: section 2(4) of the WC Commissions Act after all requires notice of every sitting to be published in the *Provincial Gazette* and in an Afrikaans and an English daily newspaper, as well as an isiXhosa daily or weekly newspaper in circulation in the

Province. However, it is the type of expenditure which is occasioned when a commission of inquiry is established and the MEC would thus have been able to anticipate it. The establishment of commissions is thus not a step to be undertaken lightly.

158.13 The MEC could not possibly have believed that any beneficial outcome from the Erasmus Commission for the City and its ratepayers could justify such expenditure. On the other hand, it is very easy to understand that in the greater scheme of the political contest between the ANC and opposition parties in the City and the Western Cape, a loyal ANC MEC would think the expenditure and diversion of resources a small price to pay for the perceived political mileage, particularly where the price has to be paid not by the ANC but from the public purse.

159.The City thus contends that the MEC's s106(1)(b) decision was made in bad faith and for an improper and ulterior purpose, and that his decision thus falls to be set aside in terms of ss6(2)(e)(ii) and (vi) and ss6(2)(f)(ii)(bb) and (dd) of PAJA, alternatively as being unlawful under the Constitution.

[E1.5] ***The NCOP***

160.In terms of s106(3) of the Systems Act an MEC designating persons to conduct a s106(1)(b) investigation must submit a written statement to the NCOP motivating the action.

161.The MEC submitted such a statement in respect of his first s106(1)(a) letter of 26 October 2007 (although even that letter hardly passes muster as a *"written statement … motivating the action"*. I have, however, ascertained from the NCOP that no such statement was submitted to the NCOP in respect of the MEC's s106(1)(b) decision.

162.The City submits that the furnishing of such a statement to the NCOP before or contemporaneously with the making of the s106(1)(b) decision is a legal prerequisite for a valid s106(1)(b) decision.

163.The MEC's decision is thus invalid and falls to be set aside in terms of ss6(2)(a)(i), 6(2)(b), 6(2)(f)(i) and 6(2)(i) of PAJA, alternatively on the constitutional basis of illegality.

[E1.6] ***Procedural unfairness***

164.I am advised that administrative action which materially and adversely affects the rights or legitimate expectations of any person must, in terms of s3(1) of PAJA, be procedurally fair. Procedural

fairness ordinarily entails compliance with the requirements set out in s3(2)(b) of PAJA.

165.The MEC's appointment of the s106(1)(b) investigation on 27 November 2007 materially and adversely affected the City's autonomy under the Constitution, the WC Constitution and the Systems Act, including the City's right to have its functional and institutional integrity respected, not to have its executive authority compromised by executive action by the MEC, to govern its own affairs, and to continue to enjoy the undiverted services of its councillors and officials. The MEC's decision also materially and adversely affects the latter's rights, subjecting them to coercive examination.

166.The MEC failed to give the City notice of his intention to designate investigators in terms of s106(1)(b), and he failed to give the City an opportunity to make representations as to why such a decision should not be taken. Had the opportunity been given, the City would certainly have used it.

167.The MEC's decision was thus procedurally unfair in terms of s3 of PAJA and falls to be set aside in terms of s6(2)(c) of PAJA.

[E2] ***Invalidity of Premier's decision***

168.The City contends that the Premier's decision to establish the first Erasmus Commission, taken on or about 29 November 2007 as reflected in the proclamation, was invalid and should be set aside.

169.I am advised that the establishment of a commission of inquiry by the Premier in terms of s127(2)(e) of the Constitution read with s1 of the WC Commissions Act may not constitute *"administrative action"* as defined in PAJA. But in any event, irrespective of the applicability of PAJA, the City contends that the Premier's decision falls to be set aside in accordance with constitutional principles of legality.

170.However, if it should be found that the Premier's decision constituted administrative action, the same grounds of attack would be available under s6(2) of PAJA.

[E2.1] ***Section 106(2) of Systems Act***

171.It is clear on the facts that the Premier established the first Erasmus Commission under s106(2) of the Systems Act read with the WC Commissions Act and in order to give effect to the MEC's s106(1)(b) decision. As submitted earlier, such a decision by the Premier is dependent for its lawfulness on the validity of the MEC's decision. For reasons set out above, the MEC's decision is invalid, and the Premier's decision must fall with it.

