IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

Case no: 13789/2013

In the application of:

CHRISTIAAN MACPHERSON	FirstApplicant
FELICITY MAGXAKA	Second Applicant
BERNARDUS VAN WYK	Third Applicant
VERNATT IVAN VAN DER WESTHUIZEN	Fourth Applicant
DIANE DE JAGER	Fifth Applicant
JULIA LE ROUX	SixthApplicant
PIERRE NEL	Seventh Applicant
PETER LESLIE ROBERTS	Eighth Applicant
EWA FORTUIN	NinthApplicant
RYK RAYMOND WILDSCHUT	Tenth Applicant
DANIE JOHAN FOURIE	Eleventh Applicant
JURIE HARMSE	Twelfth Applicant
JOHN MAXIM	Thirteenth Applicant
DEMOCRATIC ALLIANCE	Fourteenth Applicant

and

JOHANNES NICOLAAS HENDRICK STOFFELS	First Respondent
THE SPEAKER OF OUDTSHOORN MUNICIPALITY	Second Respondent
THE MINICIPAL MANAGER OF OUDTSHOORN MUNICIPALITY	Third Respondent
THE WESTERN CAPE MECOF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Fourth Respondent

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JUDGMENT:TUESDAY12NOVEMBER 2013

Schippers J:

[1] This is the third of three applications brought under the above case number to compel the first respondent, a councillor and the Speaker of Oudtshoorn Municipality ("the Municipality"), to convene a meeting of the Council of the Municipality, to consider and put to a vote motions of no confidence in the Speaker, Executive Mayor and Deputy Executive Mayor of the Municipality. The applicant is theMinister for Local Government, Environmental Affairs and Development Planning of the Western Cape Province ("the MEC").

[2] The first, second and third respondents ("the respondents") oppose the application. Where appropriate I shall refer to the first respondent as, "the Speaker". The respondents have brought a counter-application in which they seek an order directing the MEC to investigate the facts and circumstances in relation to a deed of settlement entered into between the third and seventh applicants, referred to below.

Factual overview

[3] The basic facts are uncontroversial and may be simply summarised. The Council of the Municipality ("the Council") consists of 25 seats. In the local government elections in 2011 the African National Congress (ANC) secured 12 seats, the Democratic Alliance (DA) 11, the Congress of the People (COPE) one seat and the National People's Party (NPP) one. The ANC and the NPP which together held 13 seats formed a coalition ("the ANC-led coalition") and took control of the Municipality. The DA and COPE which held 12 seats("the DA-led coalition") formed the opposition.

[4] Subsequently five ANC councillors including the 12th applicant ("Harmse") resigned and the Independent Electoral Commission (IEC) declared their seats vacant. Two of the vacant seats were filled by way of proportional representation. A by-election to fill the remaining three ward vacancies was held on 7 August 2013. Harmse, now a member of the DA, won one seat in the ward by-election and the ANC, the remaining two. This resulted in the DA-led coalition comprising 13 councillors (12 DA and the 13th applicant who represents COPE) gaining the majority of the seats on the Council.

[5] On 13 August 2013 the DA-led coalition, in terms of rule 34 of the Rules of Order Regulating the Conduct of Meetings of the Council of the Municipality

of Oudtshoorn ("the Rules of Order"), gave notice to the first respondent, in his capacity as Speaker of the Municipality, of its intention to table motions of no confidence in the Speaker, Executive Mayor and Deputy Executive Mayor("the motions of no confidence") at a meeting of the Council on 22 August 2013. Thereafter, the notice states, the Councilshould immediately proceed with an election to fill those vacancies.

[6] By letter dated 21 August 2013, the Speaker informed the DA caucus leader that the Council meeting scheduled for 22 August 2013 would be held on 29 August 2013, as he had been informed by his attorney that the DA-led coalition was not ready for the meeting and had requested a postponement. On the same day he sent another letter to the DA caucus leader advising that he was not in a position to accede to the request for a Council meeting because the subject matter of that request was currently pending before a judicial body - this Court. He referred to an application under case number 8616/2013 which he had launched in this Court and which he said was still to be heard, in which the DA persisted with its allegation that it had removed the first respondent as Speaker, and the Executive Mayor and Deputy Executive Mayor from office on 31 May 2013.

[7] Seemingly on the basis that the application under case number 8616/2013 was pending before this Court, the Speaker invoked rule 30(2)(b) of the Rules of

Order which states that no discussion shall be permitted on any matter in respect of which a decision by a judicial body is pending, and declined to entertain the motions of no confidence. Furthermore, based on the DA's persistence in defending that application, the Speaker said, he was not in a position to accede to the request for a Council meeting for the stated reasons – to consider and vote on the motions of no confidence. He went on to say that he was of the view that allowing a discussion of the motions "would impugn the credibility and integrity of Council".

[8] On the same day i.e. 21 August 2013, the Speaker wrote to the first applicant ("Macpherson"), the third applicant ("Van Wyk"), the seventh applicant ("Nel")and Harmse, in which they were advised that they had been suspended with immediate effect. Macpherson was informed that based on information at his disposal, the Speaker was of the opinion that he had breached the Code of Conduct for Councillors ("the Code of Conduct"),contained in Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"), by being a party to or entering into a settlement agreement with Nel to waive legal fees amounting to millions of rands owed by Nel to the Municipality. Van Wyk was told that the Speaker had good reason to believe that he was attempting to or would interfere with the investigation involving Nel if he was not suspended. A similar letter was addressed to Nel. Harmse was informed that serious accusations of bribery and corruption against him had

been brought to the Speaker's attention; that these were being investigated; and that he had good reason to believe that Harmse was attempting to or would interfere with the investigationif he was not suspended.

[9] The applicants' attorneys replied in a letter dated 22 August 2013. They informed the Speaker that he was attempting to prevent the DA from taking control of the Council; that his reasons for refusing to convene the meeting on 22 August 2013 were contrived; and that hehas no power to suspend the said councillors as he purported to do. He was called upon to confirm by no later than 23 August 2013 that he would call the meeting requested by the DA councillors to consider the motions of no confidence, and to unconditionally withdraw the suspensions.

[10] When these undertakings were not given, the applicants launched an urgent application on 23 August 2013 for an order directing the Speaker to give effect to their written request of 13 August 2013, to convene a meeting of the Council by Thursday 29 August 2013 and no later than 5 September2013 to consider and vote on the motions of no confidence; and an order that the decisions suspending Macpherson, Van Wyk, Nel and Harmse be reviewed and set aside ("the first application"). The applicants also sought an order that in the event that the Council meeting was not convened or completed by 5 September 2013, the MECshould be directed to give effect to the applicants' written request

of 13 August 2013, to convene a meeting of the Council to discuss and vote on the motions of no confidence. The MEC is cited as the fourth respondent in the first application.

[11] In his answering affidavit in the first application, the first respondent states that the application was in substantial part moot, because the applicants had been informed in an e-mail sent on 23 August 2013 that the suspensions complained of had been revoked with immediate effect; and that the respondents in an e-mail sent on 27 August 2013, had made it clear that a meeting would be convened on 4 September 2013, and that the agenda would include the motions of no confidence as requested by the DA councillors.

[12] On 28 August 2013 thefirst application came before Rogers J. By agreement the following orders inter alia were made:

> "1. It is recorded that the first and second respondents:
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> 1.1 Have given effect to the Applicants' written request, dated 13 August 2013, to convene a Council meeting to consider motions of no confidence in the Speaker, Executive Mayor and Deputy Mayor and that such meeting has been convened for Wednesday 4 September 2013 at 11h00.

