

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

CASE NO. 8590/02

In the matter between:

THE DEMOCRATIC ALLIANCE

Applicant

and

THE AFRICAN NATIONAL CONGRESS

First Respondent

THE NEW NATIONAL PARTY

Second Respondent

THE CITY MANAGER, CITY OF CAPE TOWN N.O.

Third Respondent

THE MUNICIPAL COUNCIL, CITY OF CAPE TOWN N.O.

Fourth Respondent

THE SPEAKER, CITY OF CAPE TOWN N.O.

Fifth Respondent

THE MAYOR, CITY OF CAPE TOWN N.O.

Sixth Respondent

**THE EXECUTIVE COMMITTEE,
CITY OF CAPE TOWN N.O.**

Seventh Respondent

THE CITY OF CAPE TOWN

Eighth Respondent

REASONS FOR JUDGMENT: 21 NOVEMBER 2002

VAN HEERDEN J:

This application was instituted as a matter of urgency on 30 October 2002 and was argued before me the following evening as a fully-fledged opposed

application. Having heard argument by Mr **Osborne** (on behalf of the applicant), Mr **Farlam** (on behalf of the first and second respondents), as well as Mr **Jamie SC** (on behalf of the third to the eighth respondents), it was ordered that the application be dismissed with costs. I indicated at that time that reasons for such order would, if required, be furnished to any of the parties on application. Those reasons are now set out below.

The applicant is the Democratic Alliance (*DA*). The first respondent is the African National Congress (*ANC*), the second respondent is the New National Party (*NNP*), whereas the third to the seventh respondents are various structures and office-bearers of the City of Cape Town, cited herein in their official capacity. For the sake of convenience, I shall henceforth refer to them by their official designations, namely as '*the City Manager*'; '*the Municipal Council*' or simply '*the Council*'; '*the Speaker*'; '*the Mayor*'; and '*the Executive Committee*', respectively. The City of Cape Town ('*the City*'), the juristic person of which the third to the seventh respondents form part, was joined as the eighth respondent at the commencement of the hearing of the matter.

The present litigation arose out of the '*floor-crossing*' legislation approved by Parliament earlier this year, following a political realignment that took place in November 2001. Pursuant to such political realignment, the NNP withdrew from the alliance (ie the DA) that had existed from July 1999 between itself, the former Federal Alliance and the former Democratic Party (*DP*), forming an alliance with the ANC instead and leaving the control of the DA predominantly in the hands of the former DP. This led to a shift of power in, *inter alia*, various local authorities, including the City of Cape Town.

The Legislative and Constitutional Background

In June this year Parliament enacted the Constitution of the Republic of South Africa Amendment Act 18 of 2002 ('*the First Amendment Act*'), the Local Government: Municipal Structures Amendment Act 20 of 2002 ('*the Local Government Amendment Act*'), the Constitution of the Republic of South Africa

Second Amendment Act 21 of 2002 (*'the Second Amendment Act'*), and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (*'the Membership Act'*). These four acts allow, under certain circumstances, for members of national, provincial and local legislatures elected under the banner of one political party to '*cross the floor*' to another political party during the term of the relevant legislature, without losing their seats in that legislature in the process.

The first two Acts mentioned above relate to floor crossing in the local government sphere. The First Amendment Act establishes limited exceptions to the rule (the so-called '*anti-defection provision*') that a local government councillor who ceases to be a member of the party that nominated him or her, loses his or her seat on the council. It provides for a fifteen-day period during the second and fourth year after a local government election, during which party allegiances may be changed without the councillors concerned losing their seats, subject to the fulfilment of certain requirements, the primary one being that at least 10% of the representatives of a particular party must leave if this is to apply. The First Amendment Act also puts into place a '*once-off*' fifteen-day period immediately following the commencement of the Act, during which period party allegiances may be changed without the councillors concerned losing their seats, without the abovementioned 10% threshold (to which all subsequent '*window periods*' are subject) being applicable.

The Local Government Amendment Act complements the First Amendment Act by removing references in the Local Government : Municipal Structures Act 117 of 1998 (*'the Structures Act'*) to the bar on floor-crossing, and by making provision for various aspects of local government to accommodate the new system of limited floor-crossing. The amendments to the Structures Act include the reconstitution of metropolitan subcouncils, the registration of political parties and the role of the Electoral Commission.

The Second Amendment Act and the Membership Act both relate to floor-crossing in national and provincial legislatures. For the purposes of the present proceedings, it is not necessary to discuss the content of these acts in any further detail.

