IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

CASE NO: 829/2011

In the matter between:

AVUSA PUBLISHING EASTERN CAPE (PTY) LTD	**Applicant**

and

M QOBOSHIYANE *NO*	**First Respondent**
STANLEY KHANYILE *NO*	**Second Respondent**
DEPARTMENT OF LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE	**Third Respondent**
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	**Fourth Respondent**
JOHN GRAHAM RICHARDS	**Fifth Respondent**

JUDGMENT

DUKADA AJ:

A. Introduction:

[1] This is an application to obtain access in terms of the **Promotion of**

Access to Information Act No. 2 of 2000 *(hereinafter called PAIA),* to the full forensic investigation report prepared by Kabuso CC *(hereinafter referred to as the Kabuso report)* held by first, second and third respondents.

B. *Factual Background*:

[2] During 2009 the predecessor of the first respondent received a letter from the then Mayor of the fourth respondent in which concerns were raised about certain acts of maladministration occurring in the fourth respondent. Pursuant to the said letter, during August 2009 the predecessor of the first respondent, acting in terms of **Section 106 of the Local Government: Municipal Systems Act No. 32 of 2000** *(hereinafter referred to as the System Act)*, appointed **Kabuso CC**, an independent firm of forensic investigators to investigate, report and make recommendations in respect of certain instances of maladministration in the fourth respondent.

[3] **Kabuso CC** conducted the said investigation, prepared and delivered a report to the predecessor of first respondent in February 2010.

[4] The first respondent assumed his present position as the Member of the Executive Council in the Department of Local Government and Traditional Affairs, Eastern Cape in December 2010. An undated letter was written by the first respondent to the National Council of Provinces with the heading

"PROGRESS REPORT ON FORENSIC INVESTIGATION AT NELSON MANDELA METRO MUNICIPALITY" and *"PROCESS PLAN ON TABLING THE NMBM KABUSO REPORT."* Another undated letter with similar contents was written by the first respondent to the Minister of the Department of Co-operative Governance, Pretoria, but in addition it contains a road map of activities done and to be done, by whom, and time frames. The last activity recorded is to *"write to Municipality requesting clarity and additional information on matters and, the present status of matters"* and the estimated completion date was 10 February 2011.

[5] First respondent wrote a letter dated 28 March 2011 to fourth respondent, annexed to his papers as Annexure **"MQ3"** reading as follows:

> "Dear Honourable Mayor Wayile
>
> FORENSIC INVESTIGATION- VARIOUS MATTERS
>
> The abovementioned refers:
>
> As you are aware in terms of section 106(1)(b) of the Local Government: Municipal Systems Act, 2000(Act No.32 of 2000) KABUSO, an independent firm were commissioned by the Department to conduct a forensic investigation regarding the various matters that were raised by Council pertaining to allegations of maladministration and other acts of serious malpractice.
>
> In this regard, I hereby wish to table a condensed report of the material findings incorporating legal opinion. The said report reveals a number of areas of concern of which, the following are transversal:
>
> - Lack of leadership and accountability at both the administrative and

political levels;

- Lack of Contracts Management;
- Circumvention and non-compliance with the municipal Supply Chain Management Processes;
- Ineffective Legal Division;
- Inability of the Municipality to properly manage the Tourism/ Development projects;
- Ineffective administration of Disciplinary actions;
- The incurrence of Fruitless and Wasteful expenditure.

I trust that the municipality would consider the findings of the report, and where appropriate institute disciplinary, civil and/or criminal proceeding. Kindly refer to my specific requests set out in the "Way Forward" sections contained under each finding and request that the municipality submit a written response together with applicable supporting documentation with 30 calendar days from the date of this letter.

Kindly refer to the condensed report attached hereto marked Annexure A and the schedule of Abbreviations marked B respectively.
I trust the above is in order.
Yours in Service delivery

_____

M. Qoboshiyane
MEC FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS"

The said letter required fourth respondent to respond within 30 days and a reply dated 29 April 2011 requested an additional period of 30 days. First respondent responded by his letter dated 9 May 2011 and granted fourth respondent more time to respond, i.e, to deliver her response not later than close of business on Friday 20 May 2011.

C. *Request For Access*:

[6] The applicant lodged a request to the offices of the third respondent for access to the Kabuso report, in the prescribed form, in terms of **Section 18(1) of PAIA read with Regulation 6 of the Regulations** promulgated in terms of the said Act.

