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Date:

16 October 2018

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The City Manager
City of Cape Town
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Cape Town

REPORT: INVESTIGATION INTO ALLEGATIONS INVOLVING THE EXECUTIVE MAYOR ALDERMAN PATRICIA DE LILLE

1. INVESTIGATION MANDATE AND SCOPE

1.1 A resolution adopted by the Audit and Performance Audit Committee ("APAC") on 5 January 2018 APAC resolved to appoint an Officer to Lead Evidence to investigate certain allegations against the Executive Mayor, Alderman Patricia de Lille (the "Executive Mayor") following a report by Bowmans dated 29 December 2017 ("the Bowmans Report").

1.2 I was appointed as the Officer to Lead Evidence in terms of the Special Conditions of Contract provided to me on 1 March 2018 to *inter alia*:

"1.2.2...investigate the allegations by the City Manager against the Executive Mayor, Alderman Patricia de Lille, as discussed in paragraphs 9.12, 9.16 and 9.17 of the Bowmans Report, with respect to her preventing him from reporting to Council allegations against the Commissioner, and to report his findings, to the Speaker to consider in terms of disciplinary procedures for Councillors..." ("the Investigation Mandate")

1.3 The allegations that I am required to investigate are recorded in the Special Conditions of Contract as the following:

Bowman Gilfillan Inc. Reg. No. 1998/021409/21 **Attorneys Notaries Conveyancers**

Directors RA Leigh (Chairman) | PM Medina (Deputy Chairman) | AJ Keep (Managing Partner) | AG Anderson | DP Anderson | LJ Anderson | JS Andropoulos | M Angumthoo | A Arumugam | L Avwi | AM Barnes-Webb | TL Beira | JM Bellew | F Bhayat | CM Bouwer | IL Brink | REW Burman | RM Carr | PM Carter | LA Chater | RA Cohen | CN Cunningham | GH Damant | RA Davey | MEC Davids | D de Klerk | TC Dhi | CR Douglas | HD Duffey | L Dyer | S Ellery | L Fleiser | KA Fulton | BJ Garven | TM Goobashe | DJ Giral | LHM Gerstle | D Gewer | TJ Gordon-Grant | CB Green | S Grimwood-Norley | A Hele | W Hamer | AS Harris | P Hart-Davies | PA Hirsch | JR Janks | JR Kaapu | CP Kennedy | KM Kem | ID Kiriman | JG Kruger | JP Kruger | R la Grange | R Labuschagne | T Laubscher | DA Lotter | J Lurie | KS Makapane | HW Mandlana | A McAllister | TP McDougall | M McGilwrie | JM McKinnel | MC Mlwa | PI Modika | TL Mongee | L Mongie | SP Naicker | UEBU Naumann | CZ Nduli | HB Ngcobo | TH Nichols | X Nyali | MAJ Oppenheim | AJ Pike | P Pity | JD Prain | MA Purchase | Y Ram | LV Raphulu | CL Reidy | JB Ripley-Evans | MS Rusa | GI Rushton | S Saffy | JW Sahli | MY Sass | CG Schaffer | DE Serchuk | RZ Shein | CEC Smith | EC Steyn | BGM Strydom | M Strydom | V Subban | H Tilsenach | SG Wilson | SA Wood | KS Wright | DD Yull |
Of Counsel S Esterhuysen | CS Franklyn | F Laher | CS Truter | KL van de Pol | A Voges | **Consultants** ARL Bertrand | JWD Brand | G Kekesi | JH Schlosberg | **Special Counsel** CL Valkin
Group COO RJ Smith | **Group CFO** J Pohl | **Company Secretary** NL van Vuuren

KENYA SOUTH AFRICA TANZANIA UGANDA



“5.3.1 That the City Manager was precluded by the Executive Mayor from reporting to Council, allegations of misconduct on the part of the Commissioner pertaining to a forensic investigation (Forensic Report FSD 049/14-15) into alleged irregularities involving payments to Volvo for bus chassis...

5.3.2 That the City Manager was precluded by the Executive Mayor from reporting to Council, allegations of misconduct on the part of the Commissioner pertaining to a forensic investigation (Forensic Report FSD 049/14-15) wherein the Commissioner caused irregular expenditure to be incurred by the City in the aggregate amount of R 43 801 607.06 made to Volvo for 29 bus chassis under tender number 138G/2012/13 and a further R 29 584 368.00 made to Scania for 24 bus chassis under tender number 140G/2012/13 during June 2014, and that the Executive Mayor instructed him to close the investigation...

5.3.3 The Executive Mayor's failure to present a dossier to Council for its consideration, in light of the allegations into the conduct of the Commissioner in respect of the Bid Evaluation Committee for tender 7C/2016/2017, pertaining to the Cape Town Foreshore Freeway Precinct.”

- 1.4 I note that the then City Manager, Mr Achmat Ebrahim, submitted his resignation on 10 January 2018, with effect from 12 January 2018. Mr Ebrahim is no longer in the employ of the City of Cape Town.
- 1.5 I was required to conclude the investigations into allegations against the Executive Mayor and report my findings to the Speaker of the Council of the City of Cape Town to consider in terms of the disciplinary procedures for Councillors by 29 March 2018, being within 30 (thirty) days of my appointment and as required in terms of the Special Conditions of Contract read with the disciplinary code for Councillors. It was not possible to conclude the investigation within the contemplated 30 (thirty) day time period.
- 1.6 The Executive Mayor was not available to meet with me prior to Tuesday 27 March 2018. The Executive Mayor also required that I provide her with written questions and she would provide me with a written response dealing with those questions. I did not think it appropriate that any interim report containing assessments, findings or conclusions be provided.
- 1.7 It was therefore necessary that I waited for the Executive Mayor to respond to my written request before I proceeded any further in relation to the Investigation Mandate.

2. ENGAGEMENTS WITH THE EXECUTIVE MAYOR

- 2.1 Due to the unavailability of the Executive Mayor, I met with the Executive Mayor on Tuesday 27 March 2018.



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- 2.2 At this meeting, I shared with the Executive Mayor the allegations that I am required to investigate in terms of the Special Conditions of Contract and produced a copy of the Special Conditions of Contract for her perusal. I put a number of documents to the Executive Mayor in order to provide her with an opportunity to respond to those documents in relation to the allegations contemplated by the Investigation Mandate. During the meeting, the Executive Mayor requested an opportunity to review the documents I put to her, to put my questions to her in writing, and to provide her with an opportunity to respond in writing.
- 2.3 Given the volume of documents provided to the Executive Mayor, and the seriousness of the allegations made against her, I agreed to the Executive Mayor's request to address her representations to me in writing. On 28 March 2018 I provided the Executive Mayor with a confidential letter which included a number of statements and versions of events and reference to documents which I requested her written response. I attach a copy of this letter marked **Exhibit 1**.
- 2.4 I addressed various letters to the Executive Mayor dated 11 April 2018, 29 May 2018 and 6 June 2018 requesting the Executive Mayor's written response and comments to my letter dated 28 March 2018 so that her comments and response can be considered and included in my report. I received a number of electronic-mails regarding the Executive Mayor's delay in submitting a response and her request for legal assistance. I received a preliminary written response from Mr John Riley on behalf of the Executive Mayor to my letter dated 27 July 2018 ("the **Executive Mayor's Response**"). A copy of the Executive Mayor's preliminary written response is attached marked **Exhibit 2**.
- 2.5 In terms of the Executive Mayor's Response, the Executive Mayor records that "*we are not in a position to provide a final response to your lengthy letter of 28 March 2018 because there are a number of matters raised therein which require clarification.*" I responded to the Executive Mayor in a letter addressed to Mr John Riley on 26 September 2018 requesting a final response and in a subsequent letter dated 27 September 2018 required the Executive Mayor's final response by 16h00 on Friday 5 October 2018, failing which I would finalise the report on the basis of the Executive Mayor's Response. On 3 October 2018 I received a letter from Mr John Riley on behalf of the Executive Mayor informing me that the Executive Mayor has no further submissions in respect of the investigation. I attach a copy of the letter dated 3 October 2018 from the Executive Mayor marked **Exhibit 3**.
- 2.6 I have referred to portions of the Executive Mayor's Response in this report, however, the response is attached and can be referred to for purposes of completeness.

3. LIMITATIONS

- 3.1 This letter is confidential and may contain legally privileged information.



- 3.2 This letter is intended only for the consideration of the addressees named herein.
- 3.3 Any unauthorised person that receives this letter must immediately inform me by telephone or and return the original or copy to me via the postal service. Any cost incurred in notifying me of such unauthorised possession of this letter shall be reimbursed. Any dissemination, distribution or copying of this letter is strictly prohibited.

4. PROCEDURES PERFORMED

- 4.1 In terms of the Investigation Mandate, I conducted interviews with the following persons:
- 4.1.1 Mr Chris Maurer;
- 4.1.2 Mr Kevin Jacoby, who referred me to his affidavit deposed to on 8 December 2017;
- 4.1.3 Councilor Brett Herron;
- 4.1.4 Mr Gerard Ras (telephonically) and
- 4.1.5 The Executive Mayor.
- 4.2 I made requests to meet with Mr Ebrahim on 2 March 2018 and again on 16 March 2018. I made this request through the office of Ms Kenhardt, as required by the Special Conditions of Contract. On 5 March 2018, I received an electronic-mail from Ms Kenhardt marked Exhibit 4 recording inter alia the following:

"I conveyed your request to meet with Mr Ebrahim last week. He advised this morning that he has already given all his evidence files to Bowmans and is not in a position to reopen these unpleasant matters, particularly in view of the impact this has had on him and his family, and for this reason he advises that he is not in a position to meet with Bowmans."