[E2.2] ***Intergovernmental relations***

172.The exercise by the Premier of his power to establish commissions is, as in the case of the MEC, constrained by the provisions of s41 of the Constitution and the Framework Act. For the same reasons as earlier stated in relation to the MEC, the Premier violated his duties under these constitutional and other provisions by establishing the first Erasmus Commission in the circumstances and manner he did.

173.The appointment of the first Erasmus Commission was thus unlawful for this reason as well.

[E2.3] ***Bad faith and ulterior motive***

174.What I have said earlier concerning the factual basis for inferring bad faith and an ulterior and improper motive on the part of the MEC is equally applicable to the Premier. I have no doubt that the course embarked upon, namely an MEC-appointed s106(1)(b) investigation in the form of a Premier-appointed commission, arose out of discussions between the Premier and the MEC in which the political considerations which I have previously mentioned were dominant. Effectively, theirs was a joint decision.

175.Accordingly, and on this basis too, the Premier's decision falls to be set aside.

[E2.4] ***Independent act by Premier?***

176.I do not know whether the Premier will contend that his decision could stand independently of the validity of the MEC's decision. If so, the contentions which follow are applicable.

177.Firstly, and as a fact, the Premier did not act independently in establishing the first Erasmus Commission. As a fact, he appointed the Commission only because the MEC had requested him to do so pursuant to the MEC's appointment of the s106(1)(b) investigation and in order to endow such investigators with the powers of commissioners under the WC Commissions Act. This is clear from the proclamation and from the MEC's press statement and background document of 27 November 2007 . It is also evident from a newspaper article published in the *Cape Times* on 26 October 2007 in which the Premier is reported as saying that he "*did not intend to appoint a judicial inquiry*". A copy of that article is appended hereto marked "**DS41**".

178.Accordingly, any claim by the Premier that he exercised his commission-appointing power independently of the MEC's decision would be untrue.

179.In any event, I am advised that as a matter of law the Premier has no power to establish a commission to inquire into a municipality's

affairs, except in order to give effect to a valid s106(1)(b) decision by the MEC. This is a matter for legal argument, so at this stage I simply record that the City will rely in this regard on:

179.1 the constitutional and other statutory provisions already mentioned which establish provincial and local government as autonomous spheres of government, with very limited rights of intervention by provincial government in a municipality's affairs;

179.2 the express provision made in s106 of the Systems Act for investigations into a municipality's affairs, which provision must be regarded as exhaustive of the circumstances in which an investigation with commission powers can inquire into a municipality's affairs.

[F] <u>THE SECOND ERASMUS COMMISSION</u>

180.On the assumption that the Premier's appointment of the second Erasmus Commission does not constitute *"administrative action"*, the City submits that his decision nevertheless falls to be set aside on the principles of legality.

[F1] *Impermissible purpose*

181.For reasons stated earlier, the City submits that the Premier may not lawfully appoint a commission to investigate a municipality's affairs or to investigate whether alleged municipal financial misconduct has occurred or whether suspected criminal offences have been committed.

182.The City submits that these impermissible purposes taint all the terms of reference of the second Erasmus Commission, though the City only has a legal interest in setting aside the second Erasmus Commission insofar as it pertains to paragraphs 1 to 10 of "DS26".

183.The City submits that insofar as municipal affairs are concerned, s106 of the Systems Act constitutes the exclusive legislative basis on which investigators can be invested with powers of a provincial commission. The Premier has expressly attempted to bypass s106 in establishing the second Erasmus Commission. His reasons for doing so are not hard to discern:

> 183.1 He has presumably been advised that whereas a decision under s106 of the Systems Act is subject to review under PAJA, the establishment of a provincial commission as an independent act arguably does not constitute *"administrative action"* reviewable under PAJA, thus making a decision of the latter kind reviewable on narrower grounds.

183.2 In order for a decision under s106(1) of the Systems Act to be lawful the requisites previously identified need to be met (reasonable belief; suspected conduct of a sufficiently serious nature, and the necessity of the investigation). The Premier and the MEC evidently appreciated that the decision to establish the first Erasmus Commission would not withstand scrutiny on this basis, and so they have attempted to bypass s106.

