

**Executive Summary of Opinion furnished to the City of Cape Town in
relation to the Erasmus Commission**

1. On 27 November 2007, the Western Cape MEC for Local Government and Housing ("the MEC") notified the City that he had decided to institute an investigation in terms of s 106(1)(b) of the Local Government: Municipal Systems Act, 32 of 2000 ("the Systems Act") into work done for the City of Cape Town ("the City") by George Fivaz & Associates ("GFA"). A proclamation to that effect was published in the Provincial Gazette on 29 November 2007. The proclamation stated that, inasmuch as the MEC had designated Judge NC Erasmus, Mr G Papadakis and Ms H Vermeulen to conduct the investigation, the Western Cape Premier now appointed the same persons to a commission (colloquially referred to as the Erasmus Commission), in terms of s 1 of the Western Cape Commission Act.

2. The appointment of a commission of inquiry (which reports to the Premier) in order to carry out an investigation instituted by the MEC in terms of s 106(1)(b) of the Systems Act has been endorsed in an unreported case dealing with that section. Nevertheless, that procedure is peculiar and at odds both with the wording of s 106(1)(b) and (2) and the apparent legislative intent. In counsel's view, the aforementioned judgment is clearly wrong. If that is so, the Premier's decision to appoint a commission was made on a complete misapprehension of his powers.

3. It is not however necessary for that issue to be addressed in the High Court. It would in any event have been impermissible, in terms of the Constitution of the Republic of South Africa, 1996 and the Systems Act, for the Premier to establish his own independent commission of enquiry into the events to be investigated by the Erasmus Commission. Moreover, the MEC's decision to appoint an investigation can be successfully impugned on its own terms – as happened in *Democratic Alliance Western Cape and Others v Minister of Local Government Western Cape and Others* 2005 (3) SA 576 (C) – and, if the MEC's decision is set aside, the Premier's decision to appoint a commission of enquiry falls with it.
4. The MEC's appointment of a s 106(1)(b) investigation is impugnable in the first instance because, on an objective examination of all relevant facts (as the section requires), the MEC did not have "*reason to believe*" that "*maladministration, fraud, corruption or any other serious malpractice*" had occurred, or was occurring, in the City. The MEC's decision must be tested in this regard with reference to the four supposed concerns identified in the MEC's 27 November 2007 letter and attachments. As counsel has demonstrated, none of those concerns has any merit; nor was there any reason for the MEC to disbelieve the explanations provided by the City, or to doubt that the City Manager would furnish him with all relevant information in response to his queries of 26 October and 14 November 2007. There was also no basis for the MEC to establish an investigation into the issues outlined in the terms of reference in the proclamation which go

beyond the concerns articulated in the MEC's press statement appended to his 27 November 2007 letter.

5. Counsel's conclusions on the impugnability of the MEC's decision were summarized as follows:

"It is thus my opinion that the MEC could not reasonably have formed the view required by s106(1)(b) and that to the extent that he purported to establish a s106(1)(b) investigation he acted unlawfully. This conclusion rests on three related objections: the suspected conduct was not of the required severity; there was inadequate foundation for the suspicion so that it was not reasonable; and the invocation of s105(1)(b) could in any event not rationally have been thought "necessary".

Alternatively, at least certain aspects of the terms of reference are matters in respect whereof the MEC did not have reasonable grounds to establish the investigation.

The impeaching of the s106(1)(b) investigation on this basis is not dependent on whether or not the establishment of a s106(1)(b) investigation constitutes "administrative action" for purposes of PAJA. Although I consider PAJA to be applicable to such a decision, the decision would in any event be constrained by the principle of legality. The MEC cannot lawfully establish a s106(1)(b) investigation unless he has the reasonable belief required by the section."

6. Counsel has thus advised the City that, in his view, "*a challenge to the establishment of the Erasmus Commission – whether viewed purely as a commission of inquiry or as a commission established on the strength of s106(1)(b)– has favourable prospects of success*".
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