[7] On 15 December 2010, the second respondent in his capacity as the Information Officer of the third respondent replied refusing access to the Kabuso report giving the following reasons:

> "The record you are requesting contains privileged information and is therefore refused in terms of section 44(1)(a)(i) of the Promotion of Access to Information Act 2 of 2000."

[8] The applicant lodged an internal appeal against the said decision to the first respondent. On 21 January 2011, the applicant's attorneys received by telefax, their Notice of Internal Appeal with an endorsement, the relevant part of which reads as follows :

> "dismissed decision of the deputy Information Officer confirmed."

The applicant then wrote a letter to the first respondent indicating that first respondent was obliged to give notice of the decision and reasons for the

decision on appeal. First respondent replied per his letter dated 14 February 2011 as follows:

> "we confirm that in terms of Section 77 (2) of the Promotion of Access of Information Act 2 of 2000, hereinafter referred to as "the Act " that the relevant authority, has confirmed the decision of the Deputy Information Officer to deny access to the records in terms of Section 44(1)(a) and (b) of the Act for the following reasons as reflected in the Act:-
>
> (a) if the records contain:-
>
> i) An opinion, advise, report or recommendation obtained or prepared; or
> ii) An account of consultation, discussion or deliberation that has occurred including, but not limited to, minutes of a meeting
>
> (b) If-
>
> i) The disclosure of the record could easily be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid-
> aa) communication of an opinion, advise, report or recommendation; or
> bb) conduct of a consultation, discussion or deliberation.
>
> We confirm the reason for refusing access to the KABUSO CC report is that all provisions listed in Section 44(1)(a) and (b) respectively are applicable,"

The applicant then launched this application on 18 March 2011.

D. *Issue*:

[9] The real issue to be determined by this court is whether the refusal of access to the Kabuso report by the first, second and third respondents is justified in terms of **PAIA**.

E. *Legal principles applicable to the issue*:

[10] At this stage it is apposite to the quote an opening remark by **Nugent JA** in ***President of the Republic of South Africa & Others v M & G Media Ltd.***[1]

> "Open and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the state' of which **Ngcobo J** said the following in ***Brummer v Minister of Social Development & Others*** [2009 (6) SA 232 (cc) para 62]:
>
> > 'The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.'
>
> But few constitutional rights are absolute. Generally they are capable of being limited within the confines of s36. The right of access to information that is held by the State has indeed been limited by the Promotion of Access to Information Act 2 of 2000- which fulfills Parliament's constitutional obligation to enact national legislation to give effect to the right."

1 2011 (2) SA 1 (SCA) para [1]–[2]

[11] It is the application of those limitations mentioned by **Nugent JA** above, in *casu* those provided for in **Section 44(1) of PAIA**, which form the subject of this application.

[12] It is **Section 32 of the Constitution of the Republic of South Africa** which obliged the Parliament to enact **PAIA**. The said section provides as follows:

> "Everyone has the right of access to-
>
> 1) (a) any information held by the state; and
> b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> 2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[13] **Section 44 (1) of PAIA** which is relied on by the first respondent in justifying his refusal to access reads as follows:

> "44. Operations of public bodies-
>
> (1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body-
> (a) if the record contains-
> (i) an opinion, advice, report or recommendation obtained or prepared; or
> (ii) an account of consultation, discussion or deliberation

that has occurred, including, but not limited to, minutes of a meeting,

for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(b) if-

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid-

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion, or deliberation;

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy."

[14] In interpreting the said **Section 44(1),** it is essential to take into account not only the afore-mentioned **Section 32 of the Constitution,** but also **Section 195** thereof, which deals with the basic values and principles which must govern public administration which are *inter alia:*

(a) A high standard of professional ethics must be promoted and maintained;

(b) Efficient, economic and effective use of resources must be promoted;

(c) Public administration must be accountable; and

(d) Transparency must be fostered by providing the public with timely, accessible and accurate information.

This section also provides that these principles apply to administration in every sphere of government, organs of state and public enterprises.