183.3 It could never have been the intention of the legislature that the careful requirements framed in s106(1) of the Systems Act could be avoided by the simple expedient of a separate decision by the Premier to appoint a commission. On the Premier's approach, there will never be need for compliance with s106(1) of the Systems Act.

[F2] ***Bad faith and ulterior motive***

184.The disestablishment of the first Erasmus Commission and the establishment of the second Erasmus Commission have not, in the City's submission, been accompanied by any change in the motives driving the actions of the Premier and the MEC. Everything said earlier

about the lack of good faith in establishing the first Erasmus Commission applies with at least equal force to the second Erasmus Commission.

185.Indeed, there are further factors which now fortify that conclusion in respect of the appointment of the second Erasmus Commission:

185.1 Instead of engaging in good faith in the dispute-resolution process envisaged by the Framework Act, the Premier and the MEC - presumably after receiving their respective counsel's opinions – proceeded summarily to jettison the first Erasmus Commission and establish the second Erasmus Commission. If they had had any genuine desire to avoid rather than fuel discord with the City, they would have communicated their views to the City and invited discussion on an appropriate way forward before implementing unilateral action which they knew would create as much conflict and potential for litigation as the earlier decision.

185.2 While the Premier has attempted to downplay his interaction with the Erasmus Commission concerning the production of an interim report, it is clear that it was at his initiative that such a report was produced. Since the first Erasmus Commission might have been found to be unlawful,

it is inconceivable that the Commission would independently have thought it appropriate for its evidence-leader to spend time on compiling a report in the absence of a specific request or mandate (albeit oral) from the Premier.

185.3 The only purpose the Premier could have had in soliciting such a report was to *"pull himself up by his own bootstraps"*. He and the MEC evidently appreciated that the s106 decision was unjustified. They hoped that evidence collected by a commission unlawfully established by them would help them to plug the gaps in their earlier decision. Such conduct is repugnant and indicative of bad faith.

185.4 The new terms of reference seek to use the Commission to investigate alleged offences under the Corruption Act. If the establishment of a commission for this purpose is not *per se* unlawful, it is – as noted earlier – a feature which is so unusual and undesirable as to reveal an improper motive. Nothing would have prevented the Premier from allowing the police and/or NPA to investigate alleged contraventions of the Corruption Act. (I may mention that in July last year and as speaker of the City I laid criminal charges of bribery and intimidation against Chaaban at the Cape Town police station [case 24477/10/2007]. These charges are currently the subject of investigation by the

police. This is one of the matters into which the Premier is now wanting the second Erasmus Commission to conduct a parallel criminal investigation.)

185.5 The Premier has also extended the Commission's terms of reference to include two matters relating to the George Municipality . Although the City has no legal interest as such in those additional matters, their inclusion is further evidence in support of the City's assertion of a party-political motive: it is obviously no coincidence that the George Municipality is also a DA-controlled local authority, and that the councillor referred to by name in paragraph 12 of "**DS28**" is a DA councillor.

185.6 Since the Commission has denied that it provided a copy of its progress report to the *Mail and Guardian*, the only inference is that same was leaked by the Premier's office, with the intention of attempting publicly to embarrass the City.

[F3] ***Intergovernmental relations***

186.The non-compliance by the MEC and the Premier with the Framework Act prior to the establishment of the first Erasmus Commission has been aggravated by the Premier's conduct since the

mayor initiated dispute-resolution procedures with the Premier on 7 February 2008 . The Premier did not seek to interact with the City to find solutions. After taking his own legal advice, he unilaterally published a further proclamation and issued a hostile media statement laced with sarcasm (*"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"*).

187.I refer to what I have already said concerning the breach by the MEC and Premier of their duties under the Framework Act in relation to the establishment of the first Erasmus Commission. For those reasons and the additional reasons mentioned above, the City submits that the Premier acted unlawfully in establishing the second Erasmus Commission as and when he did.

[F4] ***Retrospectivity***

188.For one or more of the above reasons, the establishment of the second Erasmus Commission falls to be set aside. However, if these challenges are not upheld, the City contends in the alternative that the decision reflected in the first sentence of the concluding paragraph of the proclamation (quoted earlier) should be set aside.

