



PUBLIC PROTECTOR
SOUTH AFRICA

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CLOSING REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF A VIOLATION OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE KWAZULU-NATAL PROVINCIAL GOVERNMENT, MS NOMAGUGU SIMELANE-ZULU

1. INTRODUCTION

- 1.1 This is a closing report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), section 3 of the Executive Members' Ethics Act, 1998 (EMEA) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The report relates to an investigation of a complaint of a violation of the Executive Ethics Code by the Member of the Executive Council for Health of the KwaZulu-Natal Provincial Government, Ms Nomagugu Simelane-Zulu (MEC).
- 1.3 The report is submitted to the Premier of KwaZulu-Natal, Mr Sihle Zikalala, in terms of Section 3(2)(b), read with section 3(3) of the EMEA.

2. THE COMPLAINT

- 2.1 The complaint was lodged with the Public Protector by Dr Rishigen Viranna (Complainant), a Member of the KwaZulu-Natal Provincial Legislature, on 19 June 2020.
- 2.2 In the main, the Complainant alleged that:
- 2.2.1 The MEC refused to release daily Covid-19 localised confirmed data at provincial, district and local municipal levels for the KwaZulu-Natal Province, despite having been requested to do so; and
- 2.2.2 The refusal of the MEC was improper, amounted to an abuse of power and constitutes a breach of the provisions of paragraphs 2.1(c) and 2.1(d) of the Executive Ethics Code.
- 2.2.3 The Complainant further contended that the failure by the MEC to release localised Covid-19 data was putting many residents of the KwaZulu-Natal

province at risk and that it was in violation of the constitutional imperatives of transparency and access to government information.

2.2.4 He further stated that:

“The specific information requested includes Covid-19 data including confirmed cases, recoveries, and deaths at municipal and sub-district level. According to the World Health Organisation and National Institute of Communicable Diseases have (sic) indicated having localized Covid-19 data is vital for individuals to make the required behavioural changes to stop contracting and spreading the infection.”

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 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”.

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

- 3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the Complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.
- 3.5 Sections 3 and 4 of the EMEA provides that the Public Protector must investigate any alleged breach of the Executive Code of Ethics on receipt of a complaint from a member of the provincial legislature of a province, if the complaint is against an MEC of the province. The Public Protector must submit a report on that alleged breach of the Code to the Premier of the province concerned, if the complaint is against an MEC.
- 3.6 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Moegoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that: “*When the remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences*”².

4. THE INVESTIGATION

4.1 The Investigation Process

- 4.1.1 The investigation was conducted in terms of section 182 (1) of the Constitution of the Republic of South Africa, 1996, sections 3 and 4 of the Executive Members’ Ethics Act, 1998 (EMEA) and sections 6 and 7 of the Public

¹ [2016]ZACC 11; 2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para [76].

² *Supra* at para[73]

Protector Act, 1994. The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation.

4.1.2 The investigation process included correspondence with the Complainant and the MEC, and consideration and application of the relevant laws and prescripts.

4.2 The 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:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to a breach of the Executive Ethics Code.

4.2.1.4 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. In this particular case, the factual enquiry principally focused on whether there is a legal obligation on the MEC to release localised daily Covid-19 confirmed data at provincial, district and local municipal levels for the KwaZulu-Natal Province, and if so whether the MEC failed to do so, resulting in a breach of the Executive Ethics Code.

4.3 Based on the analysis of the complaint, the following issue was identified to inform and focus on the investigation:

4.3.1 Whether the MEC has a legal obligation to daily release confirmed Covid-19 case data at provincial, district and local municipal levels for the KwaZulu-

Natal Province; and if so whether the MEC failed to do so, which constitutes a breach the Executive Ethics Code.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding Whether the MEC has a legal obligation to daily release confirmed Covid-19 case data at provincial, district and municipal levels in the KwaZulu-Natal Province; and if so whether the MEC failed to do so, which constitutes a breach of the Executive Ethics Code.

Common cause or undisputed facts

5.1.1 It is common cause that the Minister of Cooperative Governance and Traditional Affairs declared a national state of disaster due to the Covid-19 pandemic on 15 March 2020, in terms of section 27(1) of the National Disaster Management Act, 2002 (Disaster Management Act).