All four Acts were challenged on an urgent basis in this Court by the United Democratic Movement (*UDM*). A Full Bench of this Division suspended the commencement of the four Acts, pending the decision of the Constitutional Court on the application by the UDM to have the Acts declared unconstitutional and invalid. In its subsequent judgment,¹ the Constitutional Court, whilst declaring the Membership Act to be unconstitutional and invalid, upheld the

¹ Handed down on 4 October 2002, reported *sub nom. United Democratic Movement v President of the Republic of South Africa and Others* (1) 2002 (11) BCLR 1179 (CC).

constitutionality of the First Amendment Act and the Local Government Amendment Act. It also provided that the first (once-off) fifteen-day window period during which floor-crossing at local government level would be allowed (which had in effect been suspended by the interim orders made by this Court and the Constitutional Court), would commence running on 8 October 2002. Municipal council members wishing to '*cross the floor*' would thus be able to do so during such fifteen-day period (terminating on 22 October 2002).

The Municipal Council Meeting of 29 October 2002

Pursuant to this judgment of the Constitutional Court, the Speaker of the City of Cape Town Municipal Council, acting in terms of section 29(3)(a) of the Structures Act (as inserted by section 3 of the Local Government Amendment Act), convened a meeting of the Council for 29 October 2002, the purpose of such meeting being (*inter alia*) to deal with the consequences of the floor-crossings during the abovementioned fifteen-day window period. The Council was also scheduled to deal at such meeting with the reconstitution and recomposition of the various structures and committees of the Council as provided for by section 6 of the First Amendment Act.

The Council, consisting of 200 members, had, until the floor-crossing which took place during the period from 8 to 22 October 2002, been controlled by the DA. At that stage, the DA held 107 seats in the Council, the ANC holding 77 seats and

various smaller political parties holding the balance (of 16 seats). As a result of the floor-crossing, the overall balance of power in the Council shifted to the ANC/ NNP alliance. By the expiry of the window period on 22 October 2002, the DA was left with 71 seats in the Council, the ANC with 80 seats and the NNP with 32 seats, while various smaller parties held the remaining 17 seats.

At the meeting on 29 October 2002, the Council reconstituted the Executive Committee by electing 5 members of the ANC and 3 members of the NNP to the Committee. Portfolios were allocated to all of these seats, except for the one seat held by the ANC councillor who was elected as Mayor. Two nominees from the DA caucus were elected to the remaining 2 seats on the Executive Committee, both these seats being without portfolio.

The Council thereupon proceeded to reconstitute the Rules Committee of the City of Cape Town and the Subcouncils Establishment Portfolio Committee (*'the Subcouncils Committee'*), and to allocate members of the different political parties to these committees. Having resolved that the Rules Committee would have 12 members (including the Speaker), the ANC was allocated 4 seats and the NNP 3 seats (in addition to the Speaker, the Chairperson of the Committee, who is an NNP councillor). Only one member of the DA was allocated a seat on the Rules Committee, the remaining 3 seats being allocated to minority parties.

Also at the meeting held on 29 October 2002, the Council resolved that the Subcouncils Committee would have 6 members, with the seats thereafter being allocated as follows: the ANC and the NNP 2 seats each; the DA one seat; and a minority party the remaining seat.

All these allocations were made in the face of vigorous opposition and protest from the DA, which voted against every relevant resolution during the meeting. The outcome of the meeting was that the DA ended up with limited representation on the three committees in question. The relief claimed in the present application sought to redress that situation by setting aside the resolutions of the Council determining the composition of the abovementioned committees. The applicant also sought the following orders consequential upon the setting aside of the said resolutions:

'2.2 The municipal council of the City of Cape Town is hereby ordered to meet within twenty four (24) hours of the issuance of this order, for the purpose of reconstituting the executive committee of the City of Cape Town in such a manner that parties on the council are accorded fair representation on the committee, as required by the Constitution of the Republic of South Africa;

2.3 The municipal council of the City of Cape Town is hereby ordered to reconstitute the executive committee of the City of Cape Town by allowing Applicant to occupy four (4) seats, of which at least two

(2) seats must hold portfolios;

2.4 Alternatively, in the event that this Honourable Court deems it fit not to grant prayers 2.1 and 2.3 of the Notice of Motion, ordering that:

2.4.1 First and Second Respondents shall resign from two (2) seats on the executive committee of the City of Cape Town;

2.4.2 The municipal council of the City of Cape Town shall meet within twenty four (24) hours of issuance of this order for the purpose of filling the two positions vacated in terms of 2.4.1 above with two councillors designated by the Democratic Alliance caucus of the City of Cape Town;

2.5 The Executive Committee of the City of Cape Town be hereby interdicted from meeting or taking any decisions, whether collectively or individually, until this Honourable Court has disposed of this matter;

...

2.6 The municipal council of the City of Cape Town shall meet within twenty four (24) hours of issuance of this order to reconstitute the Rules Committee of the City of Cape Town in such a manner that parties on the council are accorded fair representation on the committee, as required by the Constitution of the Republic of South

Africa, by allowing Applicant to occupy at least five (5) seats on the rules committee of the City of Cape Town ...

2.9 The municipal council of the City of Cape Town shall meet within twenty four (24) hours of issuance of this order to reconstitute the Sub-Councils Portfolio Committee of the City of Cape Town in such a manner that all parties on the council are accorded fair representation on the committee, as required by the Constitution of the Republic of South Africa, by allowing Applicant to occupy at least two (2) seats on the sub- councils portfolio committee of the City of Cape Town ...'