189.In the said sentence the Premier in substance purported on 19 March 2008 to establish the Erasmus Commission with retrospective

effect to 4 December 2007 . The City submits that neither s127(2)(e) of the Constitution nor s37()2)(e) of the WC Constitution nor the WC Commissions Act gives the Premier such a power.

[G] CONSTITUTIONAL INCOMPATABILITY

190.I have mentioned above that the City impugns Proclamation 5 of 2008 made by the first respondent on the grounds of constitutional incompatibility with the principles of the independence of the judiciary and the separation of powers. It is the City's contention that the appointment by the first respondent of a judge to chair the Commission is constitutionally incompatible in the manner outlined in the preceding sentence. It is well-known that commissions of inquiry were frequently chaired by judges in the pre-constitutional era of South Africa's history. But those appointments, redolent as they were of the effects of the concept of the royal prerogative in South Africa's colonial past, occurred in a very different constitutional context from that which obtains today. Indeed, as counsel will in argument draw to the attention of this Honourable Court, those appointments in any event latterly gave rise to widespread trenchant criticism by a number of highly respected legal commentators, some of whom themselves rose to high judicial office post 1994.

191.Assuming, contrary to the City's case, that the establishment of a commission of inquiry with the terms of reference set out in

Proclamation 5 were otherwise unexceptionable, it would be quite feasible to appoint the chairperson and members of such commission from the ranks of legally qualified and experienced persons appropriately qualified for judicial appointment but who do not hold judicial office. There is no objective need for a judge to be appointed to undertake such a non-curial function.

192.I am aware that the Constitutional Court has affirmed the incidence of the principle of a separation of powers between the executive, legislative and judicial arms of government in our Constitution. I am advised that, to the extent necessary, the attention of this Honourable Court will be directed to a number of judgments of the Constitutional Court in which the principle has been acknowledged and applied in our post-constitutional jurisprudence. While there might not be an altogether absolute separation between the legislative and executive branches of government in all matters, the separation between those branches and the judicial branch is most distinct. This is obviously necessarily so if the judiciary is to be seen to be able to properly exercise its constitutional role. There can be no doubt that any law or conduct inconsistent with what the Constitution requires in that regard is invalid.

193.I am advised and verily believe that it has been authoritatively recognised by the Constitutional Court and also by the highest courts of countries like Australia and the United States of America, whose

national constitutions entrench the principle of a separation of powers in a manner analogous to that of South Africa, that an adjunct to the principle to which I have just referred is that it is relevant, when considering whether it is permissible to assign a non-judicial function to a judge, to have regard, amongst other matters, to the evident constitutional undesirability of creating 'the risk of judicial entanglement in matters of political controversy'.

194.I am advised that courts, in this country and elsewhere, have identified that it is inappropriate in a constitutionally ordained system of separation of powers for the political executive to 'borrow' a judicial officer 'to cloak actions proper to its own functions with the "neutral colours of judicial action" '.

195.The political controversy attendant on the establishment of the Commission and its terms of reference is manifest from the averments made earlier in this affidavit, particularly those going to the party-political motives of the first respondent and his lack of *bona fides*.

196.It is not necessary in this regard to make any imputations against the third respondent's ability personally to conduct himself impartially and independently as chairperson of the Commission, and as currently advised, the City does not do so. I understand that challenges of a like nature to that taken by the City under the heading of constitutional incompatibility in this case have succeeded in South Africa and in

Australia without there being any suggestion that the judges whose extra-judicial appointments were impugned had in any manner comported themselves unjudicially or in any way improperly.

197.It has been authoritatively recognised that the appearance of the independence and impartiality of the judiciary is as important as its existence when questions of the constitutional compatibility of the undertaking of non-curial functions by judges fall to be assessed. In this regard I am, with respect, unable to improve on the statement by Justice McHugh in the Australian High Court case of *Grollo v Palmer* [1995] HCA 26 at para 22:

> 'It is trite to say that justice must not only be done but must be manifestly seen to be done. One of the usual reasons for investing executive power in a judge as *persona designata* is that it gives the exercise of executive power the appearance of independence and impartiality that is always associated with the exercise of judicial power. That independence and impartiality is only possible, however, because of the institutional separation between executive and judicial functions. 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 functions 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 citizen and the government and its agencies.'

(I am advised that in regard his appointment as chairperson of the Commission the third respondent is a '*persona designata'* within the meaning of the aforegoing passage of Justice McHugh's judgment, that is a person considered as an individual rather than as a member of the judiciary.)