- 4.3 On 19 March 2018 I received an electronic-mail from Ms Kenhardt, attaching an electronic-mail from Mr Ebrahim of the same day marked **Exhibit 5** confirming that he declined the invitation to meet with me. Mr Ebrahim records the following:

"With reference to the request from Randall van Voore, you are aware that I have already had an interview with the duly appointed representatives of Bowmans. This interview was recorded by them, both on video and audio. You are also aware that I have handed Bowmans all my evidence files at this interview session.

I accordingly respectfully reiterate that I am really not in any position to reopen these unpleasant matters, particularly in view of the impact that it has

already had on me and my family. For this reason, I am simply not in any position to assist.

I trust you will find the above to be in order."

- 4.4 In the circumstances of Mr Ebrahim declining my invitation to meet with me, I viewed and considered the video recording of Mr Ebrahim's interview on 14 December 2017 insofar as it related to the Investigation Mandate.
- 4.5 I have also spoken to Mr Gerard Ras telephonically on 19 March 2018 who explained that he had provided all relevant information in writing. I was provided through the office of Ms Kenhardt, with an electronic-mail from Mr Ras dated 7 January 2018 detailing his version in respect of the matters relevant to the Investigation Mandate I attach a copy of this electronic-mail marked **Exhibit 6**.
- 4.6 In terms of the Investigation Mandate, I reviewed the following documents (which are available from me on request if not already included in the Exhibits to this report):
- 4.6.1 Letter addressed to Minister Baloyi from the Executive Mayor dated 23 March 2012;
- 4.6.2 One-on-one dossier compiled for the Executive Mayor dated 13 October 2017 including the following attachments:
- 4.6.2.1 Letter from Mr Ebrahim to the Executive Mayor dated 13 October 2017;
- 4.6.2.2 Report to Council regarding Regulation 5(1) of the Disciplinary Regulations for Senior Managers: M Whitehead;
- 4.6.2.3 City Manager and Executive Mayor one-on- one on 13 October 2017;
- 4.6.2.4 Electronic-mail correspondence exchanged between P de Vries, M Whare and B Chinsamy regarding 'Foreshore Freeway Project – comments';
- 4.6.2.5 Moore Stephens report dated 10 August 2017;
- 4.6.2.6 Request for proposals for the Development of the Cape Town Foreshore Freeway Precinct and Opinion by J.J and Gauntlett SC and F.B Pelser;
- 4.6.2.7 Electronic-mail correspondence exchanged between F Cumming and A Ebrahim regarding 'Request for meeting with the City Manager including attachments';
- 4.6.2.8 Grievance by F Cumming dated 31 August 2017;
- 4.6.2.9 Letter by the City Manager to the Executive Mayor dated 4 September 2017;



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- 4.6.2.10 Electronic-mail correspondence exchanged between C Kesson and L Carstens regarding - 'Confidential Governance issues relating to the Foreshore Freeway Project';
- 4.6.2.11 Letter by the City Manager to F Cumming dated 15 September 2017;
- 4.6.2.12 Electronic-mail correspondence exchanged between F Cumming and A Ebrahim regarding 'grievance Outcome - F Cumming including attached Report';
- 4.6.2.13 Electronic-mail correspondence exchanged between M Whitehead and D Meyer regarding 'Probation number 5';
- 4.6.2.14 Letter from M Whitehead to F Cumming dated 2 October 2017;
- 4.6.2.15 Electronic-mail correspondence exchanged between N Swart and M Whitehead regarding Recommendation in relation to probation period;
- 4.6.2.16 Letter by M Whitehead to F Cumming dated 5 October 2017;
- 4.6.2.17 Letter by M Whitehead to F Cumming dated 2 October 2017;
- 4.6.2.18 Letter by M Whitehead to F Cumming dated 6 October 2017;
- 4.6.2.19 Letter by F Cumming to M Whitehead dated 6 October 2017;
- 4.6.2.20 Memorandum by M Whitehead to the City Manager dated 9 October 2017;
- 4.6.2.21 Letter by M Whitehead to F Cumming dated 2 October 2017; and
- 4.6.2.22 Recommendation report by F Cumming in relation to probation period dated 9 October 2017 and letter from the City Manager to F Cumming
- 4.6.3 Letter addressed to Mr Ebrahim by the Executive Mayor regarding 'Application of Regulation 5(1) of the Disciplinary Regulations for Senior Manager: M Whitehead';
- 4.6.4 Statement made by the Executive Mayor in response to Mr Craig Kesson's affidavit purportedly made under the Protected Disclosures Act 26 of 2000
- 4.6.5 Affidavit deposed to by Mr Kevin Terence Jacoby on 8 December 2017;
- 4.6.6 Electronic mail correspondence exchanged between A Vorster, Mr Jacoby, and P Du Toit regarding 'Volo Assessment';
- 4.6.7 Legal Opinion from Advocate DJ Jacobs SC re Payments solely for Bus Chassis dated 12 December 2014;
- 4.6.8 Forensic investigation into alleged irregularities involving payments to Volvo -FSD 049/14



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- 4.6.9 Letter from the City Manager to the Executive Mayor regarding 'Forensic Investigation into alleged irregularities involving payments to Volvo';
- 4.6.10 Electronic mail correspondence exchanged between K Jacoby, S Odendaal, J Fagma and J Martheze regarding 'Volvo proof of insurance on my Citi Chassis';
- 4.6.11 Volvo letter to John Martheze re Confirmation / Insurance Bus Chassis;
- 4.6.12 Electronic mail correspondence exchanged between M Whitehead and A Ebrahim regarding 'Confirmation/ insurance';
- 4.6.13 Rough notes on meeting between Executive Mayor and, Kevin Jacoby, Brett Herron and City Manager;
- 4.6.14 Electronic mail correspondence exchanged between K Jacoby and L Carstens regarding 'Bus Chassis';
- 4.6.15 Letter Acting Chief Forensics to the City Manager regarding 'Forensic investigation into alleged irregularities involving payments to Volvo';
- 4.6.16 One-on-one meeting with Executive Mayor item 1 discussion regarding 'Forensic Investigation into Volvo';
- 4.6.17 Letter received from Acting Chief FEID in response to City Manager's Letter dated 7 April 2015;
- 4.6.18 One-on-one meeting with Executive Mayor item 3 – Forensic investigation into alleged irregularities involving payments to Volvo';
- 4.6.19 One-on-one meeting with Executive Mayor item 6 Volvo, with forensic report attached;
- 4.6.20 Memorandum from Chris Maurer (FEID) addressed to the Deputy Executive Mayor regarding 'Forensic Investigation into alleged irregularities involving payments to Volvo';
- 4.6.21 Rough notes on meeting between Executive Mayor, Brett Herron, Gerhard Ras, Melissa Whitehead and City Manager ;
- 4.6.22 Directorate overview of the implementation of forensic report recommendation by management;
- 4.6.23 WhatsApp communication exchanged between the City Manager and Gerhard Ras regarding 'Volvo Matter';
- 4.6.24 File notes by Keith Nicol regarding 'Volvo matter';
- 4.6.25 Letter from the City Manager to the Chief FEID advising that the matter be closed; and



- 4.6.26 Electronic mail correspondence from Gerhard Ras to Dirk Smit: Allegations made by the City Manager Achmat Ebrahim in respect of Volvo Forensic report.
- 4.7 The abovementioned documents, including the relevant legislation, was provided to the Executive Mayor in a paginated bundle comprising 431 pages.
- 4.8 I have also considered the various legislative framework relevant to the Investigation Mandate.
5. I set out below my findings in relation to the investigation mandate. I have recorded the two allegations below, and the factual circumstances surrounding the allegations. I then refer to the Disciplinary Regulations and the Executive Mayor's response to the allegations against her and conclude with my findings.
6. **ALLEGATION: THE EXECUTIVE MAYOR'S FAILURE TO PRESENT A DOSSIER TO COUNCIL FOR ITS CONSIDERATION, IN LIGHT OF THE ALLEGATIONS INTO THE CONDUCT OF THE COMMISSIONER IN RESPECT OF THE BID EVALUATION COMMITTEE FOR TENDER 7C/2016/2017, PERTAINING TO THE CAPE TOWN FORESHORE FREEWAY PRECINCT.**
- 6.1 A dossier titled "**DOCUMENTATION PERTAINING TO ALLEGATIONS OF MISCONDUCT AGAINST S57 STAFF MEMBER: MS MELISSA WHITEHEAD – EXECUTIVE MAYOR ONE-ON-ONE**" dated 13 October 2017 was presented to the Executive Mayor attached marked **Exhibit 7**.
- 6.2 The covering letter to the dossier addressed to the Executive Mayor and dated 13 October 2017 has the subject "**ALLEGATIONS OF MISCONDUCT AGAINST S57 STAFF MEMBER: MS MELISSA WHITEHEAD**". An extract of that letter is set out below:

"...