The DA further asked that the ANC and the NNP be ordered to pay the costs of the application on an attorney and client scale (irrespective of whether or not they opposed the application).

The urgency of the matter arose from the fact that the first meeting of the reconstituted Executive Committee was scheduled to be held on the morning of 1 November 2002, prior to a meeting of the Council to be held on the same day. The agenda for the Council meeting included important and urgent matters such as a consideration of rates rebates and other budgetary matters. The Council would be precluded from considering these matters unless they had first been considered by the Executive Committee and a report and recommendation of

such Committee submitted to the Council (as required by section 30(5) of the Structures Act).

Arguments and discussion

It was contended on behalf of the DA that the '*gross disproportionality*' of its representation on the abovementioned three committees does not constitute the '*fair representation*' to which it claims to be entitled and which is required, so it was argued, by the Constitution of the Republic of South Africa Act 108 of 1996 ('*the 1996 Constitution*').

In this regard, reference was made to section 43 of the Structures Act, which is pivotal to the present application, and which provides as follows, under the heading '*Composition of executive committees*':

- '(1) *If a council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least are elected. An executive committee may not have less than three members.*
- 2) *An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same*

proportion they are represented in the council.

- 3) *A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160(8) of the [1996] Constitution.'*

Section 160(8) of the 1996 Constitution, in turn, provides as follows:

'Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that –

- a) allows parties and interests reflected within the Council to be fairly represented;*
- b) is consistent with democracy; and*
- c) may be regulated by national legislation.'*

According to applicant's counsel, the requirement contained in section 160(8)(b) is readily satisfied. Thus, a system of majority rule on a '*first-past-the-post*' (FPTP) electoral system (sometimes also referred to as a '*winner-takes-all*' system) would '*be consistent with democracy*'. (On the FPTP model, upon which the South African electoral system was based prior to the first democratic elections in 1994, see further Currie & De Waal *The New Constitutional and Administrative Law : Volume 1 – Constitutional Law* (2001) 134-135.) Even a mechanism which provided that **all** the seats on an executive committee would

be filled by members of the party holding 51% of the seats in the council concerned would in all likelihood be immune to challenge on the basis of the provisions of section 160(8)(b).

However, section 160(8)(a) of the 1996 Constitution goes beyond requiring merely that the electoral mechanism chosen be '*democratic*'. It also imposes the requirement that the mechanism chosen '*allow parties and interests reflected within the Council to be **fairly represented***' (emphasis added). It is this concept of '*fair representation*' which lies at the heart of the present debate.

It was submitted that the introduction (in section 160(8)(a) of the 1996 Constitution) of the concept of '*fair representation*' in this context excluded the '*winner-takes-all*' philosophy of FPTP-style democracy. It must accordingly follow, so it was argued, that a mechanism for constituting the Executive Committee (and, indeed, also the Rules Committee and the Subcouncils Committee) of the City of Cape Town that allows for **gross** disproportion between the number of council seats held by a party and the representation of such party on Council committees would fail the test set by section 160(8)(a).

Council for the DA further contended that the core values of the new South African political order are reflected in the provisions of section 1 of the 1996 Constitution, which values include (in paragraph (d) of section 1) a '*multi-party*

*system of democratic government*² The importance of a '*multi-party system of democratic government*' is accordingly underscored by its inclusion as one of the values on which the State is founded.³

According to counsel, the *Constitutional Principles* set out in Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993 ('*the 1993 Constitution*'), with which the 1996 Constitution was required to comply (in terms of section 71(1)(a) of the 1993 Constitution), illustrate the importance of political parties, including minority political parties, in the new South African constitutional dispensation. Constitution Principle VIII provides as follows:

'There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and, in general, proportional representation.'

Constitutional Principle XIV, in turn, provides as follows:

'Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.'

It was argued on behalf of the applicant that, on a proper interpretation, the 1996

² See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC) at para [72].

³ See *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another intervening)* 2001 (3) SA 893 (CC) at para [39].

Constitution ‘*prescribes*’ proportional representation at all levels of government - national, provincial and local. Counsel referred, in this regard, to the change in the wording of section 157(3) of the 1996 Constitution brought about by section 1 of the First Amendment Act. Prior to the amendment, section 157(3) read as follows:

‘An electoral system in terms of subsection (2) must ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties.’

Following its substitution by section 1(b) of the First Amendment Act, section 157(3) provides that:

‘An electoral system in terms of subsection (2) must result, in general, in proportional representation.’

With reference to the abovequoted section 43 of the Structures Act, counsel argued that subsection 43(2) was intended by the Legislature to govern the **outcome** or **end result** of whatever mechanism or process is followed by a municipal council to elect its executive committee, while subsection 43(3) was intended to deal simply with the **methodology** determined by the relevant municipal council for such election. Following this interpretation of subsections (2) and (3) of section 43, it was contended that, whatever ‘*alternative mechanism*’ is decided upon by the municipal council concerned ‘*for the election of* its

executive committee, the **outcome** of such election must be that the executive committee '*be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in **substantially the same proportion** they are represented in the council*' (emphasis added).