198.The precise characterisation of the nature of the non-curial power that a judge appointed to chair a commission of inquiry in a case like the present is not important to the point I seek to make in the preceding paragraph. It accordingly does not detract from the City's argument if the nature of the Commission's functions or powers were to be characterised as something other than 'executive' in the sense used by Justice McHugh in the passage quoted above.

199.The subject matter of paragraph one of the commission's terms of reference casts the commission in an advisory position to the first respondent in respect of 'the legality and lawfulness' of the discharge of the Speaker of the municipal council of the City of Cape Town in

terms of item 13 of the Code of Conduct for Councillors'. The matter goes to an imputation by a political official in the provincial sphere of government regarding the propriety of the discharge by me in my capacity as the chairperson of a constitutionally designated executive and legislative organ in another sphere of government of my constitutional powers and responsibilities. It is undoubtedly a matter that is affected by the provisions of Chapter III of the Constitution; and therefore a matter in respect of which the courts may be called upon to make a determination on the constitutional propriety of the first respondent's interference in the circumstances with the City's governmental independence.

200.Within the constitutional framework the purpose of judicial power is to give binding decisions as to legal rights and obligations in settlement of controversies not only between individuals, between individuals and the State, but also, between spheres of government. The courts are the arm of power charged with the defence of the Constitution, including the responsibility for upholding its provisions where one sphere of government improperly encroaches on the functional or institutional integrity of government in another sphere and breaches its duties of mutual trust and good faith as set out in s 41(1)(h) of the Constitution. Because of the need, when the occasion arises, to adjudicate disputes involving questions concerning intergovernmental relations between national, provincial and local spheres of government which are distinctive, interdependent and interrelated, judicial power

occupies a special position in South Africa's constitutional system of government. The effective resolution of controversies which call for the exercise of the judicial power depends on public confidence in the courts in which that power is vested. That confidence is bound to be subverted if judges, whose constitutional role it is to determine disputes between spheres of government when such arise and cannot be resolved under the Framework Act, accept appointment by political officials in one spheres of government to investigate and furnish advice in regard to matters affecting political officials in another sphere of government. This particularly so when the subject matter in issue is of a nature which could quite foreseeably give rise to constitutional litigation. Therefore in furnishing advice to the political executive of the Province the chairperson of the Commission will be fulfilling a function that is fundamentally incompatible with the judicial functions that I have described at some length above.

201.The third respondent is cast in a similarly advisory role by the terms of paragraphs 7 and 12 of the terms of reference, as well as paragraph 8 to the extent that that paragraph is capable of understanding.

202.I have already emphasised above how certain of the functions of the Commission as determined by its terms of reference go to matters for which the legislative framework provides expressly for the work to be undertaken by other constitutionally established organs of state,

such as the National Prosecuting Authority. It is difficult to conceive how a judge could undertake an investigative role provided to be undertaken by the National Prosecuting Authority in a constitutionally compatible manner. After all, the very purpose of an investigation in terms of Chapter 5 of the NPA is the institution of court proceedings should the commission of a corruption offence be considered to have been identified. This consideration is affected by paragraphs 9, 10 and 11 of the Commission's terms of reference in terms of Proclamation 5 of 2008.

[H] INTERGOVERNMENTAL DISPUTE PROCEDURES

203.The City has not, before instituting these proceedings, followed the procedures set out in Chapter 4 of the Framework Act in respect of the second Erasmus Commission. There are several reasons why, in the City's submission, the City could not reasonably have been expected to follow those procedures before launching these proceedings:

203.1 The circumstances of the case are such as to make it most unlikely that the Premier would abandon his chosen course of action. The Premier and the MEC were the ones whose conduct in establishing the first Erasmus Commission violated s41 of the Constitution and s40(1)(a) of the Framework Act, as well as other constitutional provisions

enshrining the independence and institutional integrity of local government, and the Premier has persisted with his disregard for the Act in establishing the second Erasmus Commission. Given the nature of the City's allegations against the Premier, it would be invidious for the City to have to go through the Chapter 4 settlement procedures before approaching the Court.