1.2 Have undertaken not to attempt to suspend First to Thirteenth Applicants as councillors of the Oudtshoorn Municipal Council until the meeting referred to in paragraph 1.1 above is completed.

2. In the event that the meeting is not convened or completed by Wednesday, 4 September 2013, Fourth Respondent is directed to give effect to the Applicants' written request, dated 13 August 2013, to convene a meeting of the Oudtshoorn Municipal Council to consider the motions of no confidence in the Speaker, Executive Mayor and Deputy Mayor, which meeting or meetings shall take place at a time and a place to be determined by Fourth Respondent."

[13] However, at the meeting of 4 September 2013 the Council did not consider or vote on the motions of no confidence. In a written notice the Speaker said that he had considered the motions and ruled that they conflict with rule 30(2) of the Rules of Order, which precludes discussion on any matter in respect of which a decision by a judicial body is pending, and that the motions of no confidence could not be discussed in Council until the outcome of the High Court hearing (the first respondent's application under case number 8616/2013) on 10 September 2013. He then closed the meeting.

[14] Consequently on 10 September 2013,the MECapproached this Court for a variation of the order issued by Rogers J inter alia as follows: declaring that the MECconvene a meeting of the Council on Thursday 19 September 2013 at a time and place as determined by him, to consider and put to a vote the motions of no confidence referred to in the applicants' notice of 13 August 2013; and

directing the third respondent to notify all members of the Council of the time and place of the meeting ("the second application").

[15] The respondents did not oppose the second application and did not file any answering papers. By letter dated 12 September 2013, their attorney informed the State Attorney that the Speaker and the third respondent proposed that an order be taken by agreement that the meeting of the Council be held on 20 September 2013.

[16] Consequently, on 13 September 2013 an order by agreement between the parties was made by Henney J, varying the order by Rogers J as follows. The fourth respondent was directed to convene a meeting of the Council on Friday 20 September 2013 to consider, discuss and put to a vote the motions of no confidence referred to in the applicant's written request for a meeting dated 13 August 2013.

[17] A meeting of the Council was held on 20 September 2013. All 25 councillors were present. The minutes record that the Speakermade a finding that Nel and Van Wyk had breached item 2 of the Code of Conduct;that herecommended that they be removed from the Council; and that he decided that their voting rights should be suspended and revoked, pending the final decision of the MEC. The ANC-led coalition insisted that the investigative report

prepared by the Office of the Speaker regarding the breach of the Code of Conduct by Nel and Van Wyk be put to a vote. A total of 12 votes were received and the report was accepted. No votes were received on a proposal that the Speaker's report be rejected. The minutes also record that it was resolved that the motion of no confidence be rejected.

[18] On 1 October 2013 the MEClaunched this, the third application. He seeks an order directing that the meeting of the Council be continued at a time and place to be determined by him; that an independent person be appointed by the Chairperson of the Cape Bar Council to chair that meeting but with no right to vote; and that the meeting shall deal exclusively with the motions of no confidence as determined in the order granted by Henney J on 13 September 2013. He also seeks an order:prohibiting the first and second respondents from taking any action of any nature to prevent the motions of no confidence from being considered, discussed and put to a vote; declaring that the Speaker's revocation of the voting rights of Nel and Van Wyk is *ultra vires* and unlawful; and directing the first respondent to pay the costs of the application in his personal capacity on a scale as between attorney and client.

[19] It is necessary to address four preliminary points which the respondents have raised. These arethat the application is not urgent; that the remaining councillors, the Municipality and the Council have not been joined; that the

application is barred in terms of the provisions of s 45(1) of the Intergovernmental Relations Framework Act 13 of 2005 ("the Framework Act"); and that the fourth respondent lacks the requisite *locus standi* to apply for the relief sought.

Urgency

[20] The application was served on the respondents' attorney during the afternoon of 1 October 2013 and their answering affidavits had to be delivered by 10h00 on Thursday 3 October 2013. The respondents contend that there is no attempt in the founding affidavit to found this level of urgency, having regard to the fact that the MEC took ten days for the preparation of his own case. They also contend that in the particular circumstances of this case, no considerations of urgency arise inferentially from the facts alleged or from the nature of the relief sought; and that there are strong indications that the matter has been brought by way of urgency for an ulterior purpose.

[21] These contentions are without substance. The first application was launched on 23 August 2013. This was done after the Speaker declined to give effect to the applicants' written request of 13 August 2013, that he convene a meeting of the Council on 22 August 2013 to consider the motions of no confidence; and pursuant to his suspension of Macpherson, Nel, Van Wyk and

Harmseon 21 August 2013.On the eve of the hearing of the first application on 28 August 2013, the respondents gave an undertaking to convene a meeting on 4 September 2013. On 28 August 2013 they did not oppose the application on the ground that it was not urgent, nor could they. Instead, they agreed to the order made by Rogers J.

[22] Likewise, in the second application to compel the Speakerto convene a meeting of the Council on Thursday 19 September 2013, the respondents never suggested that the application was not urgent. Yetagain they conceded to an order in terms of which the Speaker undertook to convene a meeting of the Council on Friday 20 September 2013 to consider and vote on the motions of no confidence. When that did not happen this application was launched on 1October 2013.

[23] In these circumstances, it does not lie in the mouths of the respondents now to say that the matter is not urgent.

Non-joinder

[24] The respondents contend that the Municipality and the Council have a direct and substantial interest in this application arising from the provisions of the Constitution, the Systems Act, the Local Government: Municipal Structures

Act 117 of 1997 ("the Structures Act") and the Rules of Order. They say that the relief sought in paragraph 2 of the notice of motion – an order that the Speaker be directed to convene a meeting to consider and vote on the motions of no confidence – affects every councillor in that it fundamentally impacts upon the manner in which the Council is constituted and the right of each councillor to introduce motions, and their accountability to the community.

[25] The Council is said to have a legal interest in the relief sought because the right to determine its internal procedures in terms of s 160 of the Constitution is affected by paragraph 2 of the order sought. So too, its right to govern on its own initiative the local government affairs of the local community and the duty to exercise the Municipality's executive and legislative authority, as contemplated in s 4 (1)(a)-(c) and 4(2)(a) of the Systems Act.[1]

[26] The MEC's answer to the non-joinder point is that no relief is sought in respect of, and will not in any way impact upon,any of the remaining councillors or the Council itself. The relief, if granted, would merely ensure that a duly

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[1] Section 4 of the Systems Act reads as follows:
"4. Rights and duties of municipal councils.–(1) The council of a municipality has the right to-
(a) govern on its own initiative the local government affairs of the local community;
(b) exercise the municipality'sexecutive and legislative authority, and to do so without improper interference;
and
(c) finance the affairs of the municipality by-
(i) charging fees for services; and
(ii) imposing surcharges on fees, rates on property and, to the extent authorised by national legislation, other taxes, levies and duties.
(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to-
(a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community."

constituted meeting of the Council, convened in terms of the variation order, is able to continue.

[27] It is settled law that a party who has a legal interest in the subject matter of litigation which may be prejudicially affected by the judgment of a court, must be joined in the proceedings.[2]

[28] It follows that the contention advanced on behalf of the MEC that no relief is sought against the remaining councillors or the Council, is irrelevant. The only question is whether those parties it is alleged should have been joined, have a legal interest in the relief sought.

