PERMITTED BENEFITS

A report on an investigation into alleged misappropriation of funds relating to the payment of subsistence and travel allowance to the former Member of the Executive Council for the Eastern Cape Department of Social Development and Special Programmes for an overseas trip

Report No: 17 of 2014/15
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EXECUTIVE SUMMARY

1. "Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a)."

2. These provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.

3. "...As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it."

Khumalo and Another versus the MEC of Education in KwaZulu-Natal

(i) “Permitted Benefits” is my report as the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 3 of the Executive Members’ Ethics Act No 82 of 1998 (Executive Members’ Ethics Act, 1998) read with and section 8(1) of the Public Protector Act No 23 of 1994 (Public Protector Act, 1994).

(ii) The report communicates my findings and the action I consider appropriate in terms of section 182(1)(c) of the Constitution to correct any wrong I have found following an investigation into a complaint of alleged misappropriation of public funds for her own benefit by Honourable Ms. Pemmy Majodina, MPL, then Member of the Executive Council (MEC) for the Eastern Cape Department of Social Development and Special Programmes (the Department) involving her demanding and being paid more than four (4) times the prescribed Subsistence and Travel (S&T) allowance in respect of her trip to New York in September 2012 and that she failed to pay back the overpaid amount.

(iii) The Complainant is Honourable Mr. Samson Kwelita Member of Provincial Legislature (MPL) for the Congress of the People (COPE). The complaint followed an article

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1 2014 (3) BCLR 333 (CC).
published by the Daily Dispatch on 22 September 2012 in an article titled “MEC in travel row again” and on 24 September 2012 in another article titled “Travel row brought before protector”. There was also a cartoon strip in the same newspaper dated 26 September titled “Pemmy-Antoinette”.

(iv) In the main, the Complainant alleged that:

1) Ms. Pemmy Majodina, then MEC for Social Development and Special Programmes, was said to have misappropriated public funds for her own benefit, in that the former MEC demanded to be paid an extra R15 0000 in addition to the S&T allowance she had received and that the travel allowance she ultimately received exceeded that which she was entitled to;

2) The S&T amount for the MEC was overpaid by R15 000.00, which she has failed to pay back; and

3) The conduct of MEC Majodina was possibly in violation of the Executive Ethics Code.

(v) The issue I had to make a determination on was whether MEC Majodina was paid an S&T allowance, including an advance, that was far more than what she was entitled to and whether the conduct of MEC Majodina in the circumstances, failed to meet the ethical standard required of Members of the Executive, particularly under Clause 2 of the Executive Ethics Code (the Code) and was, accordingly, in violation of the Code. Ms Majodina has since moved to the portfolio of MEC for Sports, Recreation, Arts and Culture.

(vi) I must indicate upfront that the amounts involved are relatively miniscule. However, it is my considered view that the applicable principles have enormous implications for ethical usage of permitted benefits by Members of the Executive, circumstances under which public finances are recoverable or repayable in the event of overpayments or
excesses in usage or implementation of relevant benefits and specific obligations imposed by the Executive Ethics Code on Members of the Executive as stewards of public resources, regarding receiving, asking for and repayment of benefits in excess of what they are entitled to or is legally permissible.

(vii) It is worth noting that MEC Majodina, in her response to the notice I sent her in terms of section 7(9) of the Public Protector Act, 1994, alerting her to evidence that appeared to implicate her and to the possibility of adverse findings against her, did not challenge the allegation that she was paid an S&T allowance and another amount and that she had been paid the amount alleged in two tranches as alleged, which were: R3 711.25 and R15 000.00, for her 8 day trip to New York. Further worth noting is the fact that when the additional R15 000.00 was requested and approved, it was said to be money for lunch for 5 days, which meant that lunch was estimated at R3 000.00 per meal.

(viii) Contrary to the evidence submitted by the Chief of Staff in MEC Majodina’s former office, advising that MEC Majodina’s trip was full of challenges due to logistical arrangements and that this led to MEC Majodina losing her belongings wherein the receipts for the expenditure in question were kept, MEC Majodina’s submission maintains that she never kept receipts and was never requested to submit receipts upon her return from the relevant trips. She has further not denied or supported the submission that her belongings were lost and as such the relevant receipts were also lost.

(ix) As the investigation unfolded, it was brought to my attention that MEC Majodina was still involved in a dispute over S&T paid to her for her earlier trip to New York in February of the same year when she undertook the September trip, wherein her Department alleged that she was overpaid an amount of R13 935.11 and required her to pay back the same.

(x) MEC Majodina maintained until her last communication to me, in November 2014, that she did not submit receipts because she understood the money she got to be S&T and
that she has not paid back the unaccounted for R15,000.00 because she believes she was entitled to it as S&T and it was not an advance requiring justification through receipts. Her exact words were the following:

"I still maintain that I did not do anything wrong, this was not my first trip undertaken as a Public representative. I was never given an advance but S&T. I was never demanded or requested receipts upon coming. (sic) Had I known that I could have kept them”

(xi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether MEC Majodina was improperly given an excessive S&T allowance during her trip to New York?

(b) Whether MEC Majodina improperly failed to refund public money owed to her Department following her trip to New York?

(c) Whether the conduct of MEC Majodina relating to the processing of the S&T and non-repayment or account for the additional payment she received for her trip to New York in September 2012 was inconsistent with relevant provisions of the *Handbook for Members of the Executive and Presiding Officers (Ministerial Handbook)* and accordingly constitutes unethical conduct in violation of the Executive Ethics Code, the Executive Members’ Ethics Act and section 136 of the Constitution?

(xii) The investigation process commenced with a letter to the Complainant on 11 October 2012 requesting him to submit a sworn statement and substantiating evidence on the allegations. On 6 November 2012, a letter was written to the Head of Department (HoD), Social Development and Special Programmes, Ms. B. Hackula requesting her to provide information and evidence pertaining to the issues.
(xiii) A formal investigation, conducted through meetings and interviews with the Complainant and relevant officials of the Department as well as an inspection of all the relevant documents and analysis and application of all relevant laws, policies and related prescripts, followed. Upon completion of the investigation, a notice advising MEC Majodina of evidence in my possession that could lead to adverse findings against her was issued on 26 September 2014. MEC Majodina responded to the section 7(9) notice with a letter dated 02 October 2014.

(xiv) In determining whether the conduct of MEC Majodina was in violation of the Code as alleged, I sought guidance from the regulatory framework setting standards for ethical conduct for Members of the Executive. I also took into account the general regulatory framework for the management of and ensuring accountability for public finances. Key laws, policies and prescripts taken into account in this regard, were the following:

(a) Clause 2 of the Code issued by the President on 28 July 2000 in pursuit of section 2 of the Executive Members' Ethics Act, 1998 published by the President and amended on 7 February 2007, sets out the standards that the Members of the Executive must comply with, and provides the following:

1. General Standards

   ...

2.1 Members of the Executive must to the satisfaction of the President or the Premier, as the case may be:

   (a) ... 

   (b) ... 

   (c) Act in good faith and in the best interest of good governance and

   (d) Act in all respects in a manner that is consistent with the integrity of their office or the government.

2.2 In deciding whether members of the Executive complied with the provisions of clause 2.1, the President or Premier, as the case may be, must take into account
the promotion of an open, democratic and accountable government (my emphasis)

(b) In determining the amount MEC Majodina was lawfully entitled to, I sought guidance in the Ministerial Handbook issued by the President in 2007 and amended over the years, and which states that:

i. Paragraph 7.2.1(b) of the Ministerial Handbook provides that:

"A daily accommodation and subsistence allowance may be paid to Members, and Spouses accompanying them in official capacity, on official visits abroad. They may:

a. ...

b. receive a daily allowance (i.e. for three meals and other incidental expenditure such as tips, room service, reading material and normal liquid refreshments) equal to 110% of the daily allowance payable to Directors-General during visits abroad. Should the daily allowance be insufficient, their reasonable actual expenditure on meals may be reimbursed and an additional daily allowance for incidental expenditure equal to the amount applicable to Directors-General as determined from time to time by the Department of Public Service and Administration, is payable to them."


(d) It must be further noted that the preface of the Ministerial Handbook specifically states that anything not mentioned in the Financial Manual
Guidelines does NOT form part of the benefits, allowances and support services envisaged for Political Office Bearers.

(e) The General standards contained in the Ministerial Handbook further provide that members "may NOT make improper use of any allowance or payment properly made to them, or DISREGARD the administrative rules, which apply to such allowances or payments." (my emphasis). It must be noted that the wording in quotation marks is directly lifted from paragraph 2(h) of the Executive Ethics Code.

(f) In assessing the propriety of MEC Majodina's conduct, I also took into account Public Protector Touchstones being principles established in cases my office has dealt with previously, relating to alleged excesses in the use of executive privileges. Key reports that informed my thoughts as I assessed the propriety of MEC Majodina's conduct in this regard, include the Ethics of Staying in Comfort (Report No. 7 of 2011/12), In the Extreme (Report No. 11 of 2011/12, Free Money for All (Report No. 13 of 2012/13), Costly Moves (Report No. 3 of 2012/13), Inappropriate Moves (Report No. 13 of 2013/2014) and Secure in Comfort (Report No. 25 of 2013/14).