Also attached for your consideration and approval, is a report which was compiled for me in accordance with Regulations 5(1) of the Disciplinary Regulations for Senior Managers, by Mr Lungelo Mbandazayo – ED: Corporate Services, which is intended for consideration at the October Council meeting...

Furthermore I need to point out that included in the recommendation under paragraph 5 of the attached report, it is mentioned that:-

"While it is considered in the overall context of this matter a disciplinary investigation is not warranted, the matter is submitted to Council for consideration and decision as required."

I accordingly submit the report for your consideration and approval for submission to the October Council meeting." [Exhibit 7] (emphasis added)



- 6.3 The documents in the dossier, included, *inter alia*:
- 6.3.1 A draft report to Council dated 13 October 2017 with provision made for the Executive Mayor's signature and to indicate either "supported" or "not supported." **[Exhibit 7]**
- 6.3.2 A document titled "one-on-one on 13 October 2017 – discussion around way forward." This document includes a list of documents allegedly provided to the Executive Mayor by the City Manager, including *inter alia*, the Moore Stephens Report. **[Exhibit 7]**
- 6.4 The Moore Stephens report of 10 August 2017 records *inter alia* the following:

"We have become increasingly concerned about the Meetings held thus far, as regards:

- ***An absence of objectivity, impartiality and a lack of consistency on the part of Ms Whitehead regarding the scoring of certain criteria in relation, in particular, to two of the proposals – Proposal B ...and Proposal F...;***
- ***More particularly, apparent partiality on Ms Whitehead's part in relation to the favourable scoring of Proposal B and the unfavourable scoring of Proposal F; and***
- ***The apparent undue influence which Ms Whitehead is seeking to bring to bear on other members of the BEC as regards scoring, more especially given that their reporting lines in the City are to her.***

At the meeting on Friday 04 August 2017, our concerns came into relief when Ms Whitehead stated, amongst other things, that she is not prepared to stand up and recommend a proposal where the affordable housing units are under the highways.

She reported that "Brett, the Mayor and the Deputy Mayor have said that they will never accept the MDA proposal because of the people living under the highways [proposal F], that "she reports to the politicians who are the ultimate decision-makers" and "lets give the Circle of Good Hope a chance in Stage 2 to deal with the financing issues" which would, with respect appear to be inherently problematic."

...

At this time, it is unlikely that we will be able to provide the City with a favourable assurance on the process. We regard the risks for the City inherent in the process as sufficiently significant that urgent and careful consideration needs to be given by the City as to how best to address the issues and associated risks.

One option would be for Ms Whitehead to be asked to withdraw from the Technical Evaluation (Scoring) process and that that process be started anew.

Undoubtedly, in considering its options, the City may wish to consider securing an opinion from Senior Counsel."

6.5 The Executive Mayor provided a formal response to Mr Ebrahim in a letter dated 20 October 2017 with the subject title "Application of Regulation 5(1) of the Disciplinary Regulations for Senior Managers: M Whitehead". A copy of the letter is attached at **Exhibit 8**.

6.6 An extract of that letter is set out below:

"I have considered the bundle of documents you provided to me under the cover of your letter dated 13 October 2017.

Regulation 5(1) requires that council be informed of an allegation of misconduct against a senior manager.

From the documents you provided to me, there appears to be two matters to consider.

Firstly a letter from Moore Stephens which raises concerns about an absence of objectivity, on the part of Ms Whitehead, during the process of attempting to reach scoring consensus at the Foreshore Freeway BEC.

Secondly, a similar complaint raised by a Director within TDA, as part of a grievance against Ms Whitehead which is linked to his performance scoring during his probation period.

...

...the letter from Moore Stephens makes no allegation of misconduct on the part of Ms Whitehead and you followed the proposal from the auditors by obtaining legal advice from a senior advocate. You then invoked the legal advice you received which was to reconstitute the BEC and to amend the scoring process so as to remove the need to find consensus- thus allowing each BEC member to make an individual score.

I note that Advocates Gauntlett SC and Pelsler advised that "it is not necessary to remove and replace the entire BEC. This is because the none (sic) of the concerns identified by MSFS constitutes a vitiating irregularity..."

In the absence of an allegation of misconduct, or an act or omission which would amount to misconduct, it follows that Reg 5(1) does not apply. This is underscored by your comment that "a disciplinary investigation is not warranted."

- 6.7 In the document titled "Statement by the Executive Mayor in response to Craig Kesson's affidavit purportedly made under the Protected Disclosures Act 26 of 2000" attached as **Exhibit 9**, the Executive Mayor records that:

"33... The BEC has now been reconstituted following on advice from senior counsel. I was satisfied that senior counsel's advice had been implemented, and that no ground existed for me to refer the incident to Council."

- 6.8 In his interview on 14 December 2017 Mr Ebrahim allegedly indicated to the Executive Mayor that the allegations must be investigated and tested and that it is for Council to determine whether it wants to investigate as it is Council's prerogative. Mr Ebrahim stated in his interview that the Executive Mayor tables all matters that go to Council. If a report is not signed and tabled by the Executive Mayor it does not go to Council, and he further stated that all reports tabled at Council are signed by the Executive Mayor. Mr Ebrahim states that he provided the report to the Executive Mayor to be tabled and that was as far as he could go. Mr Ebrahim claimed that his responsibility in terms of the City of Cape Town's "process" was to go to the Executive Mayor and say "please let us take it" as that is how the City of Cape Town "operates." Mr Ebrahim stated that he could not undermine the Executive Mayor and she was reluctant and did not want to refer the matter to Council. Mr Ebrahim alleges that there was no recourse available to him as it was "difficult" since the Executive Mayor is in charge of the caucus and the numbers. If the Executive Mayor was not "comfortable" he could not undermine her. The Executive Mayor's response to Mr Ebrahim's request for consideration and approval of the report was formally addressed in her letter to him dated 20 October 2017. That response is found at paragraph 6.5 above.

- 6.9 In a document titled "Statement by the Executive Mayor in response to Craig Kesson's affidavit purportedly made under the Protected Disclosures Act 26 of 2000" the Executive Mayor stated at paragraph 13 that in respect of the Moore Stephens Report:



"It is simply untrue that I have ever suggested that the matter should not reach Council. My commitment to exposing corruption is well known, and is a matter of historical record. Mr Kesson contends that Ms Whitehead should have been referred to Council on the basis of the Moore Stephens Report, and that I expressed an intention to prevent this. But the truth is that the Moore Stephens Report did not recommend reporting Ms Whitehead. It recommended that senior counsel's opinion be obtained, and it noted the possibility of Ms Whitehead withdrawing from the further tender process. Both of those happened. I did not see any basis for intervention by me, or for placing the matter before Council" [EXHIBIT 9]

7. I reflect further below whether the Executive Mayor "failed" to present the dossier to Council in my consideration of the disciplinary regulations.
8. **ALLEGATION: THAT THE CITY MANAGER WAS PRECLUDED BY THE EXECUTIVE MAYOR FROM REPORTING TO COUNCIL, ALLEGATIONS OF MISCONDUCT ON THE PART OF THE COMMISSIONER PERTAINING TO A FORENSIC INVESTIGATION (FORENSIC REPORT FSD 049/14-15) INTO ALLEGED IRREGULARITIES INVOLVING PAYMENTS TO VOLVO FOR BUS CHASSIS. THAT THE CITY MANAGER WAS PRECLUDED BY THE EXECUTIVE MAYOR FROM REPORTING TO COUNCIL, ALLEGATIONS OF MISCONDUCT ON THE PART OF THE COMMISSIONER PERTAINING TO A FORENSIC INVESTIGATION (FORENSIC REPORT FSD 049/14-15) WHEREIN THE COMMISSIONER CAUSED IRREGULAR EXPENDITURE TO BE INCURRED BY THE CITY IN THE AGGREGATE AMOUNT OF R 43 801 607.06 MADE TO VOLVO FOR 29 BUS CHASSIS UNDER TENDER NUMBER 138G/2012/13 AND A FURTHER R 29 584 368.00 MADE TO SCANIA FOR 24 BUS CHASSIS UNDER TENDER NUMBER 140G/2012/13 DURING JUNE 2014, AND THAT THE EXECUTIVE MAYOR INSTRUCTED HIM TO CLOSE THE INVESTIGATION.**
 - 8.1 A forensic report FSD 049/14-15 regarding "ALLEGED IRREGULARITIES INVOLVING PAYMENTS MADE TO VOLVO" issued by the Forensics, Ethics and Integrity Department ("FEID") attached marked "Exhibit 10" included in its recommendation the following:

"In light of the above we respectfully draw the attention of the City Manager to the provisions of the MSA Disciplinary Regulations read with the MFMA Financial Misconduct Regulations which require any allegations of misconduct against a senior manager (a manager referred to in section 56 of the MSA in this case Whitehead) to be brought to the attention of the municipal council."
 - 8.2 Mr Ebrahim alleges that in relation to the forensic report and after a one-on-one meeting with the Executive Mayor, the Executive Mayor felt that she needed further meetings with persons knowledgeable on the issues. A process of meetings commenced. Mr Ebrahim stated that the Executive Mayor had a "discomfort" and he was provided with a list of questions to put to the forensics team. When the FEID stood by the initial recommendation in the forensic report, Mr



Ebrahim was of the view that the matter needed to go to Council. Mr Ebrahim states that the Executive Mayor was not "comfortable" with this. Mr Ebrahim stated that he tried to keep the Volvo matter "alive" from March to December 2015. Mr Ebrahim states that the Executive Mayor said "this is going nowhere" and took the "stance" that it would not go to Council. Mr Ebrahim then wrote to Forensics to inform them that the matter would not be taken further due to a difference of interpretation. During his interview, Mr Ebrahim stated that this was not his interpretation. Mr Ebrahim states that forensics was instructed to take the matter off of the outstanding matters list. After assurances were allegedly provided that when the payment for the chassis was made, the chassis were insured and that all busses did arrive, it was perceived as a "storm in a teacup."