5.1.2 It is further not in dispute that henceforth the Disaster Management Act had to be applied by all organs of state to deal with the national disaster.

Issues in dispute

5.1.3 In her response to the complaint dated 3 September 2020, the MEC stated that the allegations made against her do not refer to any provision of any law, legal obligation or resolution of the KwaZulu-Natal Provincial Executive Council that she might have violated or transgressed.

5.1.4 The MEC referred to the provisions of the Disaster Management Act and the Regulations made in terms thereof (referred to below) and indicated that after the declaration of the national disaster, all information and data regarding the Covid-19 pandemic was released and communicated by the national Minister

of Health. As from 19 April 2020, the KwaZulu-Natal Provincial Command Council confirmed the Covid-19 data were released by the Minister of Health in respect of the KwaZulu-Natal Province on a weekly basis. Further, that as from 24 June 2020, the Provincial Command Council started to confirm the Covid-19 results as released by the Minister of Health on a daily basis, broken down into district and municipal levels.

5.1.5 According to the MEC's response, the communication of Covid-19 information by the Minister of Health is at all times transparent and was and continues to be shared with the national and provincial governments in order to facilitate the implementation of necessary and adequate measures in dealing with the pandemic.

5.1.6 She further emphasised that *"there is no regulation nor law that instructs me to issue the cases at the district or local municipal level."*

5.1.7 The MEC further stated in her response that:

"In my position as MEC for Health, I am a creature of statute thus I have to follow the law and the protocol of my office. I cannot imagine myself assuming the power to undermine the Premier or the Minister of Health and start releasing Covid-19 results with no legal authority. This was the protocol that was followed in the entire country. The overarching philosophy of government in that regard was to curb a proliferation of mixed messages, containing the surge of misinformation, disinformation and the spread of fake news, the creation of a state of panic in the country and to foster a uniform approach in dealing with this entirely novel phenomenon which has devastating effects if not the potential of wiping out the entire population."

5.1.8 In conclusion, the MEC denied that there was any dereliction of duty on her part or that she violated any law or prescript. In her view, she acted in good faith and in the best interest of good governance when dealing with the Covid-19 information.

- 5.1.9 In his reply to the MEC's response, dated 18 September 2020, the Complainant stated that government communication regarding "*daily KZN district Covid-19 caseload statistics had been under the banner or letterhead of the Department of Health with the MEC's photo included.*" He concluded in this regard that this indicated that the MEC had been given the authority, either officially or unofficially to disseminate daily statistics to the communities of KwaZulu-Natal.
- 5.1.10 The Complainant did not refer to any provision under the Disaster Management Act or the Regulations made in terms thereof by virtue of which the MEC is obliged to release daily Covid-19 confirmed case data at provincial, district and local municipal levels. He only referred to section 32 of the Constitution, which provides that everyone has a right of access to any information held by the state. He also did not deny that provincial Covid-19 data was released by the KwaZulu-Natal Provincial Government, but stated that it was done by the MEC and not the Office of the Premier.
- 5.1.11 On 26 October 2020, I issued a Discretionary Notice in terms of Rule 42 of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto* (the Public Protector Rules) made in terms of the Public Protector Act, informing the Complainant of my intention to conclude his complaint by means of a closing report and affording him an opportunity to make representations in regard thereto.
- 5.1.12 The Complainant responded on 20 November 2020 stating in essence that many analysts are of the opinion that the Disaster Management Act "*was not adequately written for a pandemic of this nature*". He contended that one should not only consider the letter of the law, but also its spirit and purpose, which are to reduce injury and death of individual South Africans and that any action taken by the executive authority would be to fulfil this purpose.