I cannot agree with Mr **Osborne's** interpretation of the '*interrelationship*' between subsections (2) and (3) of section 43 of the Structures Act. One of the established presumptions of statutory interpretation is that no word in a statute should be regarded as tautologous or meaningless (see, in this regard, *Wellworths Bazaars Ltd v Chandler's Ltd & Another* 1947 (2) SA 37 (A) at 33; see also Devenish *Interpretation of Statutes* (1992) 210 and the other authorities there cited). Subsection 43 (3) allows a municipal council to determine '*any **alternative** mechanism for the election of an executive committee, provided it complies with section 160(8) of the Constitution*' (emphasis added). As subsection 43(1) deals primarily with the minimum and maximum permissible number of seats on an executive committee, and does not deal with the representation of parties and interests on such executive committee, it follows logically that the '*alternative mechanism for the election of an executive committee*' referred to in subsection 43(3) must be '*alternative*' to the provisions of subsection 43(2) - ie alternative to the composition of an executive committee

whereby parties and interests represented in a municipal council are represented in the committee '*in substantially the same proportion*' as their representation in the council. This interpretation of subsection 43(3) is borne out by the proviso to such subsection, which requires that the '*alternative mechanism*' determined by the relevant municipal council comply with section 160(8) of the Constitution. The provisions of section 160(8) of the Constitution, as quoted above, clearly deal, not with the **mechanism** or the **process** to be followed by a municipal council for the election of its committees, but rather with the **outcome** of such election process.

It follows that I do not agree with counsel's submission that, even where an '*alternative mechanism*' has been determined by a municipal council for the election of its executive committee members, section 43(2) of the Structures Act still requires that the executive committee must represent the parties and interests represented in the council in a '*substantially proportional*' fashion. As was pointed out by the respondents, the City's Executive Committee, both in the past and as reconstituted on 29 October 2002, was **not** composed in accordance with the provisions of section 43(2) of the Structures Act, ie its membership was not in substantially the same proportion as the representation of the different parties and interests on the Council. Instead, under the former DA-dominated Council, an '*alternative mechanism*', as referred to in section 43(3), was adopted at the first meeting of the Council on 15 December 2000 (the City of Cape Town

having been established on 5 December 2000 pursuant to the provisions of section 12 of the Structures Act), and applied by the DA-dominated Council between December 2000 and October 2002. I will return to this aspect at a later stage.

In addressing the meaning of the requirement of '*fair representation*' set by section 160(8)(a) of the 1996 Constitution, reliance was also placed by counsel for the DA on the decision in *Democratic Party & Others v Brakpan Transitional Local Council & Others*⁴ This case concerned an application by the DP for an order declaring that it was an unconstitutional derogation from the principle of '*fair representation*' (enshrined in section 160(8)(a) of the 1996 Constitution) for a transitional local council to appoint an executive committee comprising members of the ANC and the NP only, in circumstances where the NP and the DP were equally represented on the said council.⁵ The crisis that led to the application was precipitated when the third applicant, until then a member of the NP, and who had a seat on the six-member executive committee of the Council, resigned from the NP and joined the DP, but refused to give up his seat. (There was at the time no anti-defection clause applicable to local government.) The transitional local council as a whole then voted to dissolve the executive committee and to elect a new five-member executive committee in its place. Of the 20-member transitional local council, the ANC had at that stage 14

⁴ 1999 (4) SA 339 (W).

⁵ Ibid 343.

councillors, the NP 2 councillors and the DA 2 councillors (being the second and third applicants). No DA councillor was elected to the new executive committee, which committee consisted of 4 members of the ANC and 1 member of the NP.⁶

The Court (*per Cloete J*) held that the decision to reconstitute the executive committee in such a manner that the DP was **not** represented on such committee while the NP, which had the same number of representatives on the Council as the DP, **was** represented thereon, was unconstitutional. In the view of Cloete J, this decision violated the provisions of section 160(8)(a) of the 1996 Constitution, which required that, as far as practically possible, the members representing political parties in a local government council '*participate fairly*' in the committees of that council:

*'The object and purpose of s 160(8)(a) of the Constitution is to ensure, so far as is practically possible, that members representing political parties in a council participate fairly in the committees of the council. Such fairness is to be determined according to the representation on the council and not according to political support among the electorate ...'*⁷

In considering the *Brakpan Transitional Local Council* case, it must be borne in mind that the applicable '*national legislation*' (as referred to in section 160(8)(c)

⁶ At 342C-H.