8.3 Mr Ebrahim states that he could not undermine the authority of the Executive Mayor and that the Executive Mayor makes the decision on whether matters go forward to Council. Mr Ebrahim states that nothing goes to Council without the Executive Mayor's signature on it and without being tabled by the Executive Mayor. Mr Ebrahim alleges that the Executive Mayor is required to table items.

8.4 Based on the information provided by the persons interviewed for purposes of preparing this report, a timeline of events is set out below:

8.4.1 A meeting is held prior to March 2015 with the Executive Mayor, Gerrard Ras, Councillor Herron in attendance to discuss an interpretation of "part payment" in the acquisition of buses. The matter was referred to Mr Ebrahim for a forensic investigation.

8.4.2 On 17 March 2015 the Forensic Report FSD 049/14-15 is provided to the City Manager by the Acting Chief: FEID. The covering letter is attached marked **Exhibit 11**.

8.4.3 On 23 March 2015, the Forensic Report is provided to the Executive Mayor by Mr Ebrahim, attached marked **Exhibit 12**. In a covering letter Mr Ebrahim records:

"I attach for your perusal a forensic report on the above subject.

In view of the findings and recommendations I believe I (sic) would be useful for you and I to reflect on this in the presence of the Acting Chief: FEID.

...Either way, I believe it is necessary for us to jointly consider the way forward."

8.4.4 On 30 March 2015, a meeting is held between the Executive Mayor, Councillor Brett Herron, Mr Kevin Jacoby and Mr Ebrahim. A rough handwritten note of the meeting attached marked **Exhibit 13** appears to record *inter alia*, the following:

Discussion "no interview with Brett or Melissa. Misconduct ... Melissa. TCT perspective – whether the interpretation can be misconduct. Due diligence was done. Clause 9.9 of... "chassis being an asset"

- 8.4.5 The Executive Mayor's Response confirms that there was a meeting of 30 March 2015 between the Executive Mayor, Councillor Brett Herron, Mr Kevin Jacoby and Mr Ebrahim. The Executive Mayor received a meeting request from Mr Ebrahim in correspondence dated 23 March 2015. The purpose of the meeting was to discuss the Volvo chassis.
- 8.4.6 The Executive Mayor's response confirms that she had a discussion with Mr Ebrahim on her concerns relating to the recommendations in the report which caused him to write to the Acting Chief Forensics. The Executive Mayor states that the concerns were shared by Mr Ebrahim, as is clear from his letter dated 7 April 2015. In response to the allegation made by Mr Ebrahim in his interview of 14 December 2017, wherein he stated that he informed the Executive Mayor that it was a serious matter that needed to go to Council and that there was a need to investigate the matter. The Executive Mayor states that Mr Ebrahim's views, which she agrees is set out in his letter dated 7 April 2015.
- 8.4.7 On 7 April 2015 a letter is addressed to the Acting Chief Forensics from Mr Ebrahim attached marked **Exhibit 14**. An extract of that letter is set out below:

"I refer to your Forensic Report FSD 049/14-15 dated 17 March 2015.

I have had a discussion with the Executive Mayor to consider the recommendations in your report. In this regard, as you are aware, we are charged with the responsibility of tabling allegations before Council of misconduct against senior managers. It is therefore necessary that reports which point to such misconduct have sufficient substance to justify this course of action.

...I am highlighting this in view of our experiences relating to other allegations against senior managers which have been tabled before Council, only for the report to be debated and criticised and for Council to then dismiss the allegations and resolve that no further action be taken. However, the unintended consequences of such submission, if not well founded at the outset, may cause untold reputational damage to either the City or the incumbent or both..."

In the above context and for various reasons we are somewhat concerned about the recommendations in the report, and I urge you to re-look meticulously at the findings and recommendations, particularly also in view of what follows...



...it is not clear what the basis of this recommendation is, firstly, as it is not clear what allegation of misconduct has been made and by whom.

Secondly if an allegation of misconduct has been made, it is not clear what misconduct is alleged. In this context, "misconduct" means misconduct as set out in Annexure A of the Disciplinary Regulations for Senior Managers (attached for ease of reference). It is somewhat difficult to make the connection between your findings and what is listed in Annexure "A"... "

- 8.5 On 9 April 2015 a one-on-one meeting is held between the Executive Mayor and Mr Ebrahim. The one-on-one document is titled "FORENSIC INVESTIGATION – VOLVO" with annexures "a) Copy of letter to forensics dated 7 April 2015 iro forensic investigation into alleged irregularities involvement payments to Volvo" attached marked **Exhibit 15**. In the outcome section, handwritten notes record the following:

"EM [Executive Mayor] will wait to be advised of the response from forensics, before deciding on the way forward."

- 8.6 The Executive Mayor's Response confirms that there was a one-on-one meeting between the Executive Mayor and Mr Ebrahim on 9 April 2015. The Executive Mayor stated that she would wait for the outcome of the response from the FEID.

- 8.7 On 27 July 2015 the Acting Chief: Forensics, Ethics & Integrity addressed a letter to Mr Ebrahim (in response to his 7 April 2017 letter) with the subject "FORENSIC INVESTIGATION INTO ALLEGED IRREGULARITIES INVOLVING PAYMENTS TO VOLVO" attached marked **Exhibit 16**. An extract of the letter is below:

"We confirm that we are of the view that we have carried out your instruction to re-look at our forensic report (FSD 049/14-15) dated 17 March 2015. We stand by the contents of same and refer you to the contents of the recommendation in paragraph 901 of our report which states as follows:

"In light of the above we respectfully draw the attention of the City Manager to the provisions of the MSA Disciplinary Regulations read with the MFMA Financial Misconduct Regulations which require any allegations of misconduct against a senior manager (a manager referred to in section 56 of the MSA in this case Whitehead) to be brought to the attention of the municipal council."



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8.8 A one-on-one meeting is held between the Executive Mayor and Mr Ebrahim on 6 August 2015. The document titled "3. FORENSIC INVESTIGATION INTO ALLEGED IRREGULARITIES INVOLVING PAYMENTS TO VOLVO. ATTACHMENTS a) Copy of CM letter to forensics b) Copy of report from forensics" a copy of the document is attached marked "Exhibit 17" and records *inter alia*:

"a) Considerable discussion ensued flowing from the response received from FEID where the City manager highlighted the responsibility of the City Manager and the Mayor to table this matter in abbreviated form before Council

b)The Mayor elected to schedule a meeting between herself, the City Manager, Mayco Member and the TCT Commissioner flowing from which a decision will be made in the way forward."

8.9 The Executive Mayor's Response confirms that there was a one-on-one meeting between the Executive Mayor and Mr Ebrahim on 6 August 2015. The matter was raised as part of a weekly meeting with Mr Ebrahim in which he updated the Executive Mayor on matters of the administration. The Executive Mayor could not recall whether there was "considerable discussion" as alleged. The Executive Mayor decided that a further meeting must be scheduled between the Executive Mayor, the City Manager, the Mayco Member and the TCT Commissioner. The Executive Mayor claims that the intention of that further meeting concerned ways of improving capital spend.

8.10 A further one-on-one meeting is held between the Executive Mayor and Mr Ebrahim on 20 August 2015. The Executive Mayor's Response confirms that a meeting was held with Mr Ebrahim on 20 August 2015. A one-on-one document titled "6. Forensic investigation into alleged irregularities involving payments to Volvo" attached marked **Exhibit 18** records in the notes section (in handwriting):

"Mayor will call a meeting between Brett Herron, Melissa Whitehead and AE"

8.11 On 1 October 2015, the Acting Chief Forensics Mr Chris Maurer provided to the Deputy Executive Mayor, a copy of the forensic report, legal opinion, letter from Mr Ebrahim dated 7 April 2015 and the FEID response letter to the City Manager dated 27 July 2015. A copy of the covering letter is attached marked **Exhibit 19**.

8.12 There appears to be a meeting in or around October 2015 between the Executive Mayor, Mr Gerard Ras, Councillor Brett Herron, Mr Ebrahim and Mr Kevin Jacoby. The Executive Mayor confirms in her response that during that meeting, the Executive Mayor expressed a concern about the impact of capital spend.