[15] Interpreting the word *"obtain"* contained in **Section 44(1) (a) of the Act**, **Jafta** AJA *(as he then was)* remarked as follows in ***Minister for Provincial & Local Government v Unrecognised Leaders, Limpompo Province (Sekhukhuneland)***[2]:

> "However, the genesis of the legislation was the Constitution and the Act must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms. Subsection 44 (1) (a) must be construed in the context of s 32 (1) (a) read with ss 36 and 39 (2) of the Constitution (*cf Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490* (CC) (2004 (7) BCLR687) para [72]). It is clear that s 44 (1) (a) limits the right to access to information and s 36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable. Section 39 (2) obliges every court to promote' the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. It must also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution."

[16] Commenting on new text 32 *(the predecessor of Section 32)* in RE Certification of the Constitution of the RSA[3], the court remarked as follows:

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2 2005 (2) SA 110 (SCA) at para 16
3[3] 1996 (4) SA 744(CC) at para 83

> "……..What is envisaged by the CP(*sic Constitutional Principle*) is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of government".

[17] I fully agree with **Mr Goosen SC,** Counsel for applicant, that those provisions of **PAIA** which provides for the refusal of access to information must be strictly and narrowly construed so that the broadest effect may properly be given to **Sections 32** and **195 of the Constitution**.

[18] Where a public body seeks to rely upon a ground of refusal as provided in Chapter 4 of PAIA, the onus rests on it to establish that its refusal of access to the record is justified in terms of the provisions of PAIA.[4]

[19] Turning now to the reasons given for the refusal of access which the second respondent gave as quoted in para 6 above. **Section 44 (1)(a)(i)** provides that the information officer of a public body may refuse a request for access to a record of a public body- if the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law. The section does not at all provide for a refusal of access to a record of a public body on the ground that *"it contains privileged information".* In my view **Section 44 (1)(a)(i)** cited by the second

4 *President of the Republic of South Africa & Others v M & G Media Ltd supra at para [14]*

respondent in support of his refusal has no relevance to the reasons given.

[20] On appeal to the First Respondent, Applicant received a telefax note reading:-

> "dismissal decision of deputy information officer confirmed."

This appears to be a decision of the First Respondent dismissing Applicant's appeal and confirming the decision of the Second Respondent.

[21] In a country of ours which is now enriched with a "culture of justification", in my view, in matters of this nature, the afore-mentioned replies by the Second and First Respondents cannot be described as having complied with the said culture. On the *"culture of justification"* **Nugent JA,** after quoting with approval Etienne Mureinik '*Bridge to where*? *Introducing, the Interim Bill of Rights'* (1994) 10 *SAJHR* 31, remarked as follows in ***President of the Republic of South Africa & Others v M & G Media Ltd supra*** **in para [11].**

> "The 'culture of justification' referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it, unless he or she can justify withholding it. And if he or she refuses a request then 'adequate reasons for the refusal' must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request."

[22] In the light of what is set out above, it seems to me that second and first respondents in the spirit of the *"culture of justification"* were obliged to give

adequate reasons for their refusal. In my view, their afore-mentioned replies fall short of adequate reasons.

[23] When applicant's attorneys queried the afore-quoted telefax note and called upon the first respondent to give reasons for his decisions, the latter replied as quoted in paragraph 7 above. In his reply first respondent, in my view, merely regurgitates the wording of **Section 44(1)(a) and (b) of PAIA**. This is a similar reply to which **Jafta AJA** *(as he then was) (* referred to in ***Minister for Provincial & Local Government v Unrecognised Traditional Leaders, Limpompo Province (Sekhukhuneland)*** *supra* in **para [18]**) remarked as follows:

> ". . . It is notable from the quoted provisions of s44(1) that in the answering affidavit Clerihew [the information officer] merely repeats the wording of the section. Clearly, para *(b)* enjoins an information officer to consider all the facts and to determine whether it could reasonably be expected that a disclosure of a report would frustrate any of the purposes referred to in s (1)(b)(i) or (ii)."

[24] The first respondent submits in his answering affidavit that the disclosure of the entire Kabuso report, together with all its annexures, at this stage, is inappropriate and would inevitably tend to undermine the process commenced by his predecessor and which is still underway.