⁷ At 344F-G

of the Constitution), for the purposes of that case, was the Local Government Transition Act 209 of 1993. At that time, section 16(6) of Act 209 of 1993 provided as follows:

*‘Notwithstanding anything to the contrary in any law contained, a transitional council or transitional metropolitan substructure referred to in subsection (1) may elect an executive committee **according to a system of proportional representation** from among its members to exercise such powers and perform such duties as such transitional council or transitional metropolitan substructure may determine: Provided that during the pre-interim phase it will not be necessary to elect such committee according to a system of proportional representation: Provided further that –*

- a) *the transitional council or transitional metropolitan substructure shall determine **the system of proportional representation** and the number of members of and the quorum for the executive committee;*
- b) *the executive committee shall endeavour to exercise its powers and perform its duties on the basis of consensus; and*
- c) *if consensus on any matter cannot be achieved, such matter may be decided by the committee by resolution of a majority*

of at least two-thirds of its members, or the committee may, if a majority of the committee so decides, submit a report and recommendation on the matter to the transitional council or transitional metropolitan substructure for a decision.'
(emphasis added)

The two reported cases followed by the learned judge in the *Brakpan Transitional Local Council* case in coming to his conclusion (as set out above), namely *Crowther & Andere v Plaaslike Oorgangsraad vir Bethlehem & Andere*⁸ and *Nasionale Party in die Oos-Kaap en 'n Ander v Port Elizabeth Oorgangsraad & Andere*⁹ also concerned the meaning of the words '*according to a system of proportional representation*' in section 16(6) of the Local Government Transition Act of 1993, as did the case of *Louw v Matjila & Others*¹⁰ referred to in both the *Crowther* and the *Nasionale Party in the Oos-Kaap* cases. Moreover, all three lastmentioned cases also concerned the requirements for local government executive committees set by section 177 of the 1993 Constitution, which Constitution was applicable to the facts of those cases. In this regard, section 177 of the 1993 Constitution provided, under the heading '*Executive committees*':

*'A council of a local government shall elect, **according to the system of proportional representation as may be prescribed by a law**, from*

⁸ 1997 (8) BCLR 1011 (O).

⁹ 1998 (2) BCLR 141 (SE).

¹⁰ 1995 (11) BCLR 1476 (W).

among its members, an executive committee to exercise such powers and perform such functions as may be determined by such council: Provided that –

- a) the council shall determine the number of members of and the quorum for the executive committee;*
- b) the executive committee shall endeavour to exercise its powers and perform its functions on the basis of consensus among its members; and*
- c) if consensus on any matter cannot be achieved, such matter may be decided by the committee by resolution of a majority of at least two-thirds of all its members, or the committee may, if a majority of the committee so decides, submit a report and recommendation (if any) on the matter to the council for a decision.’ (emphasis added)*

Unlike section 43 of the Structures Act of 1998, which is applicable to the present matter, section 16(6) of the Local Government Transition Act makes **no** provision for the determination by a local government council for a ‘*mechanism for the election of [such council’s] executive committee*’ which is ‘*alternative*’ to a system of proportional representation. It is also interesting to note that, by contrast with the above quoted provisions of section 16(6)(a) to (c) of the Local Government Transition Act, section 52 of the Structure Act now provides, under the heading

'Quorum and decisions', that:

- '(1) A majority of the members of an executive committee constitutes a quorum for a meeting.*
- 2) A question before the committee is decided if there is agreement among at least the majority of the members present at the meeting.*
- 3) If on any question there is an equality of votes, the member presiding must exercise a casting vote in addition to that member's vote as a member.'*

Moreover, unlike section 177 of the 1993 Constitution, the 1996 Constitution does not prescribe that the executive committee of a local government council must be elected *'according to a system of proportional representation as may be prescribed by a law'*, but instead (as indicated above) provides simply for participation by member of a municipal council in the proceedings of the council and those of its committees in a manner which allows for *'fair representation'* of parties and interests reflected within the council (section 160(8)(a)); which is *'consistent with democracy'* (section 160(8)(b)); and which *'may be regulated by national legislation'* (section 160(8)(c)). It would appear that the envisaged *'national legislation'* is in fact the Structures Act. Further, by contrast with section 160(8), section 157(3) of the 1996 Constitution, prior to its substitution by section 1(b) of the First Amendment Act, provided that the electoral system governing

the election of members to a **municipal council** ‘*must ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties.*’ As indicated above, the ‘*new*’ wording of section 157(3) now simply requires that the electoral system governing the election of members to a municipal council ‘*must result, **in general**, in proportional representation*’ (emphasis added).

In the light of the material difference in wording between section 16(6) of the Local Government Transition Act, as applied by Cloete J in the *Brakpan Transitional Local Council* case, and section 43 of the Structures Act applicable to the present matter, I am in agreement with the submission made by both counsel for the respondents that the *Brakpan Transitional Local Council* case is clearly distinguishable from the matter presently before me.