(g) The benchmarking against principles applied or established in previous reports dealing with similar questions or issues, is to ensure consistency and, accordingly, fairness, which promotes good governance in the entire state system. Key principles that emerged from previous reports, include an understanding that public resources must always be dealt with lawfully, for legitimate purposes and in the public interest and that public functionaries are only entitled to benefits as state employees that are prescribed or permitted by law. Consequently, a public authority may not exercise power he or she does not have, including the award of benefits to another. Whereas a public authority or an administrator is given discretionary power, he or she may not exceed the boundaries of such authority and must exercise such entrusted power only for
the purposes it was granted and do so in good faith and in a rational and justifiable manner. The principles established also include restorative justice, incorporating paying back funds or resources unduly paid or received with a view to eschewing unlawful or unjust enrichment of self and others at the expense of the populace. The latter is part of the principle of redress captured in the Batho Pele principles and, I believe, is in line with the spirit underpinning the Constitutional’s court’s pronouncement in Khumalo and Another versus the MEC of Education in KwaZulu-Natal quoted in the opening paragraph. In the Khumalo case the MEC was told that the responsibilities of public functionaries include redressing an irregularity that is brought to their attention. The court said, in part “[A]s bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it”

(h) With regard to the general regulatory framework for the proper management of and accountability for public funds, I leaned heavily on the Public Finance Management Act No 3 of 1999 (PFMA), which states its aim as to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies. I particularly took into account the responsibility placed by the PFMA on accounting officers to recover misappropriated public funds.

(i) I relied on the PFMA cautiously while bearing in mind that it does not specifically regulate the conduct of Members of the Executive. I used the PFMA as a benchmark with the understanding that when an MEC gives instructions or interacts with an HoD or other administrative staff in connection with public funds, the MEC or any Public Office Bearer, has a duty to ensure that such

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2 2014 (3) BCLR 333 (CC)
interaction does not encourage or condone the violation of the PFMA or any other law.

(j) Having established that the Head of Department (HoD) in MEC Majodina's office, had condoned the overpayment to MEC Majodina once it was established that there had indeed been such overpay, I also considered the legality of such condonation. To achieve this, I sought guidance from the regulatory framework for rehabilitating irregular expenditure. I was particularly guided by section 38 of the PFMA. In this regard I have noted that the PFMA does not give the HoD the powers to condone such expenditure. I also took into account that such conduct would have been an exercise of discretionary power by the HoD and that discretionary power has to conform to the principle of legality, among other things.

(k) One of the ethical considerations in determining whether the purported condonation constitutes proper exercise of discretionary power, was the appreciation of the principle that you cannot give a gift that is not yours to give and, specifically, that in exercising discretionary power, an administrator may not unduly rob the populace to enrich or improperly benefit anyone. In this regard, I considered the provisions of clause 2.3 (d) of the Executive Ethics Code which states that "Members of the Executive may not use their position or any information entrusted on them, to enrich themselves or to improperly benefit any other person." I also took into account that section 6(4)(a)(iv) of the Public Protector Act, 1994 which regards improper conduct in state affairs as including:

"Improper or unlawful enrichment, or receipt of any improper advantage, or promise, by a person as a result of an act or omission in the public administration or in connection with the affairs of the government at any level or of a person exercising a public function;..."

It is worth noting though that MEC Majodina herself does not seek condonation as she believes she was entitled to the additional R15 000, 00 as S&T.
(xi) My approach to possible remedial action was informed by the ethical principle of redress, which has been embraced by the government of South Africa as part of the Batho Pele (People First) principles and the power given to me by section 182(1)(c) of the Constitution, the supreme law of our land, "to take appropriate remedial action." I was also informed by the discretionary power I have under the Public Protector Act to do whatever I deem appropriate, within the confines of the law, to redress the consequences of maladministration and other forms of improper conduct in state affairs.

(xii) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

(a) Whether MEC Majodina was improperly given an excessive S&T allowance, including an advance, during her trip to New York:

(aa) The allegation that MEC Majodina was improperly given an excessive S&T allowance, including an advance, during their trip to New York, is substantiated.

(bb) MEC Majodina received R18 721.00 for her trip to New York, which exceeds the R10 603.58 she was entitled to, inclusive of all meals and incidentals, for 8 days in terms of paragraph 7 of the Handbook for Members of the Executive and Presiding Officers (Ministerial Handbook) read with the Financial Manual for The Purposes of the Calculation and Application of Allowances and Benefits (Financial Manual) issued by the DPSA in July 2012. The Ministerial Handbook entitles MEC Majodina and other Members of the Executive travelling abroad, to a daily allowance equal to 110% of that determined by the
Financial Manual as the daily rate for Directors-General (DGs). In July 2012, the rate was determined as $US145 or R1 325.45 per day, covering breakfast, lunch, dinner and other incidentals.

(cc) MEC Majodina initially received R3 721.25, which was based on the HoD having deducted the cost of breakfast and dinner from the R10 603.58 as these had been prepaid to her hotel by the Department through the travel agent. On request, MEC Majodina was paid a further R15 000.00, which according to the authorising memo, was meant for 5 lunches, calculated with the help of a travel agent, at R3000.00 per lunch.

(dd) The process followed in paying MEC Majodina an additional R15 000.00 to top up the amount initially given at the commencement of the trip, was irregular as it did not comply with the provisions of paragraph 7 of the Ministerial Handbook prescribing that the cost of incidentals in excess of the prescribed daily allowance paid to Members of the Executive for international travel be claimed back by them on return from their trips.

(ee) As the daily rate is peremptory, no one had authority to pay or authorise the payment of a higher amount to MEC Majodia than that stipulated in the Ministerial Handbook read with the Financial Manual. In fact, quite the opposite, the Annexure to the Financial Manual, recommends that consideration be given to the proportionate reduction of a Member’s S&T allowance if some of the meals have been prepaid. This, presumably, is to prevent the double billing of the state through S&T and the hotel bill via the travel agent.
(ff) While the evidence regarding whether or not MEC Majodina demanded the additional R15,000.00 was inconclusive, by accepting the excessive amount and participating in the irregular process, the conduct of MEC Majodina amounts to collusion in the misappropriation of public funds in violation of the *Ministerial Handbook*, the PFMA and section 6(4)(a)(iv) of the Public Protector Act, 1994.

(b) Whether MEC Majodina improperly failed to refund public moneys she owed in respect of her trip to New York:

(aa) The allegation that MEC Majodina improperly failed to refund public moneys owed in respect of her trip to New York, is substantiated.

(bb) MEC Majodina did not refund the excess public funds irregularly paid to her in connection with her trip to New York despite having been aware of the misappropriation of funds in her favour and her consequent undue enrichment at state expense.

(cc) The HoD purportedly condoned the overpayment thus granting permission to MEC Majodina not to pay back the owed money. Such condonation is unlawful in so far as it exceeded the lawful authority of the HoD. While the *Financial Manual’s* provision that consideration must be given to reducing S&T paid by the amount already paid to the hotel for meals can be regarded as giving discretionary power to waive such reduction when there is justification for such, the daily rate on the other hand, is peremptory thus leaving the HoD with no discretionary power. In any event, legitimate exercise of discretionary power must be
logical, rational and justifiable. In other words there must be a sound explanation for the decision.

(dd) The purported condonation of the amount paid in excess of the prescribed daily allowance by the HoD is further negated by the fact that the reasons given for such condonation are questionable as the MEC appears never to have personally requested it or offered the information used in the memo, including the submission that she lost receipts. She has maintained that she never got an advance, the R15 000.00 was additional S&T and that she never thought she needed receipts and never kept them.

(ee) The purported condonation was inconsistent with the principles of administrative law, which include a requirement that discretionary power be exercised in good faith, within the confines of the law granting such power, in a manner consistent with the purposes of the granting of such power and in the public interest. It clearly is not in the public interest to rob the populace to unlawfully enrich or grant an improper advantage to another with public funds.

(ff) As the HoD’s conduct fell outside the powers granted under the *Ministerial Handbook*, and the PFMA, among others, and was further unjustifiable, and arbitrary, such conduct was accordingly unlawful and invalid.

(c) Regarding whether the conduct of MEC Majodina relating to the processing of the S&T and non-repayment or account for the additional payment she received for her trip to New York in September 2012 was inconsistent with relevant provisions of the *Ministerial Handbook* and
accordingly constitutes unethical conduct in violation of the Executive Ethics Code, the Executive Members' Ethics Act and section 136 of the Constitution:

(aa) The MEC's conduct, particularly regarding failure to pay back the overpaid allowance amount for the overseas trip to New York and insistence that it was S&T when she should know the provisions of the Executive Ethics Code and Ministerial Handbook regarding what she is lawfully entitled to, constitutes acquiescence in the misappropriation of public funds for her "improper or unlawful enrichment" as envisaged in section 6(4)(a)(iv) of the Public Protector Act or enriching herself as envisaged in Clause 2.2(c) of the Code and disregard for administrative rules which apply to the payment of Executive Members' allowances as envisaged in Clause 2.2 (h) of the Code. Such action is inconsistent with her position and constitutes unethical conduct as envisaged in Paragraph 2 Section 1 (i)(d) and (iii)(b) of the General Standards of Executive Ethics Code and the Section 136(2) of the Constitution, 1996. The conduct further constitutes improper conduct under Section 182 of the Constitution, 1996.