He explained that process as:

i) His predecessor received a letter from the Executive Mayor of the

fourth respondent on which he raised her concerns that certain acts of maladministration were occurring in the fourth respondent.

ii) Pursuant to the said letter and acting in terms of **Section 106 (1) (b) of the Local Government: Municipal Systems Act 32 of 2000** *(the Systems Act*) he requested the **Kabuso CC** to investigate report and make recommendations in respect of certain specified issues which had been raised by the fourth respondent.

iii) He sent a written statement to the National Council of Provinces in terms of **Section 106 (3) (a) of the Systems Act**, motivating the appointment of **Kabuso CC**, and also sent a copy of the said statements to the relevant Minister and the Minister of Finance in terms of **Section 106 (3) (b) of the Systems Act**.

iv) After receipt of the Kabuso report and legal opinions in respect thereof, he presented the Kabuso report to the fourth respondent for their response to a number of issues which gave rise to a concern and which were contained in that report .

v) He was awaiting the response to the Kabuso report from the fourth respondent which was due within thirty days from 29 March 2011. He

further gave fourth respondent an extension of time, per their request, up to and not later than Friday 20 May 2011. He had not received any response to the KABUSO REPORT from the fourth respondent.

vi) He submitted that, depending upon the nature of the response received from the fourth respondent (if any) he would be entitled, if not indeed obliged, to issue appropriate directives in terms of section 139 (1)(a) of the Constitution.

vii) He stated that the process which was commenced by his predecessor and has been continued by himself is a process which could be seriously undermined should there be premature disclosure of what is a “work in progress.”

He put it as follows:

> "it is self evidently not practical or appropriate for such an ongoing investigation to be conducted in the public domain. This will inevitably undermine the effectiveness of the investigation and the willingness of the parties (including the Municipality) to co-operate."

[25] **Mr Buchannan SC**, Counsel for first, second and third respondents submitted that the Kabuso report was precisely procured to assist the first respondent in taking a decision in the exercise of the power and performance of his duties as conferred and imposed by **Sections 139 and 154 of the**

Constitution. He argued that for the first respondent to take a decision on appropriate interventions, or a decision on whether an intervention would be appropriate at all, in the exercise of the powers and performance of his duties as conferred and imposed by **Sections 139 and 154 of the Constitution**, it is necessary for him to afford the fourth respondent an opportunity to respond to the issues raised by the Kabuso report. He further submitted that there are *"the deliberative process(es) in a public body or between public body bodies"* as contemplated in **Section 44 (1)(b) of PAIA**. He submitted that the premature disclosure of the Kabuso report will frustrate this process by inhibiting the candid communication of the report or recommendation and the further conduct of the deliberations.

[26] It becomes clear only from the answering affidavit of the first respondent that the Kabuso report was commissioned in terms of **Section 106 of the Systems Act** and that the report they prepared was obtained for the purpose of assisting the first respondent to decide whether to act in terms of **Section 139 (1)(a) of the Constitution**.

[27] In a memorandum from the second respondent to the predecessor of the first respondent, the purpose of which is described as *"to obtain approval of the MEC to conduct an investigation on possible irregularities relating to development projects at Nelson Mandela Bay Metropolitan Municipality"*, the terms of reference of the investigation are set out on page 2 thereof. The

following is written "*Section 106 of the Local Government Municipal Systems Act places responsibility to the MEC to investigate any allegations of possible maladministration, fraud and corruption, occurring/occurred in a municipality*". The said memorandum was signed by the second respondent on 7 August 2009. I cannot understand why the second respondent, while in possession of such information, failed to give adequate reasons for his refusal of access to the Kabuso report.

[28] **Mr Goosen SC** argued that while it is not disputed that the first respondent may, consequent upon findings as to maladministration contained in the Kabuso report and depending upon the fourth respondent's responses thereto, decide to act in accordance with **Section 139 of the Constitution**, the process of deciding to act in accordance with **Section 139 of the Constitution** is a matter wholly separate and independent of the content of the Kabuso report.

[29] With respect, I do not understand this line of argument. In my view in making a decision in terms of **Section 139 of the Constitution**, the first respondent will have to consider the contents of the Kabuso report together with the responses thereto by the fourth respondent, so as to hear both sides of the story. The said line of argument, therefore falls to be rejected.

[30] **Mr Van Rooyen SC**, Counsel for the fourth respondent, stated that the fourth respondent has come to Court to explain its position and to support the

first, second and third respondents. He submitted that the fourth respondent is not in a position to decide when the KABUSO REPORT will be made public and released to the applicant.

[31] It may be mentioned that first and fourth respondents, just a few days before the hearing of this application, filed supplementary affidavits with the consent of the applicant

[32] In the supplementary affidavit the first respondent mentioned further that he may also decide to act in terms of **Section 154 of the Constitution** which enjoins the Provincial Government to support and strengthen the capacity of the Municipalities to manage their own affairs and to perform their functions through legislation and other measures.