[29] The relief sought in paragraph 2 of the notice of motion, in essence, is an order directing that a meeting of the Council be convened for the purpose of considering and voting on the motions of no confidence. That is the function of the Speaker, the first respondent.Section 36 of the Structures Act provides that each municipal council must have a chairperson, called the speaker, elected by the council from among the councillors.[3] The functions of a speaker are set out in s 37 of the Structures Act. These are to preside at meetings of the council; to perform the duties and exercise the powers delegated to the speaker in terms of

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2 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657; *United Watch and Diamond Co. (Pty) Ltd and Other v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415G.

3 Section 36(1) and (2) of the Structures Act.

s 59 of the Systems Act; to ensure that the council meets at least quarterly; to maintain order during meetings; to ensure compliance in the council and council committees with the Code of Conduct; and to ensure that council meetings are conducted in accordance with the rules and orders of the council.[4] It is thus not surprising that the Rules of Order, which apply to all meetings,[5] provide that a notice of intention by a member to introduce a motion shall be given in writing to the speaker.[6]

[30] Given these powers conferred on a speaker, I do not think that it can be said that a judgment on the issues in this application cannot be sustained or carried into effect without necessarily prejudicing the interests of the Municipality, the Council or the remaining councillors; or that the relief sought in paragraph 2 of the notice of motion impacts upon the Municipality's powers under s 160 of the Constitution or s 4(1) and (2) of the Systems Act.Moreover, in this regard this application is unique – the facts show that not one, but two orders of this Court were capable of being carried into effect without the joinder of the Municipality, the Council or the remaining councillors. And there is no reason to believe that this judgment will prejudicially affect their interests, this *afortiori*given the allegations in the answering affidavit that the relevant

4 Section 37(a) – (e) of the Structures Act.
5 Rule 2(1).
6 Rule 34.

meetings of the Council were indeed convened, and that there has been compliance with the orders of Rogers J and Henney J.

[31] The relief sought inparagraphs 3 and 4 of the notice of motion are directed at preventing the first and second respondents (the Speaker acting personally and in his official capacity) from doing anything to prevent the motions of no confidence from being considered and put to a vote; and declaring that the first respondent's revocation or suspension of the rights of Nel and Van Wyk to vote at the meeting of 20 September 2013 is*ultra vires* and consequently unlawful. I consider that the interest which the Municipality has in this part of the relief to be of such a nature and soindirect as not to render it a necessary party in this application, as envisaged in the test to which I have referred. The Council and the remaining councillors plainly have no legal interest in the relief sought in paragraphs 3 and 4 of the notice of motion.

[32] As to the relief sought in paragraph 2 of the notice of motion, the party which properly should have been joined in this application, is the Municipality. Section 2 of the Systems Act makes it clear that it is the Municipality – not its council – which is an organ of State within the local sphere of government having a separate legal personality and consisting of the political structures and administration of the municipality and the community thereof. In terms of

theSystems Act,a "political structure" in relation to a municipality includes "the council of the municipality".

[33] However, I consider that for practical purposes, the Municipality has received notice of these proceedings. The Municipal Manager, who in terms s 55(1) of the Systems Act is the head of administration of a municipality, has been joined as the third respondent. There is no reason to believe that the third respondent has not, or will not, take adequate steps to ensure that the Court's judgment will not prejudicially affect any interest the Municipality might have.[7]

[34] For these reasons I consider the non-joinder point unsound.

Is the Framework Act a bar to the application?

[35] The respondents contend that the second, third and fourth respondents are organs of state; that there is a duty on the MEC to avoid litigating with another organ of state; and that s 41(2) of the Framework Act, which requires an organ of state in good faith to make every reasonable effort to settle a dispute before declaring a formal intergovernmental dispute, is a bar to the present application.

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[7] *Amalgamated Engineering Union*n 1 at 659.

[36] The Act defines an intergovernmental dispute as follows:

> "**Intergovernmental dispute'** means a dispute between different governments or between organs of state from different governments concerning a matter-
> (a) arising from -
> (i) a statutory power or function assigned to any of the parties; or
> (ii) an agreement between the parties regarding the implementation of a statutory power or function; and
> (b) which is justiciable in a court of law,
> and includes any dispute between the parties regarding a related matter;"

[37] In my view, the dispute between the parties does not fall within the ambit of this definition. The relief sought in paragraphs 2 and 3 of the notice of motion does not involvea dispute concerning a matter arising from a statutory power or function assigned to any of the parties. No party in this case disputes the Speaker's power to convene a meeting of the Council or to accept a motion. The dispute concerns essentially the Speaker's failure to convene a meeting to vote on the motions of no confidence and to give effect to two court orders.

[38] The relief sought in paragraph 4 of the notice of motion may raise an intergovernmental dispute. Although s 41(3) of the Constitution obliges organs of state to make every reasonable effort to settle intergovernmental disputes in terms of the procedures provided for that purpose, ie in the Framework Act, s 41(4) is cast in discretionary terms. If a court is not satisfied that the requirements of s 41(3) have been met, it may refer the dispute back to the

organs of state or determine the dispute.[8] In my view, this is a case where the court can and should determine the lawfulness or otherwise of the Speaker's conduct in removing Nel and Van Wyk from the Council, and suspending and revoking their voting rights.

[39] I therefore hold that the Framework Act is not a bar to the determination of this application.

Locus standi

[40] The respondents contend that the MEC has no *locus standi* to bring this application, on the following grounds. First, contrary to his assertion, this application is not directed merely at varying the order issued by Henney J, as the relief sought in paragraphs 2, 3 and 4 of the notice of motion are based upon what happened at the meeting of the Council on 20 September 2013 and cannot be said to flow from the allegations contained in the first application. Secondly, the founding affidavit states that the MEC seeks to replace the first respondent as the Speaker of the Council for purposes of the "continued meeting" (of 20 September 2013), without any legal basis for this relief. Thirdly, the fourth respondent has no powers of oversight or control of the Council, nor any

[8] *City of Cape Town v Premier, Western Cape and Others* 2008 (6) SA 345 (C) para 16.

function to ensure that "the democratic governance process is allowed to take its course", as alleged.

[41] The issue of *locus standi* was superficially addressed in the respondents' heads of argument. It was not dealt with at all in the MEC's heads of argument. For this reason I issued a direction that the parties file written submissions by 23 October 2013 on the question whether the MEC has *locus standi* to seek the relief sought in paragraphs 2 – 6 of the notice of motion, having regard to the provisions of s 160(1) of the Constitution and ss 36-40 of the Structures Act.

[42] In the further written submissions on behalf of the MEC, it is contended that he has *locus standi* by virtue of his constitutionally mandated oversight, monitoring and supervisory powers in respect of local government, as provided for in ss 139, 155(6) and 155(7) of the Constitution. It is also contended that ss 155(6) and 155(7) empower the MEC, in terms of the principle of legality, to intervene in the manner sought in this application.

[43] The respondents'submissions may be summarised as follows. The MEC has no *locus standi*, having regard to the structure and allocation of powers between the national, provincial and local spheres of government in the Constitution and national legislation. The purported exercise of any power which does not fall within the competency of a sphere of government violates

the principle of legality and is consequently invalid. Section 139(1) of the Constitution does not grant the MEC any basis to launch this application; neither does he assert that the relief sought is claimed on the basis of s 139. The absence of any reference to powers of intervention by the provincial executive or the MEC in relation to the powers and functions of a speaker and the functioning of a municipal council itself, is significant and consonant with the autonomy of local government. It is clear from the provisions of s 160 of the Constitution and ss 36 – 40 of the Structures Act, that the MEC has no power to convene Council meetings. That function falls within the preserve of the Speaker in terms of s 29 and 37(c) of the Structures Act and rule 8(2) of the Rules of Order.