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8.13 Various accounts of what was discussed during meetings held in and around October 2017 are recorded below:

8.13.1 In terms of a file note titled "Volvo matter" allegedly authored by Keith Nicol (as per a hand written note on the document "K Nicol File Notes – 30 November 2015" attached marked **Exhibit 20**, the following extract provides:

"at the meeting on 5 October 2015 (attended by Ras, Whitehead, Herron, Mayor, CM, Jacoby) the Mayor expressed the firm position that the matter should be concluded and not go to council. Ras advised her that CM has the authority to finalise the matter with no further action. CM asked Ras to provide him with the authority in writing. Despite follow up requests to Ras, this was not forthcoming."

8.13.2 In terms of Mr Jacoby's affidavit attached marked **Exhibit 21**, the following extract records:

"9. I hereby confirm that I attended another meeting after Meeting 1 (and prior to the release of the relevant forensic report in March 2015). The meeting was held in the Ray Alexander Room and I had been invited by a staff member in the Executive Mayor's office on short notice.

10. The following persons attended the meeting: the Commissioner – Transport for Cape Town, Ms Melissa Whitehead (Ms. Whitehead), the City Manager (Mr. Achmat Ebrahim), Mr Ras, Cllr Herron, the Executive Mayor and myself. The meeting was about the aforementioned forensic investigation undertaken by the forensics department into the payment for bus chassis.

11. I confirm that I was once again not in possession of a copy of the forensic investigation report although the meeting was about the investigation. I was and I am still not aware of why my relevant was in the meeting other than that I reported the matter of "part payments" for chassis of buses to the City Manager for his consideration to investigate.

12. I confirm that the Executive Mayor was of the opinion that she could find no reason why the outcome of the investigation as contained in the forensic report (including recommendations for Ms Whitehead to be investigated) should be submitted to Council for authority to investigate further.

13. The Executive Mayor indicated that it was for the City Manager to give direction to Mr Ras on the finalisation of the outcomes of the forensic report, with the understanding that it would not proceed to council."



8.14 Mr Gerard Ras provides a version of the meeting in an electronic-mail dated 7 January 2018 sent to Mr Dirk Smit. Mr Smit's office forwarded that electronic-mail to Ms Gillian Kenhardt on 8 January 2018 to forward the electronic-mail to Bowmans. The electronic-mail was sent to me on 19 March 2018, and is attached marked **Exhibit 6**. During the course of my meeting with the Executive Mayor on 27 March 2018, the Executive Mayor raised a concern that Mr Ras' electronic-mail was in response to an allegation made by Mr Ebrahim that Mr Ras had allegedly "blocked" Mr Ebrahim from taking the subject matter of Ms Whitehead's alleged wrongdoing in respect of the Volvo part payment to Council. It appears from that electronic-mail, that the allegation referred to by Mr Ras is in terms of an EWN article dated 5 January 2018 and is recorded in his electronic-mail. I do not have a copy of that article. An extract of that electronic-mail is set out below:

"8. In respect of Mr Ebrahim's allegation that I blocked him to take the matter of Ms Whitehead to Council, the following should be noted:

8.1 I admit that there was a meeting, the date of which I am uncertain, in the Ray Alexander room about the Volvo forensic report and that I was in attendance. My recollection of what transpired is as follows:

8.1.1 The report made findings in respect of maladministration against officials within the Transport Department.

8.1.2 The alleged wrongdoing was that a part payment of R40 million was made towards the Volvo buses before same were delivered completed furnished to the city.

8.2 The initial discussion, according to my recollection, went as follows:

8.2.1 The mayor expressed her concern about the report as the contentious payment of R40million stemmed from an initiative to increase the capital spent for the prior financial year. She was specifically concerned about the reputational risk for the City if the matter was blown out of proportion and not assessed in the right context. It has to be noted that the capital spend exercise was a project driven by the Mayor, the Mayco member for Finance, the City Manager and the CFO of the City. All executive directors were set annual targets to achieve a certain percentage annual spent, failing which they would be penalised on their 40 million payment to Volvo at the time of payment and I don't recall that any objection that was officially raised within the city about it at the time.



8.2.2 Cll Herron suggested that another legal opinion be sourced as he did not agree with the legal opinion on which the forensic report relied upon. It is correct that there were differing opinions on the matter among others from the Finance Department, who were of the view that the part payment to Volvo was legal.

8.2.3 The City Manager then offered to go and seek a solution to the problem given the context of the capital spend exercise. I do not recall the mayor having requested that the matter be done away with.

8.3. After the meeting adjourned, I consulted with the then Director Forensic Services. His advice was to advise the City Manager that he must act on the forensic report and if he wished to close the matter, he should do so in writing to the Director Forensic Services. I subsequently conveyed the afore-mentioned to the City Manager. I also conveyed my view that those responsible for effecting the payment should also be held to account as it was a huge amount and showed a control weakness in the contracts management of the City.

8.4 A second meeting, the date of which I am uncertain, was held at the Ray Alexander room where it was conveyed to those in attendance that the City Manager had the authority to deal with the matter and if he wanted no further action, he should do so in writing.

8.5 After the second meeting on the matter, Mr Ebrahim wanted me to write the required letter of no further action. I declined and said I cannot write a letter to myself as I was the Executive Director responsible for, amongst others, Forensics.

8.6 After a few weeks, a letter signed by the City Manager was received that to the extent that no further action was required in respect of the matter and Forensics and I regarded the matter as closed."

8.15 The Executive Mayor could not recall the detail of whether (as alleged by Mr Jacoby in his affidavit) she indicated to Mr Ebrahim that Mr Ras would give direction on the finalisation of the outcome of the report on the understanding that it would not proceed to Council. However, the Executive Mayor accepts that Mr Ras was engaged to assist Mr Ebrahim to finalise the matter. The understanding however, according to the Executive Mayor was that Mr Ebrahim had the power to make the final decision.

8.16 The Executive Mayor could not recall, as alleged by Mr Ras in his electronic-mail that she expressed a specific concern regarding the reputational risk for the City if the matter was

blown out of proportion and not assessed in the right context. However, the Executive Mayor states that she believed that there was no allegation of misconduct that could be referred to Council.

- 8.17 An extract of WhatsApp communication between Mr Ebrahim and Mr Ras is attached as **Exhibit 22** wherein the following is recorded:

"[Ebrahim:]... As you know, what was and still is paramount for me and the Mayor is the closure of the Volvo saga. I believe you are going to be dealing with that aspect, so let us leave it at that please. If however you feel very strongly about involving the Mayor, then may I suggest we do it together please. Many thanks – Achmat

[Ras:] I spoke to Vincent about the Volvo matter. According to him the matter is simple- they made recommendations to the CM & all Forensics require is a letter from the CM stating that the recommendations were considered & as a result of a difference of interpretation, the matter requires no further action & can be closed. Forensics will then take it off the outstanding matters list. I did what you asked of me at the Audit Com but I cannot do the letter from the CM. Forensics cannot & will not oppose or further stir if they receive such a letter.

[Ebrahim:] Ok that's fine then."

- 8.18 On 2 December 2015, Mr Ebrahim addressed a letter to Mr Vincent Botto, the Chief, Forensics, Ethics and Integrity attached marked **Exhibit 23**. An extract of that letter is below.

"Please be advised that I have met with the Executive Mayor, the MayCo Member responsible for TCT and the Executive Director: Corporate Services and Compliance regarding the recommendations contained in your report. Flowing from the aforementioned as well as my previous correspondence in the above regard, it is apparent that we clearly differ from your interpretation of the evidence contained in your report.

I have also had further consultations with the ED: CorC and in accordance with his advice, it is herewith confirmed that I will not be processing this matter any further, neither will I be instituting corrective action against any City staff member mentioned in the report.

I trust that this clearly states my position on this matter and that this matter will now be regarded as closed"



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9. During my meeting with the Executive Mayor, she referred me to various paragraphs of a document titled "Statement by the Executive Mayor in response to Craig Kesson's affidavit purportedly made under the Protected Disclosures Act 26 of 2000" attached marked Exhibit 9, in relation to the part-payment for buses. I set out below those paragraphs:

"22. The final relevant forensic report (FSD049/14-15) relates to the acquisition of MyCiti buses manufactured by Volvo. Volvo was beset by industrial action, which delayed delivery of the buses. The issue arose from attempts to avoid this resulting in underspending of the budget.

23. What took place was that the chassis (which were completed on time) of the buses were delivered to the City by means of what I understand constitutes in law symbolic delivery. Payment was made then within the intended financial year. City officials believed this was permitted by the contract. However, the contract was subsequently interpreted differently by some lawyers. In their view, the payment was not consistent with the contract. If so, it may, strictly speaking have been "irregular" in that it was not permitted by the contract. But it was not immoral, corrupt, criminal or mala fide. The City suffered no loss, and received value for money.

24. This matter was addressed in 2015. After discussions with amongst others the City Manager and the Chief Financial Officer, the then Executive Director: Corporate Services and Compliance expressed his disagreement with the interpretation of the evidence contained in the forensic report.

25. The matter was closed on this basis. I did not suppress any investigation. The suggestion that I somehow threatened the City Manager with an investigation if he referred the matter to Council is simply false. I never said this, and the City Manager never complained that I did. To the contrary, he confirmed that he accepted the advice of the Executive Director: Corporate Services and Compliance, whose views and judgment are widely respected.