Application of the relevant law

- 5.1.13 Section 26(1) of the Disaster Management Act provides that the national executive is primarily responsible for the co-ordination and management of national disasters in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2), if a national state of disaster has been declared.
- 5.1.14 Sections 27(2) and 27(3) of the Disaster Management Act provides that in the event of a national disaster, the Minister (in this case the Minister of Cooperative Governance and Traditional Affairs) may make regulations and issue directions on a number of matters, including the dissemination of information required for dealing with the disaster, to the extent that this is necessary for the purpose of:
- 5.1.14.1 Assisting in protecting the public;
 - 5.1.14.2 Providing relief to the public;
 - 5.1.14.3 Protecting property;
 - 5.1.14.4 Preventing or combatting disruption; or
 - 5.1.14.5 Dealing with the destructive and other effects of the disaster.
- 5.1.15 The Minister of Cooperative Governance and Traditional Affairs accordingly made Regulations that were issued on 18 March 2020 (Regulations).
- 5.1.16 Regulation 10(8)(a) provides, *inter alia* that any Minister may issue and vary directions as required, within his or her mandate, to address, prevent and combat the spread of Covid-19 from time to time as may be required, including the disseminating of information required for dealing with the national state of disaster.

5.1.17 There is no provision in the Disaster Management Act or the Regulations directing or authorising the MEC's of Health of the respective Provincial Governments to disseminate information that is required for dealing with the Covid-19 national disaster.

5.1.18 Paragraph 2.1 of the Executive Ethics Code, published in terms of section 2 of the EMEA provides that:

“Members of the Executive must, to the satisfaction of the President or the Premier as the case may be-

- (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.*

5.1.19 Paragraph 2.3 (c) provides that Members of the Executive may not, *inter alia*, act in a way that is inconsistent with their position.

Conclusion

5.1.20 The Covid-19 pandemic was declared a national disaster in terms of the Disaster Management Act on 15 March 2020. This declaration set in motion the implementation and application of the provisions of the Act to enable government to deal with the national disaster. The management and coordination of the national disaster is primarily the responsibility of the national executive.

5.1.21 On 18 March 2020, the Minister of Cooperative Governance and Traditional Affairs made Regulations in terms of the Disaster Management Act regarding the steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the thereof.

- 5.1.22 The Regulations *inter alia* regulates the dissemination of information required for dealing with the national disaster, which is the responsibility of the national Ministers, within their respective mandates.
- 5.1.23 There is no provision in the Disaster Management Act or the Regulations that places any obligation on the MEC to daily release confirmed Covid-19 case data at provincial, district and municipal levels.
- 5.1.24 It is not disputed that the Minister of Health releases daily confirmed data on, *inter alia* the number of people infected, number of deaths and the recovery rate for the entire country.
- 5.1.25 The Complainant further did not dispute that the KwaZulu-Natal Provincial Government confirms the data released by the Minister of Health, on a regular basis.
- 5.1.26 The Covid-19 pandemic caused a national disaster, the scale and impact of which have not been experienced globally before. The Disaster Management Act and the Regulations are the instruments developed by government to deal with the national disaster and have to be implemented and adhered to by all organs of state, entities and persons in the Republic of South Africa.
- 5.1.27 Neither the provisions of the Disaster Management Act, nor the Regulations impacts on the constitutional imperative of access to information held by the state, as contemplated by section 32(1) of the Constitution, relating to the spread and impact of the Covid-19 pandemic, as it provides specifically for the dissemination of information to the public at the level of the national executive.
- 5.1.28 The allegation that the MEC has a legal obligation to daily release confirmed Covid-19 case data at provincial, district and municipal levels in the KwaZulu-Natal Province is not supported by the information and evidence obtained from the investigation and the application of the relevant laws and prescripts.

5.1.29 The MEC therefore did not fail to release daily confirmed Covid-19 data, as she was under no obligation to do so.

5.1.30 There was accordingly no conduct on her part that constitutes a breach of paragraphs 2.1 and 2.3 of the Executive Ethics Code as alleged by the Complainant.

6. REASONS FOR CLOSURE

6.1. The complaint lodged by the Complainant, against MEC Nomagugu Simelane-Zulu that she refused to release daily Covid-19 localised confirmed data at provincial, district and local municipal levels for the KwaZulu-Natal Province despite having been requested to do so, and therefore breached the Executive Ethics Code, is not substantiated.

6.2 The Complainant was afforded an opportunity to comment on the contents of this report before it was finalised. However, he did not provide any further information that could support his complaint that the MEC breached the Executive Ethics Code.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 14/12/2020

Assisted by: Ms Ashika Janakk, PII-Coastal