[44] A person who claims relief from a court in any case must, as a general rule, establish that he has a direct interest in the case in order to acquire the necessary *locus standi* to seek relief.[9]

[45] In the founding affidavit the MEC says that he seeks to vary the order granted by Henney J to make provision for the continuation of the meeting of the Council of 20 September 2013; and that he seeks the replacement of the first respondent as Speaker for the purposes of the continued meeting and certain ancillary relief, which is necessary to ensure that the variation order is given

[9] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B; *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) para 29.

effect to. He also says that in his capacity as the provincial Minister responsible for local government affairs, he has an inherent interest in the manner in which the Council is governed and managed; and that it is clear from the provisions of the Systems Act and the Structures Act as well as s 139 of the Constitution, that he has a statutory obligation to ensure that the Council is governed in accordance with the relevant legislative provisions and the rule of law.

[46] I do not think that the relief sought in paragraph 2 of the notice of motion can be construed as an order for the continuation of the meeting of the Council on 20 September 2013. That meeting, as a fact, was convened and came to an end. The MEC's main complaint, as set out in the founding affidavit, is that the Speaker, by his conduct, has made it clear that he will resort to any means to ensure that the motions of no confidence are not put to a vote by the Council. That is the purpose of this application, not the continuation of a meeting. The MEC must therefore show that he has *locus standi* to approach the court for such an order, which in my view must be founded on the Constitution or legislation – not an order of court. In this regard it should be noted that the orders by Rogers J and Henney J were granted by agreement and the question of the MEC's *locus standi* was neither argued nor decided.

[47] It has been held on highest authority that it is a fundamental principle of the rule of law that the exercise of public power is only legitimate where lawful.

To the extent that the rule of law expresses this principle of legality, it is generally understood to be a fundamental principle of constitutional law.[10]The Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.[11]

[48] The fundamental principle of the rule of law admits of no exception and applies to all state authority, including judicial authority.[12] Thus, if the MEC has no power to compel a speaker of a municipality to convene a meeting to consider a motion of no confidence, a court order cannot give him such power.

[49] It follows that the power of the MEC to compel the Speaker to convene a meeting for the purpose of considering and voting on the motions of no confidence must be sourced in law, be it the Constitution or a statute.

[50] Local government is autonomous and the provincial sphere of government and all organs of state within that sphere must respect the constitutional status, institutions, powers and functions of local government;[13] and exercise their

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10 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 56.

11 *Fedsure* n 10 para 58.

12 *S v Mabena* 2007 (1) SACR 482 (SCA) para 2; *Zumaand Others v National Director of Public Prosecutions* 2008 (1) SACR 298 (SCA) para 15.

13 Section 40 of the Constitution reads as follows:
"**40. Government of the Republic.**- (1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated.

powers and perform their functions in a way that does not encroach on the functional or institutional integrity of local government.[14]

[51] Subject to national and provincial legislation, a municipality has the right to govern the local government affairs of its community, and provincial government may not compromise or impede a municipality's right to exercise its powers or perform its functions.[15]

[52] Decisions concerning the exercise of all powers and the performance of all functions of a municipality vestexclusivelyin its municipal council. So too, the election of its chairperson.[16]

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(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides."

14 Section 41(1) of the Constitution provides inter alia as follows:
"**41. Principles of co-operative government and inter-governmental relations.**- (1) All spheres of government and all organs of state within each sphere must-
…
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) …
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere."

15 Section 151 of the Constitution is in these terms:
"**151. Status of municipalities.**- (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
(2) The executive and legislative authority of a municipality is vested in its Municipal Council.
(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

16 Section 160(1) of the Constitution provides inter alia as follows:
"**160. Internal procedures.**– (1) A Municipal Council –
(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
(b) must elect its chairperson."

[53] It will immediately be observed from the above constitutional provisions that the MEC has no "inherent interest in the manner in which the Council is governed and managed", to the contrary.

[54] But it is contended that the MEC has oversight, monitoring and supervisory powers in respect of local government, in terms of ss 139 and 155(6) and (7) of the Constitution.

[55] The relevant provisions of s 139 of the Constitution are in these terms:

> "**139. Provincial intervention in local government.**- (1) When a municipality cannot or does not fulfilan executive obligation in terms of the Constitution or legislation, the relevantprovincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –
> (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
> (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to –
> (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
> (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole;
> or
> (iii)maintain economic unity; or
> (c) …
> (2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b)-

(a) it must submit a written notice of the intervention to-
(i) the Cabinet member responsible for local government affairs; and
(ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began."

[56] In my view the MEC's reliance on s 139 of the Constitution is misplaced, for two reasons. First, s 139, on its plain wording, contemplates intervention in local government by a provincial executive, not an MECacting alone.Secondly, s 139 of the Constitution itself restricts provincial intervention to a case where a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. The Speaker's failure to put to a vote the motions of no confidence is not a failure or inability by the Municipality to fulfil an executive obligation.

[57] There is nothing in the founding affidavit to suggest that the alleged intervention by the MEC is at the instance of the Provincial Executive of the Western Cape Province, or that there has been compliance with s 139(2). The MEC simply says that it is clear from the provisions of s 139 of the Constitution that he has "a statutory obligation to ensure that the Council is governed in accordance with the relevant legislative provisions and … the rule of law".

[58] In terms of s 151(2) of the Constitution, both the executive and legislative authority of a municipality is vested in its municipal council. In this respect, the

local government system is a hybrid one.[17] The fact that both executive and legislative authority is vested in the municipal council is understandable, given the nature of the functions of local government, which concern delivery of services and facilities to local communities: power, water, waste management, parks and recreation and decisions concerning the development of the municipal area. Thus executive decisions ordinarily involve decisions having a direct effect on the lives of those living in the area.[18]

[59] Likewise, s 156(1) of the Constitution provides that a municipality has executive authority in respect of the local government matters in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution – largely comprising the rendering of services such as fire-fighting services, municipal health services, municipal transport, storm water management systems, bridges and amusement facilities, cleansing services, cemeteries and funeral parlours, municipal parks and recreation, traffic and parking, refuse removal and the like.It is thus not surprising that s 139(b)(i) authorises a provincial executive to assume responsibility for an executive obligation of a municipality to maintain essential national standards or meet minimum established standards for the rendering of a service.

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17 *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) paras 21.

18 *Masondo* n 17 para 60.

[60] The executive obligations of a municipality contemplated in s 139 of the Constitution thus concern the delivery of basic services and the improvement of the well-being of members of the community within its area in relation to the local government matters referred to in s 156(1) of the Constitution.[19]Section 139 of the Constitution does not feature at all in this application.