(bb) I must indicate that I find MEC Majodina's failure to rectify the mistake even after it was uncovered, discomforting. MEC Majodina, who is bound by and should know the Executive Ethics Code and the Ministerial Handbook insists on her own definition of S&T outside the one in the Ministerial Handbook and insists to date that she did nothing wrong. This case being principally an issue of employment benefits for Members of the Executive and thus an employment matter, I found the views of the Constitutional Court in the Khumalo case apposite. In my view, making a mistake does not always constitute unethical conduct but contemptuous refusal to rectify a mistake may be at the heart of unethical conduct. It is my respectful point of view that once MEC Majodina knew she had been given benefits transcending what was permissible, it was
incumbent on her to take responsibility for correcting the mistake and her failure to do so was inconsistent with the ethical dictates of her role as a Member of the Executive and accordingly one of the stewards entrusted with public power and collective resources of the people of South Africa. Through her inaction, she failed to show good faith as required of her by the Executive Ethics Code. I must also add that her stance potentially sets a bad example for officials that may take or receive staff benefits exceeding what is permitted and may be required to pay back the excessive portion or part thereof. Her conduct is accordingly inconsistent with the requirements of her office as envisaged in the Executive Ethics Code, Executive Members' Ethics Act and, ultimately, sections 136 and 195 of the Constitution. The conduct is accordingly not only unethical but unlawful and unconstitutional.

(xiii) The appropriate remedial action as envisaged in section 182(1)(c) of the Constitution is to call on:

(a) The Premier is to consider taking disciplinary action against of MEC Majodina for the violation of the provisions of the Executive Ethics Code referred to in this report;

(b) The HoD, within 30 days of receipt of this report, is to:

(aa) Rescind the unlawful condonation of MEC Majodina's debt and then take the appropriate action to recover from MEC Majodina the irregular expenditure. This must include regularising the Department's exercise of discretionary power whether or not to deduct the prepaid breakfast and dinner from the S&T amount of that she is lawfully entitled to.

(bb) Investigate the circumstances of the money alleged to be owed by MEC Majodina for her New York trip in February 2012 and take appropriate action in terms of the PFMA.
(cc) Establish if any other public functionary in the Department, including Ms Nozibele Majikija, received more S&T and related travelling allowances and rectify any found irregularity.

(c) The Director-General in the Office of the Premier is to:

Ensure that all provincial departments, including the Office of the Premier, have an approved policy framework to regulate official travel abroad on or before 30 April 2015.

(d) The Public Protector will approach the National Treasury and the DPSA with a view to commissioning a study into S&T practices and establishing if there is uniformity and to eliminate any overpayments that may be taking place due to a misinterpretation to the travel allowance regulatory framework.
A REPORT ON AN INVESTIGATION INTO ALLEGED MISAPPROPRIATION OF FUNDS RELATING TO THE PAYMENT OF SUBSISTENCE AND TRAVEL ALLOWANCE TO HONOURABLE PEMMY MAJODINA FORMER MEMBER OF THE EXECUTIVE COUNCIL (MEC) FOR THE EASTERN CAPE DEPARTMENT OF SOCIAL DEVELOPMENT AND SPECIAL PROGRAMMES FOR AN OVERSEAS TRIP

1. INTRODUCTION

1.1 "PERMITTED BENEFITS" is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 8(1) of the Public Protector Act, 1994 (Public Protector Act), the Executive Members’ Ethics Act, 1998 (the EMEA) and the Executive Ethics Code, (the Code) following an investigation into alleged unethical conduct by Honourable Pemmy Majodina, MPL, involving misappropriation of funds relating to the payment of travel allowances for a trip to New York, while serving as Member of the Executive Council (MEC) responsible for Social Development and special Programmes in the Eastern Cape.

1.2 The report is submitted to:

1.2.1 Honourable Mr Phumulo Masualle MPL, the Premier of the Eastern Cape Province;

1.3 Copies of the report are also provided to the following:

1.3.1 The Speaker of the Eastern Cape Provincial Legislature;

1.3.2 The Secretary to the Eastern Cape Provincial Legislature;

1.3.3 The Director-General of the Eastern Cape Province;

1.3.4 Honourable Ms. Pemmy Majodina, MPL; and
1.3.5 Mr. Samson Kwelita, MPL (the Complainant).

1.4 MEC Majodina has since moved to the portfolio of MEC for Sport Recreation, Art and Culture

2. THE COMPLAINT

2.1 Mr. Samson Kwelita, MP and leader of COPE in the Eastern Cape Provincial Legislature, lodged a complaint in terms of Section 4(1) of the Executive Members Ethics Act on 28 September 2012, alleging that Hon Ms Pemmy Majodina had acted unethically in violation of the Executive Ethics Code in that she misappropriated public funds for her own benefit by demanding more than four (4) times the prescribed S&T allowance in respect of her trip to New York on 12-14 September 2012.

2.2 The Complainant followed shortly after allegations published in the Daily Dispatch Newspaper on 22 September 2012 in an article titled “MEC in travel row again” and on 24 September 2012 in an article titled “Travel row brought before protector”. Allegations were also later depicted in a cartoon strip in the same newspaper (Daily Dispatch) on 26 September 2012 with the title “Pemmy- Antoinette”.

2.3 The Complainant principally alleged that MEC Majodina had acted unethically in violation of the Executive Ethics Code by causing her Department to misuse public funds in her favour in that she had asked for an additional R15 000.00 paid to her as lunch money on the advice of a travel agent that had been asked to provide a quote for such lunch. This meant to top up an amount of R3 711.00 which had been duly paid to her as her as S&T allowance. It was alleged that the total amount she received after being given the additional R15 000.00 was impermissible in the light of guidelines issued by the Department of Public Service and Administration(DPSA) on 12 July 2012 and which were applicable to Members of the Executive.
2.4. On receipt of the Complaint, MEC Majodina was approached with a request to respond to the allegations and to present her version of events. She conceded receiving two amounts of money, being R3 711.25 and R15 000.00, as alleged, for her 8 day trip. She also confirmed that her department initially gave her R3 711.25 and later paid her an addition R15 00.00 at her request. She also conceded that she had neither paid back any money nor submitted any receipts to account for the expenditure of the R15 000.00. She explained that she acted in the manner she did as she understood the additional R15 000.00 to have been additional S&T for her and not requiring accountability or change to be given to her Department.

2.5. Hon Majodina, however denied any wrongdoing, stating, in her final letter to me dated 02 October 2014:

"I still maintain that I did not do anything wrong, this was not my first trip undertaken as Public Representative I was never given an advance but S&T. I was never demanded or requested receipts upon coming. (sic) Had I known that I could have kept them."

2.6 I accordingly did not have much to determine with regard to factual disputes. The investigation principally focussed on establishing the circumstances under which the monies in question were paid and implications for legality and ethical obligations of MEC Majodina as a Member of the Executive whose conduct is regulated by the Executive Ethics Code, among other compliance frameworks regulating proper or permissible use of public funds.
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The matter was principally investigated in terms of the powers conferred on the Public Protector by the Executive Members’ Ethics Act read with the Public Protector Act and sections 181 and 182 of the Constitution.

3.2 The Public Protector is an independent constitutional body established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.3 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.4 Section 3 of the Executive Members’ Ethics Act, 1998, (the EMEA) provides that: "The Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint contemplated in section 4."

3.5 Section 4(1)(a) of the EMEA provides that: "The Public Protector must investigate, in accordance with section 3, an alleged breach of the code of ethics on receipt of a complaint by … a member of the National Assembly."

3.6 Section 3(2)(b) of the EMEA provides that the Public Protector must report to the Premier on an investigation into a violation of the Executive Ethics Code by a Member of the Executive Council.
3.7 Section 3(4) of the EMEA states that when conducting an investigation, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act.

3.8 The Public Protector Act firstly recognises the constitutional powers of the Public Protector regarding investigating, reporting on and taking appropriate action to remedy identified wrongs in state affairs. In pursuit of section 182(4) of the Constitution, the Public Protector Act confers additional powers on the Public Protector, which include powers ancillary to investigating, incorporating the power to subpoena people and information in connection with an investigation and the power to determine the format of proceedings. The Public Protector Act further outlines, in section 6, various forms of improper conduct, which include maladministration, abuse or unjustifiable exercise of power, corrupt activities and improper or unlawful enrichment.

3.9 The additional powers conferred by the Public Protector Act (section 6), include the authority to resolve any dispute or rectify any act or omission through conciliation, mediation; negotiation, advice to the complainant, and any other measure the Public Protector deems expedient in the circumstances. He or she may also refer matters to the relevant authority charged with prosecutions, if, in his or her opinion, the facts disclose the commission of an offence.

3.10 Section 8 of the Public Protector Act regulates the process to be followed once a report of the Public Protector has been finalised and findings made. This includes the discretion to give the report to appropriate authorities, the complainant and implicated persons. It must be noted though, that when the Public Protector investigates under the EMEA, he or she wears two hats and has a responsibility to give the report to the President, or Premier, whom ever is applicable, in addition to distributing the report as he or she deems fit in the exercise of her discretion under section 8 of the Public Protector Act.
3.11 The Public Protector's power and jurisdiction, including the constitutional authority to take appropriate remedial action, were not disputed by any of the parties. It is particularly important to note that in a notice I sent to MEC Majodina in pursuit of my duties under section 7(9) of the Public Protector Act, (Section 7(9) Notice), I indicated possible outcomes based on the evidence I had then without eliciting any challenge to my powers. No concerns were raised about the process followed.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 While the investigation was conducted principally in terms of sections 3 and 4 of the Executive Members' Ethics Act and within the broad framework of section 182 of the Constitution, consideration of possible ethical violations took into account the list of possible acts of improper conduct in section 6 of the Public Protector Act. In this regard, particular attention was paid to provisions relating to proper use of public money, among them being section 6(4)(iv) of the Public Protector Act.

