

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

***“Allegations of a breach of the Executive Ethics Code by the Member of the
Executive Council for Transport and Public Works of the Western Cape
Provincial Government, Mr B Madikizela”***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A BREACH OF THE
EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL FOR
TRANSPORT AND PUBLIC WORKS OF THE WESTERN CAPE PROVINCIAL
GOVERNMENT, MR B MADIKIZELA**

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Executive Summary

- (i) This is a report of the Public Protector 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 (the Public Protector Act) and section 3(3) of the Executive Members' Ethics Act, 1998 (EMEA).
- (ii) The report communicates the findings of the Public Protector and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Transport and Public Works of the Western Cape Provincial Government, Mr B Madikizela (MEC).
- (iii) The complaint was lodged by Mr B Herron (Complainant), a Member of the Western Cape Provincial Legislature, on 20 November 2019.
- (iv) In the main, the Complainant alleged that:
 - (a) During the course of his speech made in the debate in the Western Cape Provincial Legislature on the Premier's State of the Province Address (SOPA) on 23 July 2019, the MEC made the following statement:

"I also want to deal with the factual inaccuracies that are coming from member Herron about his track record in the City of Cape Town on three aspects: My CITI N2 Express, housing delivery and inner city development".

- (b) The MEC also stated that:

"So he (Mr Herron) went on to say exactly two years ago, in his then capacity at the City of Cape Town, he initiated Inner-City developments. I

can tell you now Mr Speaker, that almost all the projects that were initiated by member Herron in the Inner-City were halted by court, all of them.” (emphasis added) (these statements were not disputed by the MEC during the investigation).

- (c) The statement made about him (Complainant) referred to in paragraph (iv)(b) was false.
- (d) It was inappropriate for the MEC, holding the office of the Western Cape MEC for Transport and Public Works, to have made false and misleading statements to the Western Cape Provincial Legislature, and that in so doing he acted in violation of paragraph 2 of the Executive Ethics Code.
- (v) Based on the analysis of the complaint, the following issue was identified for the investigation:
 - (a) Whether the MEC for Transport and Public Works, Mr B Madikizela, wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution, sections 6 and 7 of the Public Protector Act and sections 3 and 4 of the EMEA. It included the exchange of correspondence with the MEC and the Complainant, the evaluation and consideration of the documents submitted and obtained, and consideration and application of the relevant laws and legal prescripts.

(vii) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:

(a) Regarding whether the MEC for Transport and Public Works, Mr B Madikizela wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

(aa) The allegation that the MEC for Transport and Public Works, Mr B Madikizela wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019, is substantiated.

(bb) The allegation that the MEC's conduct in this regard constitutes a breach of the Executive Ethics Code, is also substantiated.

(cc) By wilfully misleading the Western Cape Provincial Legislature about the achievements or lack thereof of one of its members, the MEC did not act in a way that is consistent with his office. Instead of withdrawing the false statement and apologising to the Legislature and the Complainant, the MEC tried to change the obvious meaning of his statement in question and blamed the false statement on his limitations to converse in English.

(dd) The MEC's conduct was therefore inconsistent with the integrity of his office and not in the best interests of government.

(ee) From the responses of the MEC during the investigation, it is clear that the intention of the statement that he made in the Legislature about the Complainant was to cast aspersions on his performance as a member of the Council of the City of Cape Town. His oral reply in the

Legislature on 3 October 2019 and subsequent further explanations provided during the investigation clearly indicate that the MEC was fully aware at the time of making the statement that it was false.

- (ff) The MEC's conduct was improper and in violation of the provisions of section 136(2) of the Constitution. It also constitutes a breach of paragraphs 2.1(c), 2.1(d), 2.3(c), and 2.3(f) of the Executive Ethics Code.

- (viii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:
 - (a) The Premier of the Western Cape to:**
 - (aa) In terms of section 3(6) of the EMEA within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto to the Western Cape Provincial Legislature.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A BREACH OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL FOR TRANSPORT AND PUBLIC WORKS OF THE WESTERN CAPE PROVINCIAL GOVERNMENT, MR B MADIKIZELA

1. INTRODUCTION

- 1.1 This is a report of the Public Protector 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 (the Public Protector Act) and section 3(3) of the Executive Members' Ethics Act, 1998 (EMEA)
- 1.2 The report is submitted in terms of sections 8(1) of the Public Protector Act and section 3(3) of the EMEA to Mr A Winde, the Premier of the Western Cape, to inform him of the outcome of the investigation.
- 1.3 Copies of the report are also provided to:
 - 1.3.1 Mr Bonginkosi Madikizela, the Member of the Executive Council of the Western Cape Provincial Government responsible for Transport and Public Works (MEC); and
 - 1.3.2 Mr Brett Herron, a Member of the Western Cape Provincial Legislature, who lodged the complaint.
- 1.4 The report relates to an investigation of a complaint of a breach of the Executive Ethics Code issued in terms of the EMEA, by the MEC.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr Brett Herron (Complainant), a Member of the Western Cape Provincial Legislature, on 20 November 2019.

2.2 In the main, the Complainant alleged that:

2.2.1 During the course of his speech made in the debate in the Western Cape Provincial Legislature on the Premier's State of the Province Address (SOPA) on 23 July 2019, the MEC made false and misleading statements about him (the Complainant).