203.2 Sections 42 to 44 of the Framework Act envisage an important role for the MEC for local government in the settlement of disputes between provincial and local government, without accommodating the case where the MEC himself is (as here) a central figure in the dispute.

203.3 The MEC and Premier both purported to exercise statutory powers which have had legal consequences, namely the establishment of the Erasmus Commission. I am advised that it may well not be legally possible to undo these legal consequences without judicial intervention.

203.4 The procedures set out in Chapter 4 are time-consuming. Because the impugned decisions in the present case have had legal consequences and since the second Erasmus Commission is duty bound (until its establishment is set aside) to do its work, there simply is not time for the City to

follow Chapter 4 without suffering severe prejudice and rendering subsequent legal proceedings nugatory.

203.5 More particularly, it is extremely unlikely that the Chapter 4 procedures would be exhausted before the second Erasmus Commission has completed or progressed a considerable way with its work. I can mention that the City has (albeit in different circumstances) followed the Chapter 4 procedures in other matters, and its experience has been that their completion takes a number of months.

203.6 Finally, the conduct of the Premier and the MEC in response to the City's attempt to follow the procedures of the Framework Act in respect of the first Erasmus Commission shows how futile it would have been for the City to follow a similar course in respect of the second Erasmus Commission.

204. The City contends, in the circumstances, that the City could not reasonably have been expected to do more before launching this application. Accordingly, and in terms of s41(3) of the Constitution, s45(1) of the Framework Act is no impediment to this application. Alternatively, and in terms of s41(4) of the Constitution, the City asks this Court to exercise its discretion to entertain the case (in which regard the City relies on the facts as set out above).

[H] <u>PROCEDURAL MATTERS AND CONCLUSION</u>

205.The relief sought in terms of this application is sought as a matter of urgency because the City would be unable to obtain effective relief if the application were to be heard in the ordinary course in terms of the uniform rules and the practices of this Honourable Court. If relief is not granted urgently the Commission is likely to continue its activity and an irreversible unconstitutional infringement of the City's constitutional independence will have been perpetrated. An important and incidental aspect of the continuation of unlawful conduct that the Commission's activity will entail is the unwarranted invasion of a number of person's constitutional rights to privacy – I have mentioned above, for example, the conduct of the Commission in obtaining the Mayor's personal telephone records and the apparent provision of them by the Commission to the first respondent. A further incidental but important consideration is the incurrence of considerable expenses on the Commission by the Province and the City at the expense of tax and ratepayers and to the disadvantage of the many in the Province who are looking to government at all levels to expend its resources efficiently on socio-economic upliftment. In contrast to the aforementioned considerations there is nothing comparably urgent about the matters the Commission has been requested to report on.

206.The City has asked its lawyers, upon service of this application, to endeavour to agree with the Premier, the MEC and the Erasmus Commission to suspend the Erasmus Commission's activities pending

the outcome of this case. If agreement on these issues can be reached, it would be possible to arrange a suitable timetable for the application to be heard on a semi-urgent basis in a way that the Commission could continue its activity within the next few months if the application were to be dismissed.

207.The first and second respondents were previously provided with draft papers in an application that the City intended bring to set aside the establishment of the first Erasmus Commission. These papers were furnished in an endeavour to persuade the first respondent to cancel his establishment of the Commission. Much of the material traversed in those papers is repeated in these papers and therefore, although there is significant additional material in these papers the first and second respondent's legal representatives will be familiar with many of the points as advanced in this application and the shortened time period afforded for an answer to this application is not as limited as might otherwise have appeared. As indicated, subject to satisfactory interim arrangements being arrived at, the City is amenable to the application being heard on a mutually convenient timetable, subject of course to the Court's imprimatur.

208.The City also reserves the right to seek an expedited set-down of this case once pleadings have closed.

209. The City asks for the relief set out in the notice of motion to which this affidavit will be attached.

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JACOB DIEDERIK SMIT

The deponent has acknowledged to me that he knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my office at

on the day of 2008 in accordance with Regulation No R1258 dated 21 July 1972 as amended by Government Notice R1648 dated 19 August 1977 , as further amended by Government Notice R1428 dated 11 July 1980 and by Government
Notice R774 of 23 April 1982.

BEFORE ME

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COMMISSIONER OF OATHS
FULL NAME:
DESIGNATION:
AREA OF JURISDICTION