26. There is therefore no truth in the contention that I prevented the City Manager from reporting the matter to Council. This complaint is of course inconsistent with the accusation that I failed to table the matter with Council or request Council to investigate it."



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10. I set out further below my consideration as to whether Mr Ebrahim was "precluded" by the Executive Mayor from reporting allegations of misconduct to Council in relation to the payment for chassis.
11. *Local Government: Disciplinary Regulations for Senior Managers (GN344 of 2011 published in GG34213 of 21 April 2011) ("Disciplinary Regulations")*
- 11.1 Based on the factual circumstances set out above, I am required to consider whether the Executive Mayor failed to present a dossier to Council for its consideration in relation to the Foreshore Freeway Precinct and furthermore, whether the Executive Mayor "precluded" the City Manager from referring the findings of the forensic report regarding the payment for chassis to Council. There are two considerations which are relevant to both enquiries: firstly, whether there existed an "allegation of misconduct" which should have been referred to Council and secondly, who was responsible to refer the matters to Council.
- 11.2 I set out below the purpose and application of the Disciplinary Regulations (section 2), the Principles underlying the Disciplinary Regulations (section 3), the Policy (section 4) as well as the Disciplinary Procedures (section 5).

2. Purpose and application

(1) This Disciplinary Code -

(a) applies to all -

(i) municipalities;

(ii) senior managers; and

(b) Is intended to -

(i) provide an internal mechanism for management of misconduct;

(ii) establish standard procedures for the management of misconduct;

(iii) support constructive labour relations;

(iv) ensure a common understanding of misconduct and discipline;

(v) promote mutual respect between senior managers and council;

(vi) promote acceptable conduct;

(vii) avert and correct unacceptable conduct; and



(viii) **prevent arbitrary or discriminatory actions.**

(c) **prevails in the event of any inconsistency with any systems and procedures adopted by a municipality in terms of section 67(1)(h) of the Act to the extent that those procedures apply to senior managers.**

3. Principles

(1) **This Disciplinary Code is informed by the following principles:**

(a) **Discipline -**

(i) **is fundamentally a corrective measure and not punitive; and**

(ii) **must be applied in a prompt, fair, consistent and progressive manner.**

(2) **This Disciplinary Code is necessary for the efficient delivery of services, and ensure that senior managers -**

(a) **have a fair hearing in a formal or informal setting;**

(b) **are timeously informed of allegations of misconduct made against them; and**

(c) **receive written reasons for any decisions taken against them.**

(3) **A disciplinary hearing must -**

(a) **take place in the area of jurisdiction of the municipality; and**

(b) **be concluded within the shortest possible time.**

(4) **Except in exceptional circumstances, a disciplinary action may not be taken against a senior manager until a full investigation has been carried out.**

4. Policy

(1) **If a senior manager is alleged to have committed misconduct, the municipal council must institute disciplinary proceedings in accordance with this Disciplinary Code.**

(2) **The maintenance of discipline is the responsibility of the municipality.**

(3) **Discipline must be effected with due regard to -**

(a) **the Code of Conduct for municipal staff members as contained in Schedule 2 of the Act; and**

(b) **the Code of Good Practice provided for in Schedule 8 of the Labour Relations Act, 1995 (Act No. 66 of 1995).**



- (4) **The principles of natural justice and fairness must be adhered to notwithstanding criminal or civil action having been instituted.**
- (5) **Disciplinary procedures may not be dispensed with as a result of criminal, civil or other action having been instituted, or pending the outcome of such action.**

11.3 Regulation 5 of the Disciplinary Regulations provides the following:

"(1) Any allegation of misconduct against a senior manager must be brought to the attention of the Municipal Council.

(2) An allegation referred to in sub-regulation (1) must be tabled by the Mayor or the Municipal Manager, as the case may be, before the Municipal Council not later than 7 [seven] days after receipt thereof, failing which the Mayor may request the Speaker to convene a special council meeting within 7 [seven] days to consider the said report.

(3) If the Municipal Council is satisfied that –

(a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the Municipal Council must within 7 [seven] days appoint an independent investigator to investigate the allegation[s] of misconduct; and

(b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the Municipal Council must within 7 [seven] days dismiss the allegation[s] of misconduct."

11.4 **"an allegation of misconduct"**

11.4.1 In the Executive Mayor's Response the following view is taken:

"It cannot be in the best interests of the City to refer any allegation of misconduct allegedly perpetrated by a senior manager to Council...if officials know that each and every allegation made against a senior manager must be referred to Council, then it will open the door for further abuse of this process by staff members. Internal fighting amongst officials and the undermining of a senior managers' authority by constant meritless complaints and suspicion mongering is a problem of every organ of state. An interpretation which increases the scope for this destructive kind of behaviour should be avoided. It is submitted that it is not in the best interest of the City to refer a matter to Council if no allegation of misconduct is made and established, at least on a prima facie basis."



11.4.2 The Executive Mayor's Response recorded that it is incorrect to assume that any allegation of misconduct, no matter how absurd or obviously without merit, must be referred to Council. The Executive Mayor is of the view that a relevant allegation of misconduct against Ms Whitehead has yet to be identified. The Executive Mayor submits that an allegation must at least disclose a *prima facie* case of misconduct.

11.4.3 The foreshore freeway precinct: The Executive Mayor provided her view (in terms of her letter dated 20 October 2017) attached marked **Exhibit 8**, that there was no allegation of misconduct on the part of the Ms Whitehead in relation to the Foreshore Freeway Precinct. The Executive Mayor's Response records that there must be a person who makes an allegation of misconduct, who must reference the misconduct which falls within one of the categories described in Parts 1 and 2 of Annexure A to the Disciplinary Regulations. The Executive Mayor claims that there was never a person who, nor a complaint regarding an allegation of misconduct against Ms Whitehead. The Moore Stephens report simply raised "concerns" regarding Ms Whitehead's alleged lack of impartiality but did not lay a complaint of misconduct under Regulation 5 of the Disciplinary Regulations. The Executive Mayor is of the view that if there was no allegation of misconduct, then there was nothing to refer to Council. Even on an "activist" approach, the alleged conduct by Ms Whitehead, as contended by the Executive Mayor could not notionally fall within misconduct as defined in Annexure A to the Disciplinary Regulations.

11.4.4 The payment for chassis: In relation to the payment for the chassis, the Executive Mayor is of the view that the payment does not constitute "irregular expenditure" as contemplated in the *Municipal Finance Management Act, 56 of 2003* and Mr Maurer, in the forensic report and subsequent correspondence did not identify on what basis the payment constituted irregular expenditure. In addition, the Executive Mayor is of the view that Mr Maurer did not identify which policies were allegedly breached. The Executive Mayor states that the outcome of the forensic investigation was not a recommendation or even an allegation that a complaint about misconduct should be investigated. In summary, the Executive Mayor's Response records that:

"It appears to us that an allegation of misconduct as defined in the Disciplinary Regulations is not made against Whitehead in Maurer's report. Under the recommendations, it is merely stated that the attention of the City Manager is drawn to the Disciplinary Regulations which requires that any allegations of misconduct against a senior manager (in this case Whitehead) must be brought to the attention of the municipal council."

11.4.5 From a consideration of case law below, the Labour Court does not take a rigid and literal approach to the interpretation of the Disciplinary Regulations. Whilst these cases do not specifically deal with the meaning of an "allegation of misconduct" it does provide insight



into how the Labour Court interprets the Disciplinary Regulations more generally. The cases below illustrate that strict compliance with the disciplinary regulations is not peremptory and that the purpose of the Disciplinary Regulations is to ensure that claims of misconduct come before a Council meeting to be investigated. Substantial compliance is accepted by the Labour Court.

11.4.5.1

In **Lebu v Maquassi Hills & Others** [2012] 9 BLLR 904 (LC) the Labour Court considered whether the tabling of an allegation of misconduct by the executive mayor was a mandatory step in the institution of disciplinary proceedings against the municipal manager. On the municipal manager's interpretation of the regulations, he contended that he could only be charged with the allegations of misconduct tabled before Council and not with further allegations revealed in an investigation. The court held that sub-regulation 5(2) places an obligation on the mayor to table such allegations against a municipal manager if they are made, and the mayor would be failing in her duties if she did not do so when it happens. But merely because the mayor does not table allegations of misconduct against the municipal manager, does not prevent the Council discussing those allegations. The Labour Court held that to hold otherwise, would lead to absurd results. The Labour Court held that if an investigation authorised by Council leads to other allegations of misconduct, the Council would not be precluded from including those matters in further charges. The Labour Court held that strict compliance with Regulation 5(2) is not peremptory. The importance of that regulation is that claims of misconduct must come before a Council meeting and must be investigated before steps can be taken against a senior manager.

11.4.5.2

In the same case, the Labour Court considered alleged non-compliance with regulation 5(7)(b)(i)(aa) regarding the requirement that the mayor must appoint the presiding officer, instead of the acting municipal manager. The Labour Court held that the real issue to be determined is whether the steps taken by Council were sufficient to achieve the objectives of the regulations as determined by the language, scope and purpose of the enactment as a whole. When the mayor did not appoint a chairperson and was uncooperative, the Council was well within its powers when the appointment mechanism in the regulations had become dysfunctional because the mayor was clearly not acting as a neutral party in the matter of disciplinary action. With reference to the powers of Council as set out in the *Local Government: Municipal Systems Act 32 of 2000* the Labour Court was satisfied that the Council was acting well within its powers when it decided whom to appoint as chairperson of the inquiry.