4.1.2 The investigation process was principally guided by section 7 of the Public Protector Act, which confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. This section also gives the Public Protector authority to on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of the Public Protector Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.
4.1.3 At the conclusion of a preliminary investigation, which included responses to correspondence to the Department and MEC Majodina, I concluded that there was a basis for a formal investigation, and proceed to undertake one. The investigation process included correspondence, interviews and the sourcing and application of relevant laws and related prescripts. The prescripts in question were principally those seeking to foster ethical conduct among members of the executive and those regulating executive privileges, with a focus on the regulation of travel allowances.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation, through interviews, meetings and documents. In this particular case, the factual enquiry principally focused on whether or not the MEC acted improperly in relation to the usage of the emergency medical helicopter as there was no dispute that the trip in question was undertaken.

4.2.3 The enquiry regarding what should have happened, focused on the law or rules that regulate the ethical standard that should have been met by the MEC as regulated by
the Executive Ethics Code and other regulatory frameworks with implications for applicable ethical standards.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing injustice or prejudice suffered or damage caused as a consequence of improper conduct involving maladministration, unethical conduct or any other impropriety. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration. The same is done where the wrongful conduct negatively affects the general populace. However, in appropriate circumstances, the remedial or corrective action primarily seeks to prevent a recurrence.

4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether MEC Majodina was improperly given an excessive S&T allowance during her trip to New York?

4.3.2 Whether MEC Majodina improperly failed to refund public money owed to her Department following her trip to New York?

4.3.3 Whether the conduct of MEC Majodina relating to the processing of the S&T and non-repayment or account for the additional payment she received for her trip to New York in September 2012, was inconsistent with relevant provisions of the Ministerial Handbook and accordingly constitutes unethical conduct in violation of the Executive Ethics Code, the Executive Members’ Ethics Act and section 136 of the Constitution?
4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 Letter of invitation from the National Deputy Minister for Women, Children and Persons with Disabilities, Hon. Bogopane Zulu, and dated 15 July 2012 to the former MEC, Pemmy Majodina;

4.4.1.2 The Letter of request sent to the former Premier, Ms. Noxolo Kiviet from the former MEC, Pemmy Majodina, dated 06 August 2012 list of applicants for the position of CFO;

4.4.1.3 The Quotation from Aloe Travel Agent for the trip dated 15 August 2012;

4.4.1.4 Calculations for S&T for September for the former MEC, Pemmy Majodina, dated 23 August 2012;

4.4.1.5 Letter of request from HoD, Mrs Hackula to CFO, Mr Adonis for the payment of an advance dated 05 September 2012;

4.4.1.6 Payment advice slip for the payment of advance to former MEC, Pemmy Majodina, dated 06 September 2012;

4.4.1.7 Bas Payment stub of an advance to former MEC, Pemmy Majodina, dated 12 September 2012;

4.4.1.8 Notification Letter of debt of S&T for February 2012 for MEC, Pemmy Majodina, dated 03 May 2012;

4.4.1.9 Expenditure approval for Ms. Majikija’s S&T; and Basic Accounting System (BAS) travel and subsistence form with calculations for Ms. Majikija dated 21August 2012; and

4.4.1.10 Report by MEC to HoD on the 07 November 2012.
4.4.2 Interviews

4.4.2.1 Interview conducted with the complainant on 13 November 2012;

4.4.2.2 Interviews with the HoD and CFO of the Department on 14 November 2012;

4.4.2.3 Interviews with Officials from the Department on 14 November 2012; and

4.4.2.4 Interviews with Officials in the Office of the Premier on 10 December 2012.

4.4.3 Correspondence sent and received

4.4.3.1 Letter dated 09 November 2012 from the HoD to the Public Protector providing documents requested;

4.4.3.2 Letter of response dated 29 November 2012 from the office of the Director-General; and

4.4.3.3 Response dated 02 October 2014 to Letter in terms of Section 7(9) of the Public Protector Act by the former Member of the Executive (MEC) for the Eastern Cape Department of Social Development and Special Programmes.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996;

4.4.4.2 The Handbook for Members of the Executive and Presiding Officers, 2007;

4.4.4.3 Executive Members’ Ethics Act, 82 of 1998

4.4.4.4 The Executive Ethics Code of 2000 as amended;

4.4.4.5 The Public Finance Management Act, 1 of 1999;

4.4.4.6 The Financial Manual for Purpose of the Calculation and Application of Allowances and Benefits issued by the DPSA and dated July 2012;

4.4.4.7 The Public Protector Act 23 of 1994;

4.4.4.8 Khumalo versus MEC of Education in KwaZulu-Natal 2014(3) BCLR 333 (CC);
4.4.4.8 Visser Daniel *Unjustified Enrichment* Juta (2008; and


5. THE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 Regarding the S&T allowances that were permissible for the trip to New York:

*Handbook for Members of the Executive and Presiding Officers (Ministerial Handbook, 2007)*

5.1.1 As indicated earlier, the enjoyment of travel allowances by Members of the Executive is principally regulated by the *Ministerial Handbook* issued by the President in 2007 and amended periodically.

5.1.2 Paragraph 7.2.1(b) of the *Ministerial Handbook* provides that:

"A daily accommodation and subsistence allowance may be paid to Members, and Spouses accompanying them in official capacity, on official visits abroad. They may:

a. ...
b. receive a daily allowance (i.e. for three meals and other incidental expenditure such as tips, room service, reading material and normal liquid refreshments) equal to 110% of the daily allowance payable to Directors-General during visits abroad. Should the daily allowance be insufficient, their reasonable actual expenditure on meals may be reimbursed and an additional daily allowance for incidental..."
expenditure equal to the amount applicable to Directors-General as determined from time to time by the Department of Public Service and Administration, is payable to them."

5.1.3 It should be noted that the Executive Ethics Code does not list the rates applicable to the respective countries with regard to Subsistence and Travel allowances. The rates are determined from time to time by the Department of Public Service and Administration and are provided for in the Financial Manual for the Purposes of the Calculation and Application of Allowances and Benefits (hereinafter referred to as the DPSA Financial Manual 2012) which is revised on a yearly basis. The applicable DPSA Financial Manual relevant to this investigation is the one issued by the Minister for Public Service and Administration and dated July 2012.


5.1.4 Paragraph 2 of Annexure A to the DPSA Financial Manual 2012 provides as follows:

"The amounts set out in the table hereunder are maximum amounts. Therefore when accommodation expenditure and related expenses are wholly or partially sponsored by a donor or sponsor, or where part of the meals (e.g. breakfast included in hotel accommodation expenses) is paid by the Employer, the payment of reduced special daily allowance must be considered.

Due to the above, it is advisable to have a departmental policy on the payment of such reduced amounts. In the formulation of such policy, departments are strongly advised to consider the following breakdown of the special daily allowance to determine the reduced special daily allowance to be paid:"
2.1 Incidental expenses (15%)
2.2 Breakfast (20%)
2.3 Lunch (20%)
2.4 Dinner (45%)"

5.1.5 The amount relevant to this investigation in relation to the trip to the United States of America (US) by MEC Majodina as provided for in Paragraph 2 of Annexure A to the DPSA Financial Manual 2012 is 145 United States Dollars (US$145). This amount is 110% of the rate for the HoDs mentioned in the First Schedule of the Public Service Act or employees accompanying a Minister or Deputy Minister.

5.1.6 The S&T is then calculated in terms of the following formula:

\[ \text{US$145} \times 110\% \times \text{the applicable exchange rate of the Rand to the Dollar at the time} \times \text{the number of days and hours spend in that country} \]

5.1.7 The S&T payable for a trip to the US by the former MEC calculated for one (1) day for the relevant period would then be as follows:

\[ \text{US$145} \times 110\% \times 8,31002 \times 1 \]
\[ = R1 \, 325.45 \]

*In case of two (2) days:*
\[ \text{US$145} \times 110\% \times 8,31002 \times 2 \]
\[ = R2 \, 650.90 \]

*In case of eight (8) days:*
\[ \text{US$145} \times 110\% \times 8,31002 \times 8 \]
= R10 603.59

5.1.8 It is, accordingly, safe to conclude that for the 8 day trip, the Ministerial Handbook only authorised that Ms Majodina be given R10 603.59 and, in the event, she spent more on incidentals than anticipated, reimbursement for such further expenses on returning to the office.

5.1.9 However, as indicated above, where part of the meals (e.g. breakfast included in hotel accommodation expenses) is paid by the employer, the payment of a reduced special daily allowance must be considered. The question for my determination was whether the reduction of the daily allowance was peremptory. I concluded that the peremptory part, implied in the word "must" applies to the duty to give consideration to the reduction but the reduction itself is not a must do or peremptory. It must be accepted though that such reduction is logical in the circumstances and, accordingly, highly advisable, the idea being that the Department should not unduly pay double for the same benefit, being the meals already paid for through the hotel booking.

5.1.9 As the investigation progressed, allegations were made that Ms Nozibele Majikija, MEC Majodina’s Chief of Staff at the time, and who accompanied her during the September trip to New York also got more S&T than permissible under the Financial Manual. I deal with this matter in the remedial action.