[33] In my view, the first respondent was justified in terms of **Section 44 (1) (a) and (b) of PAIA** to refuse access to the Kabuso report.

F. *Public interest override*:

[34] This matter, however, does not end there as **Mr Goosen SC** argued that the mandatory or compulsory disclosure of a record in the public interest in terms of **Section 46 of PAIA** applies in the circumstances of this case.

[35] He argued that the first respondent is obliged in terms of **Section 46 of PAIA** to demonstrate the adverse effect or the harm which might arise from the disclosure of a record which falls within the ambit of **Section 44** *(namely an adverse effect on the process of deliberation in either policy formulation or in the decision as to whether or not to exercise a public power)*, outweighs the public interest in the disclosure of evidence of serious contraventions of the law. He submitted further that the first respondent bears an evidential burden in this regard and that the only basis advanced by the first respondent is that they are involved in a *"process"* and that the disclosure of the Kabuso report would amount to disclosure of a *"work in progress."*

[36] **Mr Buchannan SC** submitted that in order to justify disclosure, the public interest served by revealing a record evidencing a substantial contravention of the law must *"clearly outweigh"* the harm to the interest protected by the ground. He argued that the Kabuso report is currently the subject of deliberations which will ultimately assist the MEC in taking a decision on the appropriate interventions. Until the deliberative process is complete, speculation and conjecture as to the Kabuso report as well as the Municipality's responses thereto will undermine, rather than assist the MEC's decision making process the premature disclosure of the Kabuso report, as a deliberative material will result in public confusion.

[37] He submitted further that the public interest is served by preserving the

integrity of the deliberative process of both the provincial department and the Municipality and that the disclosure of the Kabuso report at this stage would adversely affect these deliberative processes and it would be contrary to public interest to do so.

[38] **Mr Goosen SC** further argued that the first respondent's concern about the *"process being undermined"* is based on no evidence and that it instead appears to reflect a distrust of the public and lack of confidence in the institutions of democratic accountability which our Constitution establishes. He further submitted that this is premised on a paternalistic conception that decision making should be shielded from public scrutiny lest public opinion shapes the decisions to be made.

[39] Whilst I agree with **Mr Buchanna SC** that the deliberative process of the first, third and fourth respondents ought to be protected in terms of **Section 44 (1)(b) of the Act**, however, there is a disturbing factor in this matter which is the apparent lack of appreciation of the essence of time as will appear here-under:

i) The Kabuso report was delivered to the predecessor of the first respondent in February 2010.

ii) First respondent, per a letter dated 28 March 2011, sent a

condensed report of the Kabuso report to the fourth respondent.

iii) The fourth respondent responded by a letter dated 29 April 2011 requesting a full copy of the Kabuso report and that the time for their response be extended to 30 days.

iv) First respondent replied per a letter dated 9 May 2011 giving them additional time to respond, i.e not later than 20 May 2011 and also advising them that the full Kabuso report will be made available to them by the State Attorney.

v) Fourth respondent received the full Kabuso report together with its annexures on 3 May 2011.

vi) On 20 May 2011 the Executive Mayor of the fourth respondent furnished the first respondent with responses to the issues raised in the Kabuso report but first respondent was not satisfied therewith.

vii) On 22 June 2011 first respondent wrote a letter to fourth respondent calling for a more detailed and particularised response within 30 days.

viii) On 1 August 2011 second respondent met the Mayor of the fourth respondent and impressed upon him the significance of providing appropriate and adequate responses to the issues raised in the Kabuso report with a degree of expedition. The Mayor undertook to finalise the responses by no later that 31 August 2011, after which responses would be tabled before the Municipality Council for consideration and endorsement.

ix) As at 1 September 2011 when this application was heard the fourth respondent had not yet fully responded to the issues raised in the Kabuso report as requested by the first respondent.

[40] From the above outline of events and times it is clear that the *"process"* between the first respondent and the fourth respondent has been going on as from 3 May 2011 and as at the date of hearing of this application it was still going on, that covers a period of about four months. To complicate matters this Kabuso report has been with the predecessor of the first respondent as from February 2010.