11.4.5.3

In **Madikizela v City of Ekurhuleni Metropolitan Municipality & Others (J2314/18) (LC)** the Labour Court considered whether there was non-compliance with the Disciplinary Regulations. In that case, the question of whether a request for an internal audit amounted to an allegation of misconduct was considered. The Labour Court found that



there was no plausible basis for interpreting the request for an internal audit as being equivalent to an allegation of misconduct against the employee even on a *prima facie* basis. The Labour Court also considered whether the appointment by the City Manager of an investigator rather than the Council's appointment of an investigator invalidated a disciplinary enquiry. The Labour Court held that as the investigation is merely a preliminary stage in launching disciplinary enquiries, unless there is manifest bad faith, or capriciousness on the part of the Municipal Council in initiating such an investigation, it is difficult to see why such deviations from the procedure would necessarily invalidate the entire disciplinary proceedings if it does not involve a material deviation from the principles governing the disciplinary code set out in regulation 5(3). The Labour Court took the view that the appointment of the investigator was "substantially compliant" with regulations 5(3) and (4).

- 11.4.6 In terms of Regulation 5(3) of the Disciplinary Regulations, the Municipal Council is given the power to determine whether there is reasonable cause to believe that an act of misconduct has been committed by a senior manager. The power is also vested in the Municipal Council to dismiss the allegation[s] of misconduct when there is no evidence to support the allegation[s] of misconduct. There is no preliminary vetting process that takes place prior to the referral to the Municipal Council to determine whether there is a basis for an allegation of misconduct. The power to determine whether an allegation of misconduct is unfounded, rests with the Municipal Council only.
- 11.4.7 It is apparent that Regulation 5(2) of the Disciplinary Regulations does not prescribe the manner or form in which an allegation of misconduct should be made and by whom. Nor do the Disciplinary Regulations prescribe the format in which an allegation must be framed. Regulation 5(1) states that "Any allegation of misconduct against a senior manager must be brought to the attention of the Municipal Council."
- 11.4.8 Regulation 5(3)(a) of the Disciplinary Regulations contemplates an investigation if there is reasonable cause to believe that an act of misconduct has been committed and the decision as to whether reasonable cause exists lies again, with the Municipal Council.
- 11.4.9 Following such an investigation, and after consideration of a report submitted by an independent investigator as contemplated in Regulation 5(4) the Municipal Council must by way of resolution institute disciplinary proceedings against the senior manager, and include in such resolution "a determination as to whether the alleged misconduct is of a serious or less serious nature." Accordingly, it is the Municipal Council that is vested with the power to determine, after an investigation has been conducted and a report submitted by an independent investigator whether the allegation of misconduct falls within the categories described in Part I or Part II of Annexure A to the Disciplinary Regulations. This further supports the contention that it is not necessary for a direct allegation to be



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formulated and crafted with exact referencing of Annexure A, Part I or II as it is for Council to determine what kind of misconduct (serious or less serious, and by implication the type of misconduct) has allegedly been committed.

11.4.10 From the above it is clear that the Municipal Council has the exclusive authority to discipline senior managers and to determine what kind of misconduct is alleged to have been committed (serious or less serious).

11.4.11 Regulation 1 of the Disciplinary Regulations defines "misconduct" as

"any of the misconduct set out in Annexure A of these Regulations, and also includes less serious misconduct and serious misconduct as set out in part I and II of Annexure A".

11.4.11.1 Annexure A to the Disciplinary Regulations lists acts of misconduct in Part I (less serious misconduct) and Part II (serious misconduct). With reference to "serious acts of misconduct", included in the list of serious misconduct includes that a senior manager will be guilty of misconduct if he or she *inter alia*:

"1. Fails to comply with or contravenes any Act, Regulation, or legal obligation relating to the employment relationship or contravenes the Code of Conduct for Municipal Staff Members contained in Schedule 2 of the Act."

11.4.12 A failure to comply with any "Act, regulation or legal obligation relating to the employment relationship" is wide and not prescriptive other than relating to or arising from the employment relationship.

11.4.13 In the circumstances, and despite the Executive Mayor's view that there was no "direct" allegation of "misconduct" in relation to the Foreshore Freeway Precinct or the payment for the chassis, the Disciplinary Regulations are wide enough to include a failure to comply with any "Act, regulation or legal obligation relating to the employment relationship" and the serious concerns raised in forensic report FSD049/14-15 in relation to the payment for the chassis and the dossier in relation to the Foreshore Freeway Precinct, may amount to an allegation of misconduct that must be referred to the Municipal Council.

11.4.14 Moreover, the power to determine whether an allegation of misconduct is serious or less serious misconduct, or whether there is no evidence to support the allegation of misconduct (and thus to dismiss the matter) lies with the Municipal Council only and not with the Executive Mayor or the City Manager to determine whether it does not amount to an allegation of misconduct. The purpose of the Disciplinary Regulations would not be achieved if a view were taken that an allegation must specify exactly what misconduct is alleged in Annexure A, Part I or II of the Disciplinary Regulations and for serious concerns



such as those raised in the Moore Stephens report and the forensic report not to be considered by Council. If such a view were taken, the objects of the Disciplinary Regulations in vesting Council with such powers would not be met.

11.5 **The duty to refer**

11.5.1 In order to determine whether the Executive Mayor "failed" to present a dossier to Council in respect of the Foreshore Freeway Precinct, and "precluded" Mr Ebrahim from referring the Forensic report relating to the payment for the chassis to Council, I must consider whether the Executive Mayor has a duty to refer allegations of misconduct to Council in respect of Senior Managers such as Ms Whitehead.

11.5.2 Regulation 5(2) provides that:

"(2) An allegation referred to in sub-regulation (1) must be tabled by the Mayor or the Municipal Manager, as the case may be, before the Municipal Council not later than 7 [seven] days after receipt thereof, falling which the Mayor may request the Speaker to convene a special council meeting within 7 [seven] days to consider the said report." (emphasis added)

11.5.3 The Disciplinary Regulations give some meaning to "as the case may be" in Regulation 5(7)(b) where it records the following:

(6) After having considered the report referred to in sub-regulation (4) the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.

"(7) the resolution in sub-regulation (6) must –

(a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature;

(b) authorise the mayor, in the case of municipal manager, or municipal manager in the case of the manager, directly accountable to the municipal manager to –

(i) appoint –

(aa) an independent and external presiding officer; and

(bb) an officer to lead evidence; and

(ii) sign the letters of appointment." (emphasis added)

11.5.4 In addition, in terms of section 56 of the Local Government: Municipal Systems Act 32 of 2000 (the "Systems Act") senior managers are appointed by the Municipal Council and are

directly accountable to the Municipal Manager. In terms of section 57 of the Systems Act, a performance agreement and employment contract is entered into between the Municipal Manager and the senior manager concerned. Accordingly, senior managers are reportable to the Municipal Manager, and it is therefore in this context that the duty to refer an allegation of misconduct in respect of a senior manager lies with the Municipal Manager.

- 11.5.5 In relation to the Foreshore Freeway Precinct report: The Executive Mayor's Response denies that the purpose of her letter dated 20 October 2017 in respect of the Foreshore Freeway Precinct was an attempt to influence Mr Ebrahim from enforcing an obligation placed on him in terms of regulation 5(1) and (2) of the Disciplinary Regulations and could not be construed, given the context, as an attempt to interfere in the management and administration of Council. The Executive Mayor records in her response, that the "City Manager was supposed to take this report directly to the Speaker himself, as he is obliged to do in accordance with the law." The Executive Mayor records that it was unnecessary for Mr Ebrahim to seek the Executive Mayor's consideration and approval in respect of the report given the clear terms of Regulation 5(2). The Executive Mayor also records that her letter of 20 October 2017 could not be construed as an "instruction" not to refer the Foreshore Freeway Precinct matter to Council.
- 11.5.6 In relation to the payment for the chassis: The Executive Mayor's Response confirms that a number of meetings took place on the dates as recorded above. During those meetings, the Executive Mayor's concerns regarding the recommendations contained in the forensic report were shared with Mr Ebrahim and a further meeting between the City Manager, the Mayco Member and Ms Whitehead was scheduled to discuss ways of improving capital spend. The Executive Mayor denies that she expressed a "firm view", but confirms that she did express the view that she did not believe the matter should be referred to Council. The Executive Mayor denies that her involvement in scheduling meetings was an attempt to influence Mr Ebrahim from enforcing an obligation placed on him in terms of Regulations 5(1) and (2) of the Disciplinary Regulations.
- 11.5.7 The Executive Mayor claims that she has no authority to refer the allegations against Ms Whitehead to Council, and she could not stop Mr Ebrahim from doing so, even though she had grave reservations about whether the allegations against Ms Whitehead revealed a *prima facie* case of misconduct. The Executive Mayor confirms that she expressed the view that Ms Whitehead should not be referred to Council because she genuinely believed that there was no allegation of misconduct, but did not "preclude" Mr Ebrahim from referring the matter to Council. The Executive Mayor's Response records the following:

"It is true that our client expressed the view that Whitehead should not be referred to Council because she genuinely believed there is no allegation of

misconduct. Our client did however not preclude Ebrahim from referring the matter to council. It must be borne in mind Ebrahim was by all accounts an experienced and formidable civil servant and certainly not someone who would shirk from fulfilling his responsibilities due to political pressure. It is in this context that our client expressed her views about the allegations against Whitehead, knowing and accepting that Ebrahim would do what was right in the circumstances (i.e that he would act in accordance with the prescripts of the relevant regulations / law)."