5.1.10 The General standards contained in paragraph 2.3(g) of Chapter 1 of the Ministerial Handbook (the Executive Ethics Code) provide that members may not make improper use of any allowance or payment properly made to them or disregard the administrative rules which apply to such allowances or payments.

5.1.10.1 Regarding the requirements for receiving or asking for more than the stipulated daily allowance, paragraph 7.2.3 of Chapter 3 the real expenditure on
gratuities, newspapers etc. whereas Paragraph 7.2.5 requires accommodation and subsistence expenses to be kept as low as possible.

5.1.10.2 General standards contained in paragraph 2.3(g) of Chapter 1 of the Ministerial Handbook (the Executive Ethics Code) provide that members may not make improper use of any allowance or payment properly made to them or disregard the administrative rules which apply to such allowances or payments.

5.1.10.3 Paragraph 1.1 of Chapter 3 of the Ministerial Handbook stipulates that allowances of Members including expenses, lawfully attributable to the State, should be paid from the Medium Term Expenditure Framework budget of the relevant Department.

5.1.10.4 Paragraph 7.2 of Chapter 3 deals with subsistence and travel allowances for international travel. This paragraph allows for an accommodation and subsistence allowance to be paid to Members in respect of visits abroad and may be in respect of reasonable actual accommodation expenses and a daily allowance equal to 110% of the daily allowance payable to Directors General during visits abroad. In the event that the daily allowance is insufficient the actual reasonable cost of the meal may be reimbursed and an additional daily allowance equal to the amount a Director-General as determined by the Department of Public Service and Administration.

5.1.11 The Financial Manual for Purpose of the Calculation and Application of Allowances and Benefits issued by the DPSA and dated July 2012 provides that:

5.1.11.1 When accommodation and related expenses are wholly or partially sponsored by a donor or sponsor, or where part of the meals is paid by the Employer, the payment of a reduced special daily allowance must be considered. If this is read with other regulatory frameworks, including section 195 of the Constitution, requiring
economic and efficient use of Public resources, viewing this provision as peremptory is justified.

5.1.11.2 Departments are strongly advised to consider special daily allowance to determine the reduced special daily allowance to be paid:

(i) Incidental expenses (15%)
(ii) Breakfast (20%)
(iii) Lunch (20%)
(v) Dinner (45%)

5.1.11.3 However, my considered view is that the peremptory part in the wording “must be considered” relates to giving due consideration to the reduction. It appears that the outcome of “giving due consideration” is open to different possibilities, including justified non-reduction. If this approach is correct that means, there may be circumstances where the non-reduction of the cash part of a person’s S&T allowance may be justified.

5.1.11.4 It is important though to note that due consideration means more than a cursory look at possible reduction and requires the decision-maker or competency exercising discretionary power to act in good faith. The decision not to reduce must comply with principles of administrative law, including rationality, good faith and reasonableness in the circumstances. Above all, as public power is a form of entrusted power thus bestowing stewardship of public functionaries, my sense of the standard imposed on decision makers exercising discretionary power is that the dictates of the Constitution, including section 195 and 136, should inform such exercise of discretion.
5.2 Regarding MEC Majodina's alleged improper failure to refund public moneys owed following their trip to New York:

5.2.1 Whether the former MEC discharged the obligations flowing from her request for an extra S&T allowance of R15 000.00 for the overseas trip to New York in September 2012.

5.2.1.1 Section 136(1) of the Constitution provides that Member of the Executive Council must act in accordance with a Code of Ethics prescribed by National Legislation. The Code of Ethics referred to will be discussed hereunder at paragraph 5.2.1.3.

5.2.1.2 In terms of section 136(2), Members of the Council may not

(a) …
(b) Act in any way that is inconsistent with their office, or ……

5.2.1.3 The Executive Ethics Code contemplated by the Executive Members' Ethics Act published by the President on 28 July 2000 and amended on 7 February 2007 should also have been adhered to, in this regard Clause 2 of the Code sets out the standards that the Members of the Executive must comply with.

"1. General Standards

(i) Members of the Executive must to the satisfaction of the Premier
(a) Perform their duties and exercise their powers diligently and honestly
(b) Fulfil all the obligations imposed upon them by the Constitution and law.
(c) Act in good faith and in the best interest of good governance and
(d) Act in all respects in a manner that is consistent with the integrity of their office or the government.
(ii) In deciding whether members complied with the provisions of clause (paragraph) above the premier must take into account the promotion of an open, democratic and accountable government.

(iii) Members may not-
(a) ...
(b) Act in a way that is inconsistent with their position
(c) ...
(d) ...

5.2.2 Regarding the law, MEC Majodina principally had to act within the confines of the PFMA although being not an accounting office, is the PFMA. In requesting additional S&T as she saw it, for example, she should have done so in terms of the provisions of the section 64(1) of PFMA which provides that any directive by an Executing Authority of a department to the accounting authority of the department having financial implications for the department must be in writing. Her obligations, I believe, included the duty to ensure she is not part of irregular and/or fruitless and wasteful expenditure.

5.2.3 If we accept that the payment of travel allowances to public functionaries such as MECs is an employment matter, then the pronouncement of the Constitutional Court in Khumalo versus MEC of Education in KwaZulu Natal offers some guidance regarding the duty of public functionaries to correct an irregularity that has come to their attention. I consider the remarks particularly apposite regarding determining if MEC Majodina had any duty to return or refund a benefit improperly given to her having failed to proof that she deserved the benefit (R15 000.00) by virtue of having spent than the R3 711.25 S&T originally allocated to her by her office.

5.3 Regarding whether the conduct of the former MEC relating to the entire processing of the S&T allowance for the trip to New York in September 2012, including neither refunding no accounting for the additional R15 000.00
received, was in violation of the Ministerial Handbook, the Executive Members’ Ethics Act and the Constitution:

5.3.2 The Executive Ethics Code contemplated by the Executive Members Ethics Act published by the President on 28 July 2000 and amended on 7 February 2007 should also have been adhered to. In this regard Paragraph 2 of the Code sets out the standards that the Members of the Executive must comply with. Paragraph 2 section 1 of the General standards of Executive Ethics Code provides that:

"(l) Members of the Executive must to the satisfaction of the Premier:

(a) Perform their duties and exercise their powers diligently and honestly
(b) Fulfil all the obligations imposed upon them by the Constitution and law.
(c) Act in good faith and in the best interest of good governance and
(d) Act in all respects in a manner that is consistent with the integrity of their office or the government."

5.3.3 Members of the Executive, at whatever level, are, accordingly required to act lawfully and in compliance with the Constitution. It’s worth noting that as a Member of the Executive MEC Majodina was required to fulfil all obligations imposed on her by the Constitution and the law in addition to acting in good faith and in the interest of good governance.

5.3.4 Obligations imposed on Provincial Members of the Executive include the duty to act ethically enshrined in section 136 (1) of the Constitution. Part of the ethical duty imposed on them is the negative duty imposed by section 136(2)(c) not “to enrich themselves or improperly benefit any other person.” It is my considered view that the duty not to enrich yourself includes not placing yourself in a position of receiving undue benefits at state expense and returning as soon as possible, whatever you may have received unduly and accordingly unjustly. The duty imposed by section 136(2)(c) of the Constitution is not dissimilar to the principle of unjustified enrichment
in civil law. Restoring a benefit that is not deserved applies even if obtaining such benefit was due to no fault of the undeserving recipient.

5.5.4 Ultimately, MEC Majodina had to comply with the Executive Ethics Code. The sections with key relevance to the present case include the provisions of clause 2.3(d) of the Executive Ethics Code which states that “Members of the Executive may not use their position or any information entrusted on them, to enrich themselves or to improperly benefit any other person.”

5.5.4 Section 6(4)(a)(iv) of the Public Protector act regards improper conduct in state affairs as including:

“Improper or unlawful enrichment, or receipt of any improper advantage, or promise, by a person as a result of an act or omission in the public administration or in connection with the affairs of the government at any level or of a person exercising a public function;...”

5.5.5 The pronouncement of the Constitutional Court in Khumalo versus the MEC of Education in KwaZulu-Natal is worth considering with regard to assessing whether MEC Majodina has a duty to pay back any money should it be determined that it was unduly received. In the Khumalo case, the Constitutional Court, it considered section 195 of the Constitution as imposing a duty on public functionaries to correct an irregularity that is brought to their attention. Incidentally that case dealt with employment and in my view, the question of the permissible usage of executive privileges, including travel allowances by Members of the Executive qualifies to be viewed as an employment matter. The relevant part of the Khumalo case though, is its reference the duty to redress or correct an irregularity, which the Constitutional Court said is imposed by section 195 of the Constitution on public functionaries “in the context of employment or, otherwise” should they be aware of such irregularity.
5.5.6 The relevant part of the Constitutional Court judgement in the Khumalo case is where it says the following:

"1. "Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a).

2. These provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.

3. ....As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it."³

5.6 Principles from Previous Reports of the Public Protector (Touchstones)

5.6.1 Public Protector Touch Stones, which are principles used or established in cases raising similar ethical questions before were also considered in assessing the propriety of MEC Majodina’s conduct. Key reports in this regard were the following:

5.6.1.1 In the Extreme”, Report No: 11 of 2011/2012: The report, titled “In the Extreme” related to an investigation an Executive Members’ excessive expenditure in respect of travels and accommodation for the Department of Cooperative Governance and Traditional Affairs

5.6.1.2 Relevant principles included the following observations:

(i) "The general standards determined by paragraph 2 of the Executive Ethics Code compel Ministers to act in good faith, in the best interests of good governance and in a manner that is not inconsistent with the integrity of his/her office or the

³ Khumalo versus MEC for Education in KwaZulu-Natal (2014) BCLR 333 (CC)
government." The report also pointed out that Ministers are expected to avoid opulence and expenditure."