[61] The next question is whether the MEC has *locus standi* by virtue of the provisions s 155(6) and (7) of the Constitution, which read as follows:

> "(6) Each provincial government must establish municipalities in is province in a manner consistent with the legislation enacted in terms of subsection (2) and (3) and, by legislative or other measures, must –
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs
>
> (6A) …
>
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

[62] It is convenient to deal firstly with s 155(7) of the Constitution. It does not apply. It authorises a provincial government to see to the effective

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[19] *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* [2012] JOL 28311 (ECB) paras 59-61.

performance by a municipality of its functions in respect of the matters listed in Schedules 4 and 5 to the Constitution, ie local government matters. However, that is not the purpose of this application. It has nothing to do with the failure of the Municipality to carry out any of the local government matters referred to Part B of Schedule 4 or Part B of Schedule 5.

[63] The MEC's reliance on s 155(6) of the Constitution is likewise misplaced. That provision contemplates legislative or other measures – which must first be passed or put in place - to provide for the monitoring and support of local government and to promote the development of local government capacity, to enable municipalities to perform their functions and manage their own affairs. The relief in paragraph 2 of the notice of motion is not sought in terms of any legislative provision or a measure as contemplated in s 155(6), which, on its plain wording, does not authorise*ad hoc* monitoring of local government or promotion of local government capacity.

[64] This construction, in my opinion, is buttressed by the provisions of the Systems Act. That Act and the Structures Act were passed to give effect to the provisions of Chapter 7 of the Constitution.[20] The preamble to the Systems Act states that it was passed inter alia,"to establish a framework for support, monitoring and standard setting by other spheres of government in order to

[20] Masondo n 17 para 12.

progressively build local government into an efficient, frontline development agency, capable of integrating the activities of all spheres of government for overall social and economic upliftment of communities". Provincial monitoring of municipalities is specifically provided for in s 105 of the Systems Act. It provides inter alia that the MEC for local government in a province must establish mechanisms and procedures in terms of s 155(6) of the Constitution, to monitor municipalities in the province in managing their own affairs,exercising their powers and performing their functions; and to monitorlocal government capacity.[21]

[65] In terms of s 106(1) of the Systems Act,if an MEC has reason to believe that fraud, corruption or any other serious malpractice has occurred in municipality, he or she must by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information

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[21] Section 105 of the Systems Act reads as follows:

"**105. Provincial monitoring of municipalities.**- (1) The MEC for local government in a province must establish mechanisms processes and procedures in terms of section 155(6) of the Constitution to –

(a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
(b) monitor and development of local government capacity in the province; and
(c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.

(2) The MEC for local government in a province may by notice in the *Provincial Gazette* require municipalities of any category or type specified in the notice or of any other kind described in the notice, to submit to a specified provincial organ of state such information as may be required in the notice, either at regular intervals or within a period as may be specified.

(3) When exercising their powers in terms of subsection (1) MECs for local government-

(a) must rely as far as is possible on annual reports in terms of section 46 and information submitted by municipalities in terms of subsection (2); and
(b) may make reasonable requests to municipalities for additional information after taking into account–
  (i) the administrative burden on municipalities to furnish the information;
  (ii) the cost involved; and
  (iii) existing performance monitoring mechanisms, systems and processes in the municipality."

required in the notice; or designate a person to investigate the matter.[22] Within 14 days the MEC must submit a written statement to the National Council of Provinces (NCOP) motivating the action; and send a copy of the statement to the national Minister responsible for local government and the Minister of Finance.[23]

[66] In this case the MEC has not exercised the powers conferred on him in terms of s 106(1) of the Systems Act. Neither does he allege that he has done so.

[67] It follows that the MEC has no *locusstandi* under s 155(6) or (7) of the Constitution to launch this application.

[68] What remains, then, is whether the MEC has *locus standi*under the Structures Act or the Systems Act.

[69] In terms of the Structures Act, each municipal council must have a speaker, elected from among councillors at the first sitting of the council after its election.[24]The speaker decides when and where the council meets, but if a majority of councillors request the speaker in writing to convene a council

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22 Section 106(1)(a) and (b) of the Systems Act.
23 Section 106(3)(a) and (b) of the Systems Act.
24 Section 36(1) and (2) of the Structures Act.

meeting, the speaker must convene a meeting at a time set out in the request.[25] The speaker places items on the agenda and determines the priority of business at the meetings of the council.[26]

[70] The speaker's term of office ends when the next council is declared elected; or when he or she resigns as speaker or is removed from office or ceases to be a councillor.[27]A municipal council by resolution may remove its speaker from office. Prior notice of an intention to move such a motion must be given.[28] Thus the Speaker may be removed from office only by the Council.

[71] The constitutional and statutory provisions outlined above make two things clear. The first is that the MEC has no "inherent interest in the manner in which the Council is governed and managed"; neither does he have any "statutory obligation to ensure that the Council … is governed in accordance with the rule of law". To the extent that the court in *Imbabazane* held otherwise, I respectfully disagree.[29] The second is that the relief sought in paragraph 2.1 of the notice of motion, namely that an independent person appointed by the Cape Bar Council act as chairperson of the Council, cannot be granted. Mr Jamie,who

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25 Section 29(1) of the Structures Act. This however is subject to s18(2), in terms of which a municipal council must meet at least quarterly.

26 Rules 5(2) and (6) of the Rules of Order.

27 Sections38 and 39 of the Structures Act.

28 Section 40 of the Structures Act.

29 *Member of the Executive Council for Co-Operative Governance and Traditional Affairs v Imbabazane Municipality and Others* [2013] JOL 30050 (KZP) paras 23-35.

with MsAdhikari appeared for the MEC, conceded this and submitted that the third respondent should be directed to chair the proposed meeting.

[72] It is not clear why the applicants, all councillors of the Municipality who clearly have *locus standi,* did not launch this application. Instead, they filed an affidavit by their attorney, MsJonker, in which she says the applicants support this application brought by the MEC, which in essence involves the enforcement of the orders made by Rogers J and Henney J.MrVermeulen, who with Mr De Bruyn and MrSnijders, appeared for the respondents, rightly submitted that MsJonker's affidavit takes the lack of *locus standi* on the part of the MEC no further.

[73] For these reasons I have come to the conclusion that the MEC has no *locus standi* to claim the relief in paragraphs 2 and 3 of the notice of motion.

[74] However, the relief sought in paragraph 4 of the notice of motion - a declaratory order that the Speaker's revocation of the voting rights of Van Wyk and Nel is unlawful -stands on a different footing.

[75] The MEC has *locus standi* by virtue of item 14(2) of the Code of Conduct, which provides that a municipal council may request the MEC for

local government in the province to suspend a councillor for a period, or remove a councillor from office.[30]

[76] The Speaker, at the meeting of 20 September 2013, recommendedthat Nel and Van Wyk be removed from the Council,and decided that their rights to vote be suspended and revoked, pending the decision of the MEC.

[77] In my view, the MEC plainly has a legal interest in the relief sought in paragraph 4 of the notice of motion.

The declaratory order

[78] On 20 September 2013 the Speaker opened the council meeting. The minutes record that he invoked the powers under rule 6 of the Rules of Order, in terms of which a speaker may at any time and without notice introduce an urgent matter. He said that he had done certain investigations into alleged breaches of the Code of Conduct; that one of these investigations related to the alleged fraudulent settlement in the case of *Nel v Oudtshoorn Municipality*; and that he had requested the relevant councillors to respond to his report on the investigation but that they did not, save for a letter by their attorneys. He went on to say that as Speaker, he was required to ensure compliance with the Code

[30] Item 14(2)(c) and (e) of the Code of Conduct.

of Conduct in terms of s 37(e) of the Structures Act; that the Code prescribes that the removal of a councillor is justified in specified circumstances,which is the only possible sanction particularly where the breach is of a gross nature.