With reference to section 160(8)(a) of the 1996 Constitution, counsel for the DA further contended that it is difficult to understand what ‘*fair representation*’ could mean other than ‘*participation*’ in relation to the share of a political party’s seats in the Municipal Council. There may be questions of ‘*proximate fairness*’ requiring larger political parties to allocate a seat on the Executive Committee to the collectivity of political parties with only a small representation on the Council. However, so the argument went, there must, at the very least, be a rational relationship between the number of minority party representatives holding seats

on the Executive Committee and such parties' representation in the Council as a whole.

It was submitted in this regard that the allocation of only 20% of seats on the Executive Committee to a party (the DA) which holds nearly 40% (38.797% to be precise) of the total number of Council members who qualify for representation on the Executive Committee¹¹ clearly constitutes a gross disproportionality. According to counsel, there is no rational relationship between the strength of the DA in the Council and its allocated seats on the Executive Committee. The same applies to the allocation of only 1 seat (8.333% of the total number of seats) on the Rules Committee, and the allocation of only 1 seat (16.666% of the total number of seats) on the Subcouncils Committee to the DA, such party's representatives on the Council representing 35.5% of the total number of members of Council from whose ranks the members of these two committees had to be drawn.

According to Mr **Osborne**, the committee allocations were nothing more than a '*political ploy*' intended to marginalise the DA in the committees of the Council of the City of Cape Town; an *ad hoc* political scheme, foisted upon the Council by the ANC/NNP Alliance. The committee allocations were especially unfair, so it

¹¹ Political parties holding less than 10% of the total number of Council Seats not qualifying for representation on the Executive Committee, in terms of the electoral '*mechanism*' adopted by the then DA-dominated Council in December 2000.

was argued, since they produced the anomalous result that the NNP, which holds less than half of the Council seats held by the DA (32 seats, as opposed to 71 seats), has ended up with significantly more seats on each of the three committees than the DA. Counsel argued that the present situation is, in that respect, very similar to that faced by the Court in the *Brakpan Transitional Local Council* case, in which (as indicated above) Cloete J held that it was unfair, in a situation where the NP and the DP held the same number of seats on the Brakpan Transitional Local Council, that the former party should be represented on that Council's executive committee, but not the latter party. It was further argued that, as regards the Executive Committee, the unfairness of the present situation is aggravated by the fact that neither of the two seats allocated to the DA has a portfolio attached to it. By contrast, all three seats on the Executive Committee allocated to the NNP have portfolios attached to them.

The respondents argued, on the other hand, that it could only be in terms of a '*proportional representation*' system, as envisaged in section 43(2) of the Structures Act, that the DA could rely upon any entitlement to a specified number of seats on any one of the three committees at issue in these proceedings. This is so because, unlike the express and objectively determinable system referred to in section 43(2), details of the '*alternative mechanism*' envisaged in section 43(3) of the Structures Act (which subsection requires compliance with section 160(8) of the 1996 Constitution) are noticeably lacking. It is for this reason,

according to the respondents, that ‘*one cannot conflate “fair representation” with proportional representation*’ (in the words of Mr Peter Gabriel, the Chief Whip in the Municipal Council, who deposed to the main answering affidavit filed on behalf of the ANC).

The respondents pointed out that section 160(8) of the 1996 Constitution refers in terms to ‘*participation*’ in the proceedings of Council committees, and not to the **composition** thereof. It was submitted on behalf of the respondents that this would appear to acknowledge the fact that participation in, short of membership of, a Council committee is constitutionally sanctioned and desirable. As was pointed out by Mr Richard Wootton, the Acting Director: Legal Services of the City of Cape Town (who deposed to the main answering affidavit filed on behalf of the third to the eighth respondents), all councillors are permitted as of right, in terms of the Rules of Order of the Executive Committee and of the Council’s other committees, to attend meetings of the committees and, with the permission of the relevant chair, to address such meetings. All councillors are therefore permitted, as of right, to ‘*participate*’ in the proceedings of all Council committees, although councillors are not allowed to vote in any committee unless they are members of the relevant committee.

Both counsel for the respondents also referred to the decision of Horn J in the unreported case of *The Democratic Alliance & Another v Masondo N.O. &*

Another. ¹² Counsel acknowledged that this decision is of no **direct** relevance to the present proceedings: the *Masondo* case related to the appointment of a mayoral committee in terms of section 60 of the Structures Act and the court held that section 160(8) of the 1996 Constitution does not apply to mayoral committees, such a committee not being a committee of the municipal council, but rather a committee of the executive mayor. However, when dealing (albeit *obiter*) with the meaning of the words ‘*fair representation*’ in section 160(8)(a) of the 1996 Constitution, Horn J pointed out that the requirement of fair representation in terms of section 160(8)(a) ‘*is itself a relative concept which must be measured against what it is that the Legislature set out to achieve when enacting*’ that section.¹³

It was argued on behalf of the respondents that, given the inherent flexibility of the concept of fair representation - and accordingly the range of possibilities which could fall within the ambit of this concept - the DA could not simply point to its representation in the Council and then lay demand, in the language of entitlement, to a corresponding (or even a substantially corresponding) membership of the relevant committees. This would amount to a system of proportional representation or one substantially similar thereto, which **is** required by section 43(2) of the Structures Act, but **not** by section 43(3) thereof, read

¹² Witwatersrand Local Division Case No. 01/9260.