(ii) "Although the Ministerial Handbook provides that Members of the Cabinet can be accommodated in any hotel during domestic official travels, it also requires of them to act in good faith and in a manner that is consistent with their office".

(iii) "It is expected of Ministers to act responsibility and in an accountable manner, in spending public funds.

5.6.1.3 "Costly Moves", Report No: 3 of 2012/2013

(i) The report, titled "Costly Moves" related to an investigation of alleged excessive and reckless use of public funds in occupying expensive accommodation at hotels and guest houses while she was awaiting the allocation of official residences in Pretoria and Cape Town.

(ii) The principles established by the Public Protector included the prohibition of use of executive privileges in an opulent manner and that only privileges allowed by law or policy may be exercised by Members of the Executive.

5.6.1.4 "Ethics of Staying in Comfort", Report No: 11 of 2011/2012

(i) The report, titled "Ethics of Staying in Comfort" related to an investigation into allegations of breach of the Executive Members' Ethics Act, in that during months of October and November 2009, several reports surfaced in the media regarding the alleged exorbitant expenditure of the Minister of Police in respect of hotel expenses at the Hilton Hotel in Durban and the Table Hotel in Cape Town.

(ii) The principles established by the Public Protector included that when Members of Cabinet receive their executive privileges it is their duty as well
to act responsibly and in an accountable manner when spending public funds.

5.6.1.5 “Free Money For All”, Report No: 13 of 2012/13

The report titled “Free Money For All” dealt with a similar issue to the one concerning MEC Majodina’s entitlements and responsibilities regarding S&T. A Municipal Manager, Mayor and others were required to refund their municipality an advance irregularly paid to them while they were in Italy, the change of which they had collectively pocketed. The Municipal Council accepted the request to ensure the money was repaid and delivered on its promise.

5.6.1.6 “Unsolicited Donation”, Report No 22 of 2013/14

The report titled “Unsolicited Donation” dealt with, among others, impermissible extension of an Executive Member’s benefits to her friend. The benefits in question involved overseas travel privileges. During the investigation, the Executive Member concerned admitted doing so and offered to ensure that her Department was reimbursed.

5.6.1.7 “Secure in Comfort”, Report No 25 of 2013/14

The report titled Secure in Comfort dealt with ethical responsibilities of a Member of the Executive in a case where he is or should be aware that impermissible and excessive benefits are extended to him. It further dealt with the ethical responsibility regarding paying a fair amount of the value of the resulting improper or unlawful enrichment.

5.6.2 It is worth noting that the findings and remedial action regarding prohibited excesses in the use of Executive and other benefits of public functionaries were accepted by the competent authorities requested in the reports to consider such findings and to implement remedial action indicated therein.
6. EVIDENCE AND INFORMATION OBTAINED

6.1 Regarding Whether the former MEC was improperly overpaid an excessive S&T allowance, including an advance, during their trip to New York:

6.1.1 As indicated at outset, MEC Majodina has never denied receiving the R15 000.00 the Complainant believes was unlawfully paid to her. She has also not denied receiving the original S&T of R3 711.25. What she denies is that she requested the amount of R15 000.00 and that it constitutes S&T. Her submission, made in two letters to me, is simply that she received the S&T she deserved, it wasn't the first time she operated that way, and she maintains there is nothing wrong with the manner in which things unfolded. She also confirms she asked for the additional amount on discovering she was going to get only R3 711.25, which she considered inadequate. She admits to providing no receipts to account for the R15 000.00 additionally paid to her when a request on her behalf through a memo dated 05 September 2015 submitted by then HoD, Ms Hackula to the Chief Financial Officer (CFO, Mr Adonis at the MEC's verbal request. The memo admits there is no institutional policy on S&T and related overseas allowances and that the current operations are based on the guidelines in the DPSA Financial Manual. In fact all parties agreed there is no institutional policy on S&T.

6.1.2 In her letter to me, MEC Majodina makes the following submission:

"I still maintain that I did not do anything wrong, this was not my first trip undertaken as a Public representative. I was never given an advance but S&T. I was never demanded or requested receipts upon coming. (sic) Had I known that I could have kept them”

6.1.3 The matter for determination accordingly, was not whether the money was paid as alleged to MEC Majodina but rather what the circumstances were for such payment
and if indeed it constitutes overpayment. A key dispute in this regard, was whether the R15 000.00 was additional S&T as submitted by MEC Majodina or an advance as submitted by the HoD and confirmed by her memo of 05 September 2015, in which she requested “the approval of an advance”. Incidentally, MEC Majodina, who insists the R15 000.00 was not an advance but S&T appears oblivious to this critical document, which was the basis of her being paid the R15 000.00.

6.1.4 Letter dated 21 August 2012 from Acting Senior Manager: Expenditure – Mrs F P Ncunyane, addressed to the Office of the MEC (For attention Ms N Majiklija/Ms N Mathews:
Subject: Confirmation of S&T: MEC’s trip to New York

6.1.4.1 The Letter was advising that the salary section is responsible for the calculation S&T (Special Daily Allowance) to be paid to MEC Majodina and that the amount is meant to cater for:

1. Incidental expenses (15%)
2. Meals
   2.1 Breakfast (20%)
   2.2 Lunch (20%)
   2.3 Dinner (45%)

6.1.4.2 The letter further sought written confirmation whether part of the S&T (Meals) must not be included in the calculation of the Special Daily Allowance (meals included/not with the accommodation).
6.1.5 Letter dated 5 September 2012 From Head of Department: Mrs N C Hackula, addressed to the Chief Financial Officer: Mr N Adonis:
Subject: Advance payment for honourable MEC trip to New York: 09 -16 September 2012

6.1.5.1 The HOD requested the Office of the Chief Financial Officer to process an advance payment for the MEC for an amount of R15 000.00 which would be utilised for the payment of any lunch as this was not included in the quotation of the service provider. The HOD also indicated that the amount will also cater for any incidental costs that the MEC might incur during the trip.

6.1.5.2 The HOD also acknowledges in the letter that the Department does not have a policy on international travel and that the Department is currently using the National Guidelines from DPSA as a guide. Further that they have also considered the system description which does not cater for exceptional cases such as that and that it therefore necessitated the approval of advance payment for the MEC.

6.1.6 Letter dated 15 November 2012 From the MEC addressed to the Public Protector;
Subject: Request for reconciliation by Hon. MEC Majodina

6.1.6.1 MEC Majodina commenced her written submission by indicating that she was not aware that the amount of R15 000.00 paid to her was an advance. The MEC further indicated that she was never informed that the amount is an advance and that she was never informed of any conditions attached to the advance, or that she should produce receipts for that amount. She further indicated that she belaboured under the impression that it is additional subsistence allowance for which no receipts are required.
6.1.6.2 She also indicated that the Department does not have an International Travel Policy and therefore she used the *Ministerial Handbook* as her point of reference. She went on to quote the whole Paragraph 7.2 of the Ministerial Handbook (Executive Ethics Code).

6.1.6.3 She further argued that the *Ministerial Handbook* (Executive Ethics Code) makes provision for an additional amount to be paid as S&T. Actually, the *Ministerial Handbook* does not provide for additional S&T but rather for the payment of an additional allowance for incidental expenditure equal to the amount applicable to Directors-General as determined from time to time by the DPSA, in the event S&T is insufficient.

6.1.6.4 She also argued that the *Ministerial Handbook* does not require that receipts be kept for expenses incurred. It is unclear though where the authority for none requirement of receipts for incidentals such as lunch or meals derives from. In the handbook, the only incidentals that may not need receipts are small things such as newspapers. On what grounds would a person be entitled to be reimbursed for meals as stipulated in the *Ministerial Handbook* if they could not produce receipts or evidence of their out of pocket expenses. The view that receipts are most probably required is further buttressed by the *Ministerial Handbook's* reference to reimbursement of "reasonable actual expenditure. Again it is difficult to understand how "reasonable actual expenditure" can be equated with "anticipated expenditure".

6.1.6.5 MEC Majodina also argued that she had undertaken numerous international trips either as part of a delegation from National Parliament, Provincial Legislature and other Provincial Departments which she had served and was never required to keep and submit invoices.
6.1.6.6 MEC Majodina indicated that on being informed that her subsistence allowance would only be R3 711.25, she realised that she would not be able to pay incidental expenses and lunches from that amount. She therefore asked the Department to relook the subsistence allowance and pay the difference, if there is any. She indicated that she was informed that the amount of R15 000.00 was calculated on the basis of information provided for by the Department's travel agent, Aloe Travel, being the reasonable amount for five (5) lunches. MEC Majodina submitted a copy of an e-mail from the travel agent with a proposed meal estimate as follows:

"5 lunches @ USD300 per day"

6.1.6.7 She further indicated that the amount of R15 000.00 seemed to be the actual expenditure for the lunches that she had to pay for herself. Incidentally, the memo requesting the money said it was for incidentals transcending lunch that may not be catered for by the S&T allowance already awarded to the MEC. The MEC further indicated that at that stage it is impossible for her to obtain receipts for the lunches, teas, soft drinks, gratuities, newspapers, etc. that she paid for herself. She further indicated that had she known that she was supposed to submit receipts or invoices on her return, she would have kept and submitted them.