[79] Then the Speaker said:

> "Ek het al dieinligting in hierdiesaakoorweeg, en ek het my oordeeluitgeoefendaaroor, en ek het bevinddatbeideraadsheerPierre Nel and raadslidBen van Wyk die munisipaliteitvalslik en ten onregteverteenwoordig het en item 2 van die gedragskodeverbreek het.
>
> Dienooreenkomstig, en met die erns van die beskuldigings as basis, beveelekaandatbeideraadsheerPierre Nel en raadslidBen Van Wyk uit die raadverwyder word. Hierdieaanbevelingsal, in terme van item 13(3) van die gedragskode, onmiddellikaan die Provinsiale Minister van PlaaslikeRegeringversend word.
>
> Boonopmaakeknou 'n beslissingdat die stemreg van beideraadsheerPierreNel en raadslid Ben van Wyk opgeskort word en herroep word, hangende die finale besluit van die Provinsiale Minister van PlaaslikeRegering in hierdieaangeleentheid."

[80] Items 13 and 14 of the Code of Conduct set out the procedure which must be followed when a councillor breaches the Code. Item 13 provides that if the chairperson of a municipal council on reasonable suspicion is of the opinion that a councillor has breached the Code, he or she must authorise an investigation, give the councillor a reasonable opportunity to reply in writing regarding the

alleged breach and thereafter report the matter to a meeting of the council.[31]The chairperson must report the outcome of the investigation to the MEC.[32]

[81] Item 14 of the Code of Conduct reads inter alia as follows:

> **"14. Breaches of Code.-** (1) A municipal council may –
>
> (a) Investigate and make a finding on any alleged breach of a provision of this Code; or
>
> (b) Establish a special committee-
>
> (i) to investigate and make a finding on any alleged breach of this Code; and
>
> (ii) to make appropriate recommendations to the council.
>
> (2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-
>
> (a) issue a formal warning to the councillor;
>
> (b) reprimand the councillor;
>
> (c) request the MEC for local government in the province to suspend the councillor for a period;
>
> (d) fine the councillor; and
>
> (e) request the MEC to remove the councillor from office.
>
> (3) (a) Any councillor who has been warned, reprimanded or fined in terms of paragraph (a), (b) or (d) of subitem (2) may within 14 days of having been notified of the decision of council appeal to the MEC for local government in writing setting out the reasons on which the appeal is based.
>
> (b) A copy of the appeal must be provided to the council.
>
> (c) The council may within 14 days of receipt of the appeal referred to in paragraph (b) make any representation pertaining to the appeal to the MEC for local government in writing.

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31 Item 13(1)(a) – (c) of the Code of Conduct.

32 Item 13(3) of the Code of Conduct.

(d) The MEC for local government may, after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.

[82] The provisions of items 13 and 14 of the Code of Conduct make it clear that the Speaker has no power to make any determination that Nel or Van Wyk breached the Code of Conduct. Only the Council or a special committee established by it can make such a finding.[33]He has no power to recommend the removal of a councillor. If a councillor breaches the Code of Conduct, only the Council may request the MEC to suspend the councillor for a period, or remove the councillor from office.[34]The power to suspend or remove a councillor from office is solely that of the MEC.[35]The Speaker has no power to decide that the voting right of anycouncillor should be suspended or revoked - there is no legislative provision which authorises him to do this.

[83] As stated above, the principle of legality implies that a body exercising public power must act within the powers lawfully conferred on it. In *Pharmaceutical* it was held that the principle requires that the exercise of public power by a functionary should not be arbitrary: a decision must be rationally

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33 Item 14(2) of the Code of Conduct.
34 Item 14(2)(c) and (e) of the Code of Conduct.
35 *Ibid*.

related to the purpose for which the power was given, otherwise it is in effect arbitrary and inconsistent with this requirement.[36]

[84] Thus, in making a finding that Nel and Van Wyk had breached the Code of Conduct; recommending that they be removed from the Council; and deciding to suspend and revoke their voting rights pending the decision of the MEC, the Speaker violated the principle of legality. His actions are *ultra vires* and unlawful, and fall to be set aside.

[85] The respondents however submit that the sanctions provided for in item 14 are not an exhaustive list of the remedies at the disposal of the Speaker; and the fact that the Speaker's suspension of the voting rights of Neland Van Wyk does not fall within the purview of item 14, is not determinative of the lawfulness of the suspension. Then it is submitted that there is nothing remarkable about the suspension of their voting rights, as they in any event could not have participated in the voting and the motion was carried.

[86] These submissions have no substance. The Systems Act, which contains the Code of Conduct, is a special law enacted inter alia to "provide for the core principles, mechanisms and processes … necessary to enable municipalities to move progressively towards the social and economic upliftment of local

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[36] *Pharmaceutical Manufacturers Association of S A: in re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85.

communities". Its preamble states that local government requires an efficient, effective and transparent local public administration which conforms to constitutional principles.

[87] The suspension and removal of a councillor for a breach of the Code of Conduct is governed exclusively by the Code. The Speaker does not have "a reservoir of common law powers" in relation to the suspension of councillors. The preamble to the Code itself has accountability by councillors as an object - they are elected to represent local communities on municipal councilsand to ensure that a municipality has structured mechanisms of accountability to local communities. In fulfilling their role in providing services equitably, effectively and sustainably, councillors must be accountable and report back to constituencies. The Code states that it was drafted in order to ensure that councillors fulfil their obligations to their communities and support the achievement by the municipality of its objectives set out in s 19 of the Structures Act. The latter provision, in turn, states that a municipal council must strive within its capacity to achieve the objectsof local government set out in s 152 of the Constitution. Those objects include the provision of democratic and accountable government for local communities.

[88] As already found, the Speaker's conduct was a violation of the principle of legality, was *ultra vires* and unlawful. The motion in terms of which this conduct purportedly was sanctioned by the Council, is likewise unlawful.

[89] The MEC is accordingly entitled to the declaratory order sought.

The counter-application

[90] The respondents seek an order, firstly, directing the MEC to designate a person to investigate the facts and circumstances in connection with the execution of a deed of settlement, in terms of which, it is alleged, Van Wyk purported to abandon a costs order in favour of the Council in the matter of *Nel v Oudtshoorn Municipality*.[37] Secondly, upon completion of the investigation and in the event of it being found that there was criminal conduct involved in the execution of the deed of settlement, the MEC should be ordered to act in terms of the provisions of s 106(1)(b) of the Systems Act; and report the matter to the South African Police Service for criminal prosecution. Thirdly, the MEC should be ordered to submit any further issues arising in this application to a dispute resolution mechanism to be determined by the Premier of the Western Cape.

[37] SCA case number 247/2012; WCC case number 18083/2010.

[91] It appears from the respondents' papers that on 25 June 2013, Nel and Van Wyk entered into the deed of settlement in the following circumstances.In 2010 Nel launched an application in this Court challenging the Council's appointment of a municipal manager. That application was dismissed with costs on an attorney and client scale. An application for leave to appeal against that order was also dismissed with costs on the same scale. Nel's appeal to the Supreme Court of Appeal was dismissed with costs. The respondents estimate that the various cost orders against Nel amount to some R700 000. The deed of settlement however records that each party ieNel and the Municipality would bear his or its own costs in relation to the matter from its inception; and that Van Wyk is duly authorised by a resolution of the Municipality. In effect then, all the costs orders against Nelin favour of the Municipality were abandoned.