[41] The fourth respondent in her answering affidavit says "obtaining of legal opinions [by the first respondent] from Senior Counsel on the various aspects raised in the Kabuso report occurred from March 2010 to October 2010 and that the consolidation of the Kabuso report and the legal opinions

took a further two months". She seems to seek cover from that statement to justify her delay in furnishing a response to the first respondent.

[42] To me, it seems, even the said time taken by the first respondent in obtaining legal opinions and consolidating them and the report, cannot be described as a reasonable one.

[43] Regarding this aspect of time, the following statement by the first respondent, in paragraph 5.29 of his answering affidavit made on the 15th May 2011 is worth noting and I fully agree with it :

> "Despite the Municipality requesting a further thirty days to respond to my detailed request, I have afforded them a further period to provide such response by not later that Friday the 20th May 2011. It is my view that the Municipality has had more that an adequate opportunity to respond to issues which, after all arose within the Municipality itself, related to documents held by the Municipality, and where they have been in possession of my detailed request for responses since the end of April 2011."

[44] **Section 195 (1) (g) of the Constitution** provides that *"Transparency must be fostered by providing the public with timely, accessible and accurate information".* (My underlining). In my view, this section makes time to be of essence in matters of this nature; but unfortunately the way in which the fourth respondent has dealt with the Kabuso report does not reflect an appreciation of that aspect.

[45] It is common cause that there were allegations of certain acts of maladministration in the fourth respondent which raised concerns to the previous Executive Mayor. As a consequence thereof the predecessor of the first respondent appointed Kabuso report CC to conduct investigations and the Kabuso report was prepared in respect thereof.

[46] The response by the fourth respondent to the issues raised in the Kabuso report has been outstanding for an unreasonable time. It seems to me the disclosure of the Kabuso report would reveal a substantial contravention of, or a failure to comply with the law. I fully agree with **Mr Goosen SC** that the attitude of the first respondent referred to in para 38 above seem to be rather paternalistic and appears to reflect a distrust of the public. The right to timely, accessible and accurate information so aptly described by **Ngcobo J** in the Brummer case *supra* the Constitution demands that it be fostered.

[47] In my view, to withhold access to the Kabuso report any further will be against public interest that will be served by revealing the Kabuso report which evidences a substantial contravention of the law and such public interest clearly outweighs the harm to the interest protected by Section 44(1)(a) and (b) of the Act.

[48] This view is re-enforced by the following remarks by the authors Iain Currie and Jonathan Klaaren.[5]

5 The Promotion of Access to Information Commentary (2002) at para 7.13 page 109

> "Moreover, there is more to the term "public interest" than the aspects specifically identified in the override (i.e the public interest in upholding the law and in awareness of public safety or environmental risks). There is also a public interest in furthering the general goals of the Act i.e facilitating and promoting the disclosure of information to promote open government and human rights."

[49] I therefore, for the reasons advanced above, find that there is no justification in law for the first, second and third respondents, to continue to refuse any longer, applicant access to the full Kabuso report together with its annexures.

G. *Costs*:

[50] The fourth respondent has filed an affidavit opposing the relief sought by the Applicant and has associated herself with first, second and third respondent in opposing the relief sought herein.

I find no reason to treat her differently in regard to costs. I further find no reason to depart from the general rule that costs follow the results.

[51] In the circumstances the following order is made:

a) the decisions of the first, second and the third respondents to refuse applicant access to the Report prepared by KABUSO cc on the instructions of the first respondent in relation to and in respect of an investigation conducted into the affairs of the fourth

respondent in terms of provisions of Section 106 of the Local Government: Municipal Systems Act No. 32 of 2000, are hereby set aside;

b) First respondent and third respondents are hereby ordered to deliver to the applicant within five (5) days of this Order a copy of complete report, together with its annexures, mentioned in Order (a) above.

c) First and second, third and fourth respondents are ordered to pay costs of this application jointly and severally, the one paying the other to be absolved.

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D Z DUKADA
ACTING JUDGE OF THE HIGH COURT

For Applicant:	Adv G G Goosen SC
Instructed by:	Pagdens Attorneys
For First, Second & Third Respondents:	Adv R G Buchannan SC with ADV G G Ngcangisa

Instructed by:	State Attorney PORT ELIZABETH
For Fourth Respondent:	Adv R O Van Rooyen SC
Instructed by:	Doreen Mgoduka Attorneys
Heard on:	1 September 2011
Delivered on:	20 October 2011