6.1.6.8 The MEC indicated that “in order to close this chapter, I intend to ask the Department to again establish whether the amount of R15 000.00 is reasonable as an additional subsistence allowance, and if need be, I shall reimburse the Department.”

6.1.6.9 The MEC further indicated that she then realised that not having International Travelling Policy is a mistake and that she had given the Department to
immediately commence with the development of such a Policy to avoid that kind of embarrassment in future.

6.1.6.10 The MEC concluded that she wishes to state that she was humiliated in the press as a result of the matter through no fault of her own.

6.1.6.11 I must indicate that the stance of MEC Majodina in the final communication was more in line with the spirit of the Executive Ethics Code in that she was willing to change her mind in the future, should the Department she used to politically head decide she was liable.

6.1.7 Memo dated 27 February 2014 from the Chief of Staff of the Office of the MEC: Ms N Majikija addressed to the Head of Department;

Subject: Request for Condonement of Expenditure by the Honourable MEC

6.1.7.1 The purpose of the memo was to approach the Head of department to condone expenditure by the MEC during her trip to New York.

6.1.7.2 It is noted that the motivation in the memo was that “The Trip itself was full of challenges due to logistical arrangements for the trip, this has led to the Honourable MEC losing her belongings wherein the receipts for the expenditure in question were kept. It is prudent to mention that, the money was spent responsibly and according to the expectations. The receipts for any advance have to be submitted to the Department on return from the trip. The MEC had already started the process because she had hoped to find her staff with receipts”

6.1.7.3 It is rather disturbing that the motivation for condonation contradicts the submission by MEC Majodina in that she did not allege that her belongings where she had kept the receipts were lost. Instead she said that she would have kept the
receipts if she had known that she had to submit them. Equally disturbing is that
the memo for condonation was drafted long after this investigation had
commenced.

6.1.7.4 The request was approved by both the CFO, Mr N Adonis and the HOD, Mrs N C
Hackula.

6.1.8 Notification letter dated 3 May 2012, addressed jointly by Manager - Debt
Management: N P Gaika and State Accountant – Y K Mapasa addressed to the
MEC

6.1.8.1 The letter sought to inform the MEC about a debt of R13 935.11 emanating from
the incidental expenses paid to her at 100% (R16 394.25) instead of 15%
(R2 459.14) resulting in a debt of R13 935.11 in relation to her trip to the UN
Headquarters in New York from 27 February to 9 March 2012.

6.2 Regarding whether MEC Majodina improperly failed to refund public money’s
owed, following their trip to New York in February 2012:

6.2.1 In her response dated 02 October 2014 to the Public Protector’s section 7(9) Notice,
the former MEC said that she was never given an advance but S&T and that she was
never demanded or requested receipts upon coming back.

6.2.2 In the meeting held with the HoD and the CFO, they explained the practice that
when an applicant for S&T allowance returns from an overseas trip he or she is
supposed to provide receipts for reconciliation to ensure that if the whole S&T
allowance amount approved has not been fully utilised the residue be reimbursed to
the Department. They further stated that, if the whole amount was utilised and was
insufficient the applicant be refunded for the difference. It is worth noting though, that
the HoD and CFO did not contradict MEC Majodina’s submission that no one ever
asked her for receipts on coming back. She therefore cannot be said to have refused to pay.

6.2.3 Having considered the different versions on how the R15 000.00 got to be paid to MEC Majodina and the paper trail, I have no reason to doubt that the R15 000.00 that was paid to MEC Majodina at her request, was an advance.

6.2.4 However, the evidence supporting the allegation that she demanded that money is inconclusive. There is also no evidence that she was asked to repay it though there is evidence that she was asked to repay an alleged overpayment of a travel allowance amounting to R13 935.11 for her February trip.

6.2.5 Regarding the allegation that MEC Majodina demanded the R15 000.00 there is nothing concrete to contradict her version. However, it is worth noting that the HoD's submission that it was not common practice to give advances and that the convention was to reimburse those who had overspent on incidental, is consistent with the contents of her memo to the CFO when she requested the advance for the MEC a few days before her departure. Her letter states, in part, "We have also considered the system description which does not cater for exceptional cases such as this...."

6.3 Regarding whether the conduct of MEC Majodina relating to the processing of the S&T for the trip to New York in September 2012 was in violation of the Ministerial Handbook, the Executive Members’ Ethics Act and the Code:

6.3.1 This aspect will be addressed in the following section through the comparing and contrasting what MEC Majodina had a duty to do or not to do in compliance with the Executive Ethics Code and what she actually did, assessing the gap and determining if the result constitutes unethical or improper conduct.
7. MEASURING CONDUCT AGAINST THE RULES

7.1 Whether MEC Majodina was improperly given an excessive S&T allowance during her trip to New York:

7.1.1 It has been established that MEC Majodina was allocated an S&T allowance of R10 603.58 for her trip to New York on 09-12 September 2012 and that her department reduced the actual pay-out to her by R6 982.33 (65%), the explanation being that that amount had been prepaid to her hotel via her travel agent to cover dinner and breakfast, which left her with R 3 711.25 for all incidentals except breakfast and dinner during her 8 day trip. It has also been established that, at her instance, a further amount of R15 000.00 was paid to her based on a quotation of the cost of lunch made by a travel agent.

7.1.2 One of the key questions that arose during the investigation was whether or not the reduction of the payable S&T allowance in the light of prepaid incidentals such as dinner and breakfast, is a peremptory requirement. As indicated in the narrative I have presented on the standard that had to be met by and/or in respect of MEC Majodina’s S&T allowance, I am of the view that the HoD or whoever is the competent authority is given discretion whether to reduce or not and decide the extent of the reduction’s alignment to the guideline which gives incidental expenses 15%, breakfast 20%, lunch 20% and dinner 45% of the 110% of DGs rate payable per day based on the country in question’s rate as determined by DPSA.

7.1.3 On assessing whether the granting of the additional R15 000.00 was in line with the regulatory framework, I could not find any backing for the submission that it was. The provisions of the Ministerial Handbook MEC Majodina seeks to rely on do not provide her with the authority she seeks, which is to get additional no-questions-asked S&T. The paragraph of the Ministerial Handbook she seeks to rely on authorises reimbursements rather than advances. The DPSA guidelines on the other hand are
even more stringent, requiring, among other things that consideration be given to reducing the S&T payable to a person travelling abroad by the value of meals and other incidentals paid in advance or sponsored.

7.1.4 I must say that her submission that she travels all the time and presumably this is how things are done should be a source of grave concern to the Treasury particularly in the current of austerity measures. However, even without authority measures, a practice that seems to ignore the rules determining what travel benefits are permissible for public functionaries, should be a source of concern to those charged with ensuring fiscal discipline in state affairs. It is particularly worth noting that apart from MEC Majodina having her own unique definition of S&T, which includes a R3000.00 day meal ticket arrived at not through the Financial Manual as directed by the Handbook but the quote of a travel agent. It's worth noting that the quote for lunch amounts to more than double the combined cost of the prepaid breakfast and dinner and yet in the Financial Manual Guidelines, Dinner is presumed to need a lion's share (45%) of the entire S&T while breakfast and lunch are expected to about the same amount (20%) for each meal.

7.1.5 It must also be noted that MEC Majodina's submission that the additional R15 000.00 constitutes S&T and not an advance is at odds with the memorandum dated 27 February 2014 by the former Chief of Staff in the office of the former MEC to the HoD requesting for condonement of the expenditure by the HoD who concedes that what the former MEC received was not an S&T but an advance. The memo that solicited the funds itself labels it as an advance as indicated earlier.

7.1.6 Going back to the responsibilities of Member of the Executive with regard to compliance with the law, it must be borne in mind that in terms of section 195 of the Constitution, such responsibilities include stewardship over departmental processes to ensure financial probity and other good governance measures. What then is to be made of the conduct of an MEC who not only claims not to know what constitutes
S&T, two years since a dispute arose regarding her receipt of an impugned advance, she has not solicited the source documents to establish the truth.

7.1.7 It is worth noting that had the MEC complied with the PFMA requirement that all directives of an Executing Authority to the administration with financial implications must be in writing, she would not be confused regarding what the money was classified as she would have received a written response indicating the legal parameters for increasing her allowance for the trip in question.

7.2 Whether MEC Majodina improperly failed to refund public moneys owed following her trip to New York:

7.2.1 If we accept that section 136(2)(c) prohibits Members of the Executive from using their power to enrich themselves and that the Executive Code of Ethics also prohibits improper and unlawful enrichment, it must follow that when a Member of the Executive receives undeserved benefits even if not through their fault, to prevent improper or unlawful enrichment, they have an obligation to return what is not theirs to the extent returnable. As indicated earlier, the ethical and justice considerations in this regard, are not dissimilar to those relating to the principle of unjustified enrichment in civil law.

7.2.2 An alternative or complementary way of establishing whether or not there’s a duty on the MEC to rectify the wrong caused by giving her benefits she is not entitled to is the Khumalo case that requires a public functionary to redress a wrong he/she is competent to address once such has been brought to his or her attention.