[92] Nel, Van Wyk andthe MEC have not answered these allegations. In the replying affidavit the MECsays that the allegations are irrelevant and that the respondents' complaint that he has not acted against Nel and Van Wyk is premature. I should however point out that the Premier in an e-mail sent on 5 July 2013 to the respondents' attorneys, said that there was no resolution by any competent authority in either the Municipality or the DA for anyone representing either party to conclude a deed of settlement in the case of *Nel v Oudtshoorn Municipality*. She went on to say that the so-called deed of

settlement is of no force and effect, and is not justified nor condoned by the DA which would not allow a private legal bill to be passed on to ratepayers.

[93] The notice of counter-application states that the provision in terms of which the MEC should be directed to investigate the facts and circumstances in connection with the execution of the deed of settlement, is s 106(4)(b) of the Systems Act. However, that provision does not authorise this Court to make an order in the terms sought in the counter-application. In terms of s 106(4)(a) of the Systems Act the national Minister may request the MEC to investigate maladministration or fraud which in the Minister's opinion has occurred in a municipality. Section 104(6)(b) goes on to provide that the MEC must table a report detailing the outcome of such an investigation in the relevant provincial legislature within 90 days from the date on which the Minister requested the investigation.[38]

[94] An opinion by the Minister that there is maladministration or fraud or any other serious malpractice in a municipality, is thus a jurisdictional requirement

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[38] Section 106(4) of the Systems Act reads as follows:

(4) (a) The Minister may request the MEC to investigate maladministration, fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred or is occurring in a municipality in the province.

(b) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which the Minister requested the investigation and must simultaneously send a copy of such report to the Minister, the Minister of Finance and the National Council of Provinces.

for both the exercise of the power under s 106(4)(a) of the Systems Act and the report which the MEC is required to table under s 104(4)(b).[39]

[95] However, in argumentMrVermeulen submitted that s 106(1)(b) and item 14 of the Code of Conduct of the Systems Act authorises this Court to make an order in the terms sought in the counter-application.

[96] The argument is unsustainable. The jurisdictional requirement for the exercise of the power under s 106(1) is that the MEC must have reason to believe that fraud, corruption or any other serious malpractice has occurred in a municipality. This Court cannot direct him to form the requisite belief. Apart from this, the facts show that the relief sought in paragraphs 1 and 2 of the notice of counter-application is wholly inappropriate. The respondents contend that Neland Van Wyk breached the Code of Conduct. If they wish to have these Councillors suspended or removed from the Council, the procedure prescribed in items 13 and 14 of the Code of Conduct must be followed. In my view, this Court cannot cut across those provisions by ordering the MEC to investigate misconduct. As already stated, the lawgiver has determined that misconduct by councillors, who are accountable to their local communities, must be dealt with in terms of the Code of Conduct.

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[39] *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) at 34H-35B.

[97] It follows that the respondents' reliance on item 14 of the Code of Conduct for some sort of mandamus to compel the MEC to investigate the circumstances under which the deed of settlement was concluded, is misguided.

[98] The respondents have also not established any factual or legal basis for the order sought in paragraph 3 of the counter-application – that the MEC be ordered to submit vague "further issues arising in the application" to a dispute resolution procedure determined by the Premier. Having regard to the order made below, there are no further issues which arisein this application.

[99] The counter-application thus falls to be dismissed.

Costs

[100] The costs of the first application before Rogers J stood over for later determination. In that application the applicants seek an order directing the first respondent to pay the costs of the application in his personal capacity on a scale as between attorney and client, alternatively that his attorney, Mr Hardy Mills, pay the costs of the application *de bonispropriis*.

[101] The costs of the second application before Henney J also stood over for later determination and it was agreed between the parties that if the motions of

no confidence were put to a vote at the meeting of 20 September 2013, the MEC would not pursue the issue of costs.

[102] In this, the third application, the MEC asks for an order directing the first respondent to pay the costs in his personal capacity on a scale as between attorney and client, alternatively that his attorneys of record be directed to pay the costs *de bonispropriis*. In argument Mr Jamie indicated that the MEC does not persist with any claim for costs against the respondents' attorneys.

[103] Theparties were requested to file written submissions by Wednesday 23 October 2013 as to which party should be liable for the costs of the first and second applications and on what scale, which they did.

[104] The applicants submit that the first respondent should pay the costs of the first and second applications in his personal capacity, for the following reasons. He conceded the relief sought in the first application when confronted with his unlawful actions in refusing to call a meeting of the Council and unlawfully attempting to suspend certain councillors. He also agreed to the relief sought in the second application, after he had convened and then unlawfully adjourned the Council meeting of 4 September 2013. He then agreed to convene the meeting of 20 September 2013 but the motions of no confidence were not put to a vote as a direct result of the first respondent's *mala fide* actions. He agreed to both

orders of this Court made on 28 August 2013 and 13 September 2013, but deliberately undermined those orders by utilising various unlawful means to prevent the motions of no confidence from being put to a vote. His actions are fundamentally at odds with his statutory and constitutional duties as Speaker, and were aimed solely at retaining his position as a councillor.

[105] The respondents contend that throughout, the Speaker was about the affairs of the council and not on a frolic of his own. The fact that his own position was under threat is not conclusive, for the following reasons inter alia. The chain of events which culminated in the meeting of 20 September 2013 was set in motion at the Council meeting of 31 May 2013. The decisions taken by the applicants at the meeting of 31 May 2013 have been declared unlawful and set aside by Le Grange J. The Speaker's pursuit of the investigation of the deed of settlement cannot be faulted, since the results of that investigation redounded to the benefit of the Municipality. The fact that the Speaker at the relevant times acted pursuant to legal advice, has not been seriously challenged. The Speaker's conduct falls within the indemnity provided by s 28 of the Structures Act or s 2 and 3 of the Western Cape Privileges and Immunities of Councillors Act 7 of 2011.

[106] In *Coetzeestroom*[40] Innes CJ laid down the general rule in regard to costs against public officials or statutory functionaries, as follows:

> "With respect to the question of costs, the Court should lay down a general rule in regard to all applications against the Registrar arising on matters of practice. To mulct that official in costs where his action or his attitude, though mistaken, was *bona fide* would in my opinion be inequitable. … This general rule we shall follow for the future; but the Court will reserve to itself the right to order costs against the Registrar if his action has been*mala fide* or grossly irregular. … The rule will not apply to cases in which the Registrar may be sued for damages caused to a third party by a negligent or improper discharge of his duties. In such cases the question of costs will have to be decided simply on the facts before the Court."[41]

[107] The Appellate Division has not decided whether a court should, as a general guide to the manner of exercising its discretion, follow the rule laid down in *Coetzeestroom*.[42] It has held that the rule should not be elevated into a rigid one of universal application which fetters the judicial discretion in relation to costs.[43]In *Swartbooi*[44] the Constitutional Court stated that under the common law, generally speaking, an order for costs *de bonispropriis* against persons acting in a representative capacity is appropriate if their actions are motivated by malice or amount to improper conduct.[45]

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40 *CoetzeestroomEstate and GM Co. v Registrar of Deeds* 1902 TS 216.
41 *Coetzeestroom*n 40 at 223-224.
42 *Potter and Another v Rand Townships Registrar* 1945 AD 277 at 292.
43 *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670F-G.
44 *Swartbooi and Others v Brink and Others* 2006 (1) SA 203 (CC).
45 *Swartbooi* n 44para 7.