- 11.5.8 The Executive Mayor's duty to refer an allegation of misconduct to Council is only with regards to an allegation of misconduct committed by the Municipal Manager, or in the event that the City Manager has failed to refer an allegation of misconduct against a Senior Manager within 7 days the Mayor "may" then request the Speaker to convene a special council meeting to consider a report.
- 11.5.9 The City Manager "must" refer an allegation of misconduct to Council and his failure to do so within 7 days triggers the power of the Executive Mayor to request the Speaker to convene a special council meeting. The Executive Mayor did not request the Speaker to convene a special council meeting and did not refer the matter to Council. If the Executive Mayor did not consider there to be an allegation of misconduct to refer to Council (regardless of whether this view is correct), there was no direct obligation requiring her to refer the matter to Council herself when it relates to an allegation of misconduct against a senior manager. Whilst the power is vested in the Executive Mayor to request a special council meeting within 7 days of the City Manger's failure to do so, this is not peremptory.
- 11.5.10 As the concerns related to Ms Whitehead, a senior manager of the City directly accountable to the Municipal Manager, the duty to refer the matter to council rested with the Municipal Manager and not the Executive Mayor. The Executive Mayor is therefore correct, that it was not her obligation to refer the allegations of misconduct against Ms Whitehead to Council in respect of both the payment for chassis and the Foreshore Freeway Precinct. Whilst the Executive Mayor confirms that she expressed a view that Ms Whitehead should not be referred to Council, Mr Ebrahim had the power to refer Ms Whitehead to Council notwithstanding the Executive Mayor's views.
- 11.5.11 Due to the unwillingness of Mr Ebrahim to meet with me, I can only refer to the statements made by him in his interview on 14 December 2017, wherein he was of the view that the Executive Mayor tables all matters that go to Council. Mr Ebrahim states that if a report is not signed and tabled by the Executive Mayor it does not go to Council, and he further alleged that all reports tabled at Council are signed by the Executive Mayor – this is apparently the "process" followed by the City of Cape Town and is how it "operates". Mr

Ebrahim states that the Executive Mayor has the authority in terms of the way the City of Cape Town runs. Mr Ebrahim stated that he had no recourse because the "system" did not allow him any recourse, and claims that the "system" employed by the City of Cape Town is for the Executive Mayor to table reports, even if she does not speak to the report. Mr Ebrahim further alleges that if the Executive Mayor did not want to table a report, it did not get to Council. Mr Ebrahim explained that he previously tabled reports at Council but this stopped. He was required to report to the Executive Mayor for her to apply her mind and she would decide whether matters go forward to Council.

- 11.5.12 It is beyond the scope of my mandate to determine whether in practice, all reports tabled at Council are signed and/or approved by the Executive Mayor or whether there exists a "process" in practice which the City of Cape Town apparently follows whereby it is only the Executive Mayor who decides whether reports are tabled at Council. The investigation is limited to the facts available to me, and a consideration of the regulatory framework, including the Disciplinary Regulations as to when an obligation to table matters at Council arises in the context of allegations of misconduct against a senior manager. The Disciplinary Regulations require the Municipal Manager to refer allegations of misconduct against Senior Managers to Council. It is in this context that I make the findings in this report.
- 11.5.13 It is not clear why Mr Ebrahim, in the context of the Disciplinary Regulations, sought the approval and consideration of the Executive Mayor to submit the report in relation to the Foreshore Freeway Precinct to Council. The Executive Mayor's Response records that she did not need to correct Mr Ebrahim's view that it is not her responsibility to table matters to Council in relation to allegations of misconduct against Senior Managers, as Regulation 5(2) is "100% clear".
- 11.5.14 I am required to determine whether Mr Ebrahim was "precluded" from referring the forensic report to Council in respect of the payment for chassis. The Executive Mayor indeed expressed a view that the matter should not go to Council in respect of the payment for chassis. It appears from the statements made by Mr Ebrahim that he took this into account in his subsequent conduct in not referring the matter to Council.
- 11.5.15 In my assessment, the Executive Mayor attempted to persuade and influence Mr Ebrahim in reporting a matter to Council which he was in law, required to do. According to Mr Ebrahim the Executive Mayor informed him that "this is going nowhere" and in those circumstances, Mr Ebrahim did not want to undermine the Executive Mayor. Considering that the Executive Mayor was in a position of authority over the City Manager, he was placed in a dilemma – to either submit to the Executive Mayor's views (and thus fail to comply with his own obligations), or table the allegation of misconduct at the next Council meeting. There remained a number of options open to Mr Ebrahim including seeking external legal advice on the point, informing the Executive Mayor that he had the duty to

report notwithstanding the Executive Mayor's views or tabling the report at the next Council meeting. Mr Ebrahim chose not to do so, and in failing to do so, his conduct was apparently informed by the Executive Mayor's views.

11.5.16 However, nothing in law prevented Mr Ebrahim from referring the matter to Council himself. There is no evidence that the Executive Mayor legally obstructed Mr Ebrahim from referring the forensic report to Council. I therefore hold the view that Mr Ebrahim was not "precluded" from referring the matter to Council in respect of the payment for chassis.

11.5.17 In relation to whether the Executive Mayor "failed" to present a dossier to Council, while I am of the view that the dossier should have been presented to Council as it included very serious concerns regarding the conduct of a senior manager, that responsibility, regardless of the "practice" of the City of Cape Town lies with Mr Ebrahim as the Municipal Manager. Therefore, whilst the Executive Mayor in her formal response of 20 October 2017 did not agree that the matter be tabled at Council, it was not, in terms of the Disciplinary Regulations, her responsibility to table the Report. I therefore am not of the view that it was the Executive Mayor who "failed" to present the dossier in relation to the Foreshore Freeway Precinct to Council, but rather, it was Mr Ebrahim's failure to present the dossier to Council, notwithstanding the Executive Mayor's views.

12. CONCLUSION

12.1 The information relating to the Foreshore Freeway Precinct and the payment for the chassis wherein it is alleged that the Executive Mayor herself failed to present a dossier to Council, and allegedly "precluded" Mr Ebrahim from referring a matter to Council requires a consideration of the Disciplinary Regulations.

12.2 I do not share the Executive Mayor's view that there existed no "allegation of misconduct" and consequently that regulation 5(1) and (2) of the Disciplinary Regulations were not triggered in respect of both the Foreshore Freeway Precinct and the payment for the chassis. Allegations of misconduct as defined are wide, and the powers to determine what kind of allegation of misconduct (serious or less serious) as well as the power to dismiss such allegation on the basis that there is no evidence to support the allegation is a power vested in Council only. The information contained in the Dossier regarding the Foreshore Freeway Precinct and the forensic report relating to the payment for the chassis raised serious concerns which properly construed should be investigated further rather than dismissed before being presented to Council.

12.3 With regards to the duty to refer, the Disciplinary Regulations are clear, that the duty to refer an allegation of misconduct against a Senior Manager, rests with the City Manager and not the Executive Mayor. Whilst the Executive Mayor does have the power, in the event of a failure by



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the City Manager to refer an allegation of misconduct to Council, to request the Speaker to convene a special Council meeting within 7 days, this is not preemptory.

- 12.4 Whilst there appeared to have been a "practice" adopted by Mr Ebrahim to refer all matters to the Executive Mayor for her consideration and final approval before tabling, this is not what the Disciplinary Regulations contemplate. In addition, and whilst I accept that Mr Ebrahim's conduct in not referring the payment for the chassis to Council was indeed influenced or informed by the Executive Mayor's views (firm or otherwise), he was ultimately not "precluded" in law from referring the matter if he desired as he maintained the legal powers to refer the matter to Council at all times. In my assessment, at most, the Executive Mayor sought to influence and persuade Mr Ebrahim from referring an allegation of misconduct to Council, however, nothing in law prevented him from tabling the allegation at the next Council meeting.
- 12.5 Accordingly, I do not hold the view that the Executive Mayor "precluded" the City Manager from referring the allegations relating to the payment for the chassis to Council regardless of whether she expressed a firm view or not.
- 12.6 Similarly, whilst the Executive Mayor did not present the dossier to Council relating to the Foreshore Freeway Precinct, nothing prevented the City Manager from referring the matter to the Council himself notwithstanding the Executive Mayor's views and accordingly there is no "failure" on the Executive Mayor's part in not referring the matter to Council as it is Mr Ebrahim's legal obligation to refer the matter to Council.

Yours faithfully



Bowman Giffilan

per: Randall Van Voore