7.2.3 But what are we to make of the purported condonation. Firstly, to accept the fruits of the condonation would place MEC Majodina in a position of bad faith as the condonation was secured under questionable circumstances. The second impediment is the fact that the HoD, like any other public functionary, may only exercise powers given to him/her by law or some other lawful instrument. In the
present case, we have already established that the S&T rate is peremptory. If the
R15 000.00 is accepted as S&T this would give the MEC more S&T than permitted
by law. While the HoD has discretionary power to condone an irregularly awarded
benefit or justified failure to account for an advance, such discretionary power has to
be exercised legitimately and condoning an act using false or questionable
motivation cannot be legitimate as that would not pass the test of good faith,
rationality and justifiability, among others.

8. FINDINGS

Having considered the evidence uncovered during the investigation against the
relevant regulatory framework, I make the following findings:

8.1 Whether MEC Majodina was improperly given an excessive S&T allowance,
including an advance, during her trip to New York:

(a) The allegation that MEC Majodina was improperly given an excessive S&T
allowance, including an advance, during their trip to New York, is
substantiated.

(b) MEC Majodina received R18 721.00 for her trip to New York, which exceeds
the R10 603.58 she was entitled to, inclusive of all meals and incidentals, for 8
days in terms of paragraph 7 of the Handbook for Members of the
Executive and Presiding Officers (Ministerial Handbook) read with the
Financial Manual for The Purposes of the Calculation and Application of
Allowances and Benefits (Financial Manual) issued by the DPSA in July
2012. The Ministerial Handbook entitles MEC Majodina and other Members
of the Executive travelling abroad, to a daily allowance equal to 110% of that
determined by the Financial Manual as the daily rate for Directors.
General (DGs). In July 2012, the rate was determined as $US145 or R1 325.45 per day, covering breakfast, lunch, dinner and other incidentals.

(c) MEC Majodina initially received R3 721.25, which was based on the HoD having deducted the cost of breakfast and dinner from the R10 603.58 as these had been prepaid to her hotel by the Department through the travel agent. On request, MEC Majodina was paid a further R15 000.00, which according to the authorising memo, was meant for 5 lunches, calculated with the help of a travel agent, at R3000.00 per lunch.

(d) The process followed in paying MEC Majodina an additional R15 000.00 to top up the amount initially given at the commencement of the trip, was irregular as it did not comply with the provisions of paragraph 7 of the Ministerial Handbook prescribing that the cost of incidentals in excess of the prescribed 'daily allowance' paid to Members of the Executive for international travel, be claimed back by them on return from their trips.

(e) As the daily rate is peremptory, no one had authority to pay or authorise the payment of a higher amount to MEC Majodia than that stipulated in the Ministerial Handbook read with the Financial Manual. In fact, quite the opposite, the Annexure to the Financial Manual, recommends that consideration be given to the proportionate reduction of a Member’s S&T allowance if some of the meals have been prepaid. This, presumably, is to prevent the double billing of the state through S&T and the hotel bill via the travel agent.

(f) While the evidence regarding whether or not, MEC Majodina demanded the additional R15 000.00 was inconclusive, by accepting the excessive amount and participating in the irregular process, the conduct of MEC Majodina amounts to collusion in the misappropriation of public funds in violation of the Ministerial Handbook, the PFMA and section 6(4)(a)(iv) of the Public Protector Act.
8.2 Regarding whether MEC Majodina improperly failed to refund public moneys she owed in respect of her trip to New York

(a) The allegation that MEC Majodina improperly failed to refund public moneys owed in respect of her trip to New York, is substantiated.

(b) MEC Majodina did not refund the excess public funds irregularly paid to her in connection with her trip to New York despite having been aware of the misappropriation of funds in her favour and her consequent undue enrichment at state expense.

(c) The HoD purportedly condoned the overpayment thus granting permission to MEC Majodina not to pay back the owed money. Such condonation is unlawful in so far as it exceeded the lawful authority of the HoD. While the Financial Manual provides that consideration must be given to reducing S&T paid by the amount already paid to the hotel for meals can be regarded as giving discretionary power to waive such reduction when there is justification for such, the daily rate on the other hand, is peremptory thus leaving the HoD with no discretionary power. In any event, legitimate exercise of discretionary power must be logical, rational and justifiable. In other words there must be a sound explanation for the decision.

(d) The purported condonation of the amount paid in excess of the prescribed daily allowance by the HoD is further negated by the fact the reasons given for such condonation are questionable as the MEC appears never to have personally requested it or offered the information used in the memo, including the submission that she lost receipts. She has maintained that she never got an advance, the R15 000.00 was additional S&T and that she never thought she needed receipts and never kept them.
(e) The purported condonation was inconsistent with the principles of administrative law, which include a requirement that discretionary power be exercised in good faith, within the confines of the law granting such power, in a manner consistent with the purposes of the granting of such power and in the public interest. It clearly is not in the public interest to rob the populace to unlawfully enrich or grant an improper advantage to another with public funds.

(f) As the HoD’s conduct fell outside the powers granted under the Ministerial Handbook, and PFMA, among others, and was further unjustifiable and arbitrary, such conduct was accordingly unlawful and invalid.

8.3 Regarding whether the conduct of MEC Majodina relating to the processing of the S&T and non-repayment or account for the additional payment she received for her trip to New York in September 2012 was inconsistent with relevant provisions of the Ministerial Handbook and accordingly constitutes unethical conduct in violation of the Executive Ethics Code, the Executive Members’ Ethics Act and section 136 of the Constitution:

(a) The MEC’s conduct, particularly regarding failure to pay back the overpaid allowance amount for the overseas trip to New York and insistence that it was S&T when she should know the provisions of the Code of Ethics and Ministerial Handbook regarding what she is lawfully entitled to, constitutes acquiescence in the misappropriation of public funds for her “improper or unlawful enrichment” as envisaged in section 6(4)(a)(iv) of the Public Protector Act or enriching herself as envisaged in Clause 2.2(c) of the Code and disregard for administrative rules which apply to the payment of Executive Members’ allowances as envisaged in Clause 2.2 (h) of the Code. Such action is inconsistent with her position and constitutes unethical conduct as envisaged in Paragraph 2 Section 1 (i)(d) and (iii)(b) of the General standards of Executive Ethics Code and the Section 136(2) of the Constitution. The conduct further constitutes improper conduct under Section 182 of the Constitution.
(b) I must indicate that I find MEC Majodina’s failure to rectify the mistake even after it was uncovered discomforting. MEC Majodina, who is bound by and should know the Executive Ethics Code and the Ministerial Handbook insists on her own definition of S&T outside the one in the Ministerial Handbook and insists to date that she did nothing wrong. This case being principally an issue of employment benefits for Members of the Executive and thus and employment matter, I found the views of the Constitutional Court in the Khumalo case apposite. In my view, making a mistake does not always constitute unethical conduct but contemptuous refusal to rectify a mistake may be at the heart of unethical conduct. It is my respectful point of view that once MEC Majodina knew she had been given benefits transcending what was permissible, it was incumbent on her to take responsibility for correcting the mistake and her failure to do so was inconsistent with the ethical dictates of her role as a Member of the Executive and accordingly one of the stewards entrusted with public power and collective resources of the people of South Africa. Through her inaction, she failed to show good faith as required of her by the Executive Ethics Code. I must also add that her stance potentially sets a bad example for officials that may take or receive staff benefits exceeding what is permitted and may be required to pay back the excessive portion or part thereof. Her conduct is accordingly inconsistent with the requirements of her office as envisaged in the Executive Ethics Code, Executive Members’ Ethics Act and, ultimately, section 136 and 195 of the Constitution. The conduct is accordingly not only unethical but unlawful and unconstitutional.

9. REMEDIAL ACTION

The appropriate remedial action as envisaged in section 182(1)(c) of the Constitution is to call on:

(a) The Premier to consider taking disciplinary action against MEC Majodina for the violation of the provisions of the Executive Ethics Code referred to in this report;
(b) The HoD, within 30 days of receipt of this report, is to:

(aa) Rescind the unlawful condonation of MEC Majodina’s debt and then take the appropriate action to recover from MEC Majodina the irregular expenditure. This must include regularising the Department’s exercise of discretionary power whether or not to deduct the prepaid breakfast and dinner from the S&T amount of that she is lawfully entitled to;

(bb) Investigate the circumstances of the money alleged to be owed by MEC Majodina for her New York trip in February 2012 and take appropriate action in terms of the PFMA and

(cc) Establish if any other public functionary in the Department, including Ms Nozibele Majikija, received more S&T and related travelling allowances and rectify any found irregularity.

9.3 The Director-General in the Office of the Premier to:

(a) Ensure that all provincial departments, including the Office of the Premier, have an approved policy framework to regulate official travel abroad on or before 30 April 2015.

(b) The Public Protector will approach the National Treasury and the DPSA with a view to commissioning a study into S&T practices and establishing if there is uniformity and to eliminate any overpayments that may be taking place due to a misinterpretation to the travel allowance regulatory framework.

10. MONITORING AND ACKNOWLEDGEMENTS
10.1 The Director-General to submit an action plan to the Public Protector indicating departmental intentions regarding the implementation of the remedial action referred to in paragraphs 9.1 to 9.3 above within 30 days of the date of this report.

10.2 The Director-General should advise the Public Protector of action taken by the Premier within 60 days of receipt of this report.

10.3 The Public Protector Team is grateful for cooperation received from all the parties, including MEC Majodina and the HoD of the Department of Social Development and Special Programmes.

ADV THULI N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31 March 2015

Assisted by: Adv. GM Maxakato: Senior Investigator
Quality Assurance Support provided by Mr Isaac Matlawe