[108] I turn now to consider the question whether the Speaker's actions were *mala fide* or improper.

[109] The Speaker himself concedes that the notice of 13 August 2013 containing the motions of no confidence complies with rule 34(2) of the Rules of Order and thus was proper. This is underscored by the fact that he agreed to convene the meetings of 4 and 20 September 2013. At the material times the Speaker therefore knew that the motions had to be considered and put to a vote at a meeting of the Council. Moreover, it is not disputed that there was a by-election on 7 August 2013, which entitles the DA-led coalition to the majority of the seats on the Council.

[110] The Speaker however employed a few stratagems to prevent the motions of no confidence from being considered and put to a vote.

> (1) On 21 August 2013 the Speaker, acting unilaterally, suspended Macpherson, Nel, Van Wyk and Harmse with immediate effect. Save for Harmse, they were suspended because, in the words of the Speaker, they "made themselves guilty of alleged fraud by allowing [a] fraudulent settlement agreement to be entered into … in breach of items 2 and 6(2) of the Code of Conduct". By letter dated 22 August 2013, the applicants' attorneys informed the Speaker that he has no power to suspend

councillors; that only the Council is empowered to impose certain sanctions; and that only the MEC can suspend or remove a councillor. The applicants were forced to approach this Court. On 23 August 2013 the Speaker revoked the suspensions.

(2) On 27 August 2013, the Speaker agreed to convene a meeting of the Council on 4 September 2013. In his answering affidavit in the first application, the Speaker said that the motions of no confidence were the only items on the agenda for that meeting. However, the Council did not vote on the motions on 4 September 2013, because he made a ruling that they are in conflict with rule 30(2) of the Rules of Order and could not be discussed until the outcome of his application brought in this Court under case number 8616/2013. Aside from the fact that the rule 30(2) pointhas no merit, it is contrived. The Speaker had already in his letter of 21 August 2013 referred to rule 30(2) as a reason for not convening a meeting of the Council on 22 August 2013, and implicitly abandoned the point when he agreed to convene the meeting of 4 September 2013 to vote on the motions. At the relevant times the Speaker knew or must have known that he was again going to invoke rule 30(2) in order to prevent the motions of no confidence from being put to a vote on 4 September 2013. Had he told the applicants that he would resort to the very same

strategem, there is no doubt that they would never have agreed to the order made by Rogers J. Indeed, MrVermeulen fairly conceded this.

(3) The Speaker agreed to the order by Henney J. However, at the meeting of the council on 20 September 2013 hemade a finding that Nel and Van Wyk had breached the Code of Conduct.He did this for the same reason that he had initially suspended them on 21 August 2013– their involvement in the deed of settlement -which suspensions he had revoked. But he went further. He recommended that they be removed from the Council and suspended and revoked their voting rights. Again, if he had told the applicants or the MEC that he would resort to this strategem, they would not have agreed to the order made by Henney J.

(4) At the relevant times the Speaker was aware of the provisions of the Code of Conduct. That much is clear from what he said in correspondence and at the meeting of 20 September 2013. He could thus not have been mistaken about the ambit of his powers under the Code. In this regard the submission that the Speaker acted pursuant to legal advice, does not bear scrutiny. The opinion from counsel attached to his answering affidavit is dated 19 August 2013. He suspended the four councillors on 21 August 2013, but then revoked those suspensions on 23 August 2013. He has not explained this.

[111] In my view the most plausible and probable inference to be drawn from the above facts,[46] is that the Speaker's conduct was *mala fide*. He resorted to the strategems in order to prevent the motions of no confidence from being put to a vote, thereby securing his own position. The facts also show that the Speaker acted improperly, for which no inference is necessary.Mr Jamie correctly submits that the Speaker's conduct was fundamentally at odds with his constitutional and statutory duties. Either way, I consider it appropriate that he should pay the costs of the first and second applications *de bonispropriis*.

[112] MrVermeulen conceded that if the Speaker acted *mala fide*, an order for costs *de bonispropriis* would be appropriate. However, in his further submissions, it is stated that this concession did not take account of the provisions of s 28 of the Structures Act read with s 161 of the Constitution, or of ss 2 and 3 of the Western Cape Privileges and Immunities of Councillors Act.

[113] Section 28 of the Structures Act provides inter alia that provincial legislation in terms of s 161 of the Constitution, must provide at least that councillors have freedom of speech in a municipal council and its committees; and that councillors are not liable in civil proceedings for anything they have said in, produced before or submitted to, the council or any of its

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[46] *AA OnderlingeAssuransie-AssosiasieBpk v De Beer* 1982 (2) SA 603 (A) at 614G-615A; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) para 7, per Zulman JA.

committees.[47]Sections 2 and 3 of the Western Cape Privileges and Immunities of Councillors Act are to similar effect. I do not think that the provision of s 28 of the Structures Act or the provincial Act apply in this case for the reasons that the Speaker acted *mala fide* and exercised his powers improperly.

[114] The respondents also submit that if the Court finds that the MEC lacks *locus standi*, neither the first nor the second orders should have been granted and the MEC should pay the costs of those applications. The submission is unsound. The first application was brought by the applicants who plainly have *locus standi*. Both orders were made by agreement, after the Speaker undertook to convene the relevant meetings and put the motions of no confidence to a vote.

[115] As regards the costs of this application, it cannot be said that the MEC has been substantially successful. He has only succeeded in relation to the relief sought in paragraph 4 of the notice of motion. But equally, the respondents have not been substantially successful. Although they have succeeded as regards the relief sought in paragraphs 2 and 3 of the notice of motion, they have been unsuccessful in the counter-application.

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47 "28(1) Provincial legislation in terms of s 161 of the Constitution must provide at least-
(a) that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as envisaged in s 160(6) of the Constitution; and
(b) that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-
(i) anything that they have said in, produced before or submitted to the council or any of its committees; or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.
(2) Until provincial legislation contemplated in ss (1) has been enacted the privileges referred to in paras (*a*) and (*b*) of ss (1) will apply to all municipal councils in the province concerned."

[116] For these reasons, and given that the issues in this application and the counter-application are not separate and distinct but too closely connected for the Court to apportion costs between the different issues, I consider that the appropriate order in this application is one directing each party to pay his own costs.[48]

[117] I make the following order:

1. This application is dealt with as one of urgency in terms of rule 6(12) of the Rules of Court.

2. The relief sought in paragraphs 2 and 3 of the notice of motion dated 30 September 2013 is refused.

3. It is declared that the second respondent'sactions at the meeting of the Council of Oudtshoorn Municipality on 20 September 2013: (a)in finding that the third and seventh applicants had breached the Code of Conduct for Councillors; and (b) in deciding that their rights to vote be suspended and revoked, are*ultra vires* and unlawful.

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[48] See Erasmus *et al* Superior Court Practice (suppvol) p E12-8 and the authorities collected at footnote 7.

4. The counter-application is dismissed.

5. Each party shall be liable for his own costs incurred in the third application launched on 1 October 2013, and the counter application brought on 7 October 2013.

6. The second respondent will pay the costs of the application launched on 23 August 2013*de bonispropriis*.

7. The second respondent will also pay the costs of the application launched on 10 September 2013*de bonispropriis*.

SCHIPPERS J

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Date(s) of hearing	:	Wednesday, 9 OCTOBER 2013
Judgment delivered	:	Tuesday, 12 NOVEMBER 2013