¹³ At 14 of the typed judgment.

together with section 160(8) of the 1996 Constitution.

In the *United Democratic Movement* case (*supra*), the Constitutional Court specifically considered the proportional representation system and its relationship to the multi-party system of democratic government contemplated by section 1(d) of the 1996 Constitution. The Constitutional Court stated¹⁴ that, textually, proportional representation was not included in the founding values set out in section 1 of the 1996 Constitution, nor could it be implied as a requirement of multi-party democracy. In my view, it is clear from, *inter alia*, the judgment of the Constitutional Court in the *United Democratic Movement* case that the requirement of ‘*fair representation*’ set by section 160(8)(a) of the 1996 Constitution can be met by a system of representation other than proportional representation or a system approximating one of proportional representation. Indeed, as was argued by counsel for the respondents, such a result appears to flow ineluctably from the fact that section 43 of the Structures Act clearly makes a distinction between a system of proportional representation (as envisaged in section 43(2)) and a system encompassed by the ‘*alternative mechanism*’ provided for in section 43(3).

As mentioned above, the respondents further pointed out that the composition of the City’s Executive Committee, both in the past and as reconstituted on 29

¹⁴ At para [29].

October 2002, did **not** comply with section 43(2) of the Structures Act, ie its membership was not in substantially the same proportion as the representation on the Council of the various different parties and interests concerned. Instead, an '*alternative mechanism*' as permitted by section 43(3), was adopted by the then DA-dominated Council of the City of Cape Town at its first meeting on 15 December 2000, was implemented by the Council at such meeting, and thereafter again in February 2001 and in December 2001. It is this same mechanism that was again implemented at the meeting of 29 October 2002 insofar as the election of members to the Executive Committee was concerned. It operated as follows:

'[the Council would elect the first eight members to the ten-member Executive Committee and] *the eight persons so elected will be the first eight members of the Executive Committee. Should this election result in a situation where certain political parties or interests are not fairly represented, the remainder of the seats of the Executive Committee must be reserved for such parties or interest parties [sic?]. These vacant seats must then be filled by an election by Council from such parties or interest groups in a fair manner that is consistent with democracy and complies with the provisions of section 160(8) of the Constitution.*

It may not be possible to accommodate all parties and interests and it would therefore not be fair to try to accommodate all parties and interest groups, especially small parties or interest groups. The Executive Committee has only

ten seats representing a council of 200 and it is therefore recommended that any party or interest group, having less than 10% support, not be considered for representation on the Executive Committee, unless a representative from such party or interest group is elected as ... one of the eight ... referred to above.'

According to the respondents, in the implementation of this '*alternative mechanism*', as adopted in December 2000, the rationale for the election of the first 8 members of the Executive Committee was, in the case of 7 of them, their suitability for the executive post that each of them would fill, such suitability in each instance being motivated on the basis of their particular qualifications, skills and experience relevant to the particular portfolio for which they were nominated. In the case of the eighth member, his or her suitability to be Mayor was the determining consideration. While the Executive Committee constitutes the executive of the Council, the ten portfolio committees, which develop policy, are part of the legislative branch of Council. Since February 2001, members of the Executive Committee do not sit on the portfolio committees, notwithstanding the fact that members of the Executive Committee are responsible for the portfolios with which the various committees are tasked. This structure and split of responsibilities was decided upon by the Council in February 2001 in order to comply with the principle of separation of powers provided for in the 1996 Constitution, by separating the executive, legislative and judicial '*arms*' of the City of Cape Town. This separation of powers at local government level was to some

extent modelled on the structure employed in the national and provincial spheres of government.

It should be mentioned that, whilst taking the view that the composition of the Executive Committee prior to 29 October 2002 was not relevant for the purposes of the present proceedings, the applicant nevertheless denied that the '*alternative mechanism*' described by the respondents was employed by the Council after February 2001. According to the applicant, this mechanism was abandoned by Council during February 2001, whereafter there were no longer any members on the Executive Committee without portfolios; the portfolios were "*shuffled around*"; the members of the Executive Committee were no longer chairpersons of any Council committees; and the committees to which such members had been elected in December 2000 became the separate portfolio committees. In view of the fact that the applicant is seeking final relief, I am enjoined to apply to time-honoured principles articulated by Corbett JA (as he then was) in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 15 by approaching the application on the basis of those facts averred in the applicant's affidavits which have been admitted by the respondents, together with the facts alleged by the respondents. It follows that, for the purposes of the present proceedings, I must accept the respondents' version that the mechanism of electing the City's Executive Committee utilised at the meeting on 29 October

15 1984 (3) SA 623 (A) at 634E-635C.

2002 (aptly described by Mr **Farlam** as '*the best person for the job mechanism*') was a mechanism that was not only devised by the applicant, but was utilised by it from December 2000 until October 2002.

As regards the composition of the Rules Committee and of the Subcouncils Committee, Mr **Farlam** correctly pointed out that neither of such committees is governed by the provisions of section 43 of the Structures Act. Such committees are established in terms of section 79 of the Structures Act, which section makes no reference whatsoever to proportional representation. The mechanism for appointing the members of such committees, and the ultimate composition of such committees, must therefore be measured only against the requirements set out in section 160(8) of the 1996 Constitution, as analysed above.¹⁶

The Rules Committee is established by the Council and headed by the Speaker. Its tasks are to consider the rules of the Council, to investigate violations of the Code of Conduct and so on. According to the respondents, the rationale for the composition of the Rules Committee was developed by the then DA-dominated Council in 2000. Because the Rules Committee performs a '*crucial watchdog function*', it was regarded as important to have as many political parties as possible represented on such Committee. For this reason, while the governing party or interest group should have a majority of seats on the Rules Committee,

¹⁶ See the *Masondo* case (*supra*) at 11, 13 and 15-16 of the typed judgment.

as many minority parties as possible should be allocated seats on such Committee. While, at the meeting on 29 October 2002, the Council resolved that the size of the Rules Committee would be reduced from 16 members (including the Speaker) to 12 members (also including the Speaker), the allocation of seats on such Committee was made on the same basis as had been operative since 2000.

The Subcouncils Committee is not one of the ten standing portfolio committees of the Council. As was the case under the previous DA-dominated Council, this Committee is established by the Council to oversee the introduction of the different municipal subcouncils, to consider issues surrounding demarcation, and to deal with *ad hoc* issues relating to the establishment and functioning of municipal subcouncils. According to the respondents, the '*formula*' used for the composition of this Committee by the DA-dominated Council was the same as that applicable to the various portfolio committees, viz that the ruling party or interest group was given a majority, the remaining members of the Committee being divided amongst the opposition parties, with priority given to the official opposition and as many other minority parties as possible also being represented on the Committee. While, at the meeting on 29 October 2002, the Council resolved that the size of the Subcouncils Committee would be reduced from 11 members to 6 members, the allocation of seats was done on exactly the same basis as that previously utilised by the DA-dominated Council.

The respondents' allegations regarding the composition of both the Rules Committee and the Subcouncils Committee were not really disputed by the applicant, the applicant taking the stance that these details were not specifically relevant for purposes of the present proceedings.

Finally, it was argued on behalf of the respondents that the 1996 Constitution makes provision for a separation of powers between the Legislature, the Executive and the Judiciary.¹⁷ It was submitted, with reference to the judgment of the Constitutional Court in *Bel Porto School Governing Body & Others v Premier, Western Cape, & Others*¹⁸ that the Court should not allow itself to be dragged into matters which should be dealt with at a political or administrative level and not at a judicial level.

I agree with the argument advanced on behalf of the respondents that there can be few cases concerning matters that are more of a political nature than the present one. The ANC/NNP Alliance now controls the City of Cape Town. Such alliance is entitled, in accordance with the principle of majority rule enshrined in (*inter alia*) section 160(3) of the 1996 Constitution, to govern the City. Such government is carried out, on an executive level, by the Executive Committee.

¹⁷ See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (2) SA 883 (CC) at para [22]; *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) at para [36].

¹⁸ 2002 (3) SA 265 (CC) at para [87].

Seven of the members of such committee have portfolios, ranging from finance and housing to health and the environment and other aspects of the government of the City, all of which are vital to its inhabitants. The decisions as to who fill such posts and what their political loyalties are, are quintessentially political issues which are not easily, if at all, resolvable by the application of legal norms, and by adjudication in a court of law. Provided that the requirements set out in section 160(8) of the 1996 Constitution are complied with, which in my view is indeed the case in the present proceedings, a court should be loath to interfere with local government decisions such as those currently before me.

Clearly, the fact that the system utilised for the composition of the Executive Committee, the Rules Committee and the Subcouncils Committee at the meeting on 29 October 2002 is an '*inherited system*', devised by the former DA-dominated Council and utilised by it right up until 29 October 2002, is not decisive in evaluating the fairness or otherwise of the present representation of the DA on the committees in question. However, this fact is certainly one of the considerations to be borne in mind in such process of evaluation.

In dismissing the application, I was persuaded by the submissions on behalf of the respondents, which submissions brought me to the conclusion that none of the applicant's rights had been infringed by the decisions taken at the Council meeting on 29 October 2002, and that the applicant had not made out a case for

any of the relief sought by it.

While I was certainly of the view that the applicant should be ordered to pay the costs incurred by all eight respondents, I was not persuaded by the arguments advanced by Mr **Farlam** to the effect that the applicant should be ordered to pay the costs of the first and second respondents on a punitive scale.

Conclusion

For the reasons set out above, the application was dismissed with costs.

.....
B J VAN HEERDEN