2.2.2 It was inappropriate for the MEC, holding the office of the Western Cape MEC for Transport and Public Works, to have made false and misleading statements to the Western Cape Provincial Legislature, and that in so doing he acted in violation of paragraph 2 of the Executive Ethics Code.

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 and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5 In the matter of 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 Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that:
- “When 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*
- 3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);

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

² *Supra* at para [73].

- 3.6.3 “Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution.” However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.6 The Public Protector’s power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);
- 3.6.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and

- 3.6.9 “*Appropriate*” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017)*, the Court held as follows when confirming the powers of the Public Protector:
- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);
- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);

- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and
- 3.7.7 *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).
- 3.7.8 Section 3 of the EMEA provides, *inter alia* that the Public Protector must investigate any alleged breach of the Executive Ethics Code on receipt of a complaint by the Premier or a member of the provincial legislature, if the complaint is against a MEC of the province. If the complaint is against a MEC, the Public Protector has to submit her report on the investigation to the Premier.
- 3.7.9 Mr Madikizela is a Member of the Executive Council of the Western Cape Provincial Government. The complaint of a breach of the Executive Ethics Code was lodged in terms of the EMEA by a Member of the Western Cape Provincial Legislature. Accordingly, the matter falls within the Public Protector's jurisdiction and had to be investigated.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution, sections 6 and 7 of the Public Protector Act and sections 3 and 4 of the EMEA.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 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, improper conduct and/or maladministration?

4.2.1.4 In the event of a breach of the Executive Ethics Code, improper conduct and/or maladministration, what would it take to remedy the wrong and what action should be taken?

4.2.1.5 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 or not the MEC acted in breach of the Executive Ethics Code when he made statements about the Complainant during the course of his speech made in the debate in the Western Cape Provincial Legislature on the Premier's SOPA, on 23 July 2019.

4.2.1.6 The enquiry regarding what should have happened, focuses on the EMEA, the Executive Ethics Code and the law or rules that regulate the standard that should have been met by the MEC, to comply with the Executive Ethics Code.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to address a breach of the Executive Ethics Code, in terms of the EMEA.

4.3. On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the MEC for Transport and Public Works, Mr B Madikizela wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

4.4 The Key Sources of information

4.4.1 Documents:

4.4.1.1. The letter of complaint submitted by the Complainant on 19 November 2019 to the Public Protector South Africa (PPSA), to which were attached, *inter alia* copies of transcripts of HANSARD recordings of proceedings of the Western Cape Provincial Legislature on 23 July 2019 and 3 October 2019, Question Papers of the Western Cape Provincial Legislature dated 2 August 2019, 6 September 2019, 3 October 2019 and 18 October 2019 and the MEC's Written Reply dated 1 November 2019.

4.4.2 Correspondence between the PPSA and:

4.4.2.1 The MEC on 18 June 2020, 8 July 2020, 29 September 2020 and 30 October 2020.

4.4.3 Legislation and other prescripts:

4.4.3.1 The Constitution of the Republic of South Africa, 1996.

4.4.3.2 The Public Protector Act, No 23 of 1994.

4.4.3.3 The Executive Members' Ethics Act, No 82 of 1998.

4.4.3.4 The Executive Members Ethics Code, 2000.

4.4.3.5 The Standing Rules of the Western Cape Provincial Legislature, issued in March 2019.

4.4.4 Case Law

4.4.4.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.4.4.2 President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017); and

4.4.4.3 President of the Republic of South Africa and Another v the Public Protector and Others [2020] ZAGPPH 9 (10 March 2020).

4.4.4.4 New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020).

4.4.4.5 Marr v MEC Department of Health Eastern Cape Provincial Government and Another (3908/05, ECJ29/06) [2006] ZAECHC 16 (10 April 2006).

4.4.5 Notices issued in terms of section 7(9)(a) of the Public Protector Act:

4.4.5.1 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the MEC on 11 December 2020 affording him an opportunity to respond to the evidence obtained during the investigation and he replied thereto on 19 January 2021 and on 15 February 2021.

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 for Transport and Public Works, Mr B Madikizela wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code

Common cause or undisputed facts

- 5.1.1 It is common cause that both the MEC and the Complainant are members of the Western Cape Provincial Legislature, representing the Democratic Alliance and GOOD political parties, respectively.
- 5.1.2 It is also common cause that the debate on the Premier's the SOPA was held in the Western Cape Provincial Legislature on 23 July 2019.
- 5.1.3 It is further not in dispute that both the MEC and the Complainant participated in the debate and that during his speech, the MEC made the following statement:

"I also want to deal with the factual inaccuracies that are coming from member Herron about his track record in the City of Cape Town on three aspects: My CITI N2 Express, housing delivery and inner city development".

- 5.1.4 He also stated that:

"So he (Mr Herron) went on to say exactly two years ago, in his then capacity at the City of Cape Town, he initiated Inner-City developments. I can tell you

now Mr Speaker, that almost all the projects that were initiated by member Herron in the Inner-City were halted by court, all of them.” (emphasis added)

Issues in dispute

- 5.1.5 The Complainant contended that the MEC’s statement referred to in paragraph 5.1.4 above is false.
- 5.1.6 According to the Complainant, he submitted written questions to the Western Cape Provincial Legislature in connection with the MEC’s statement, which were published on 2 August 2019, for written reply. He requested that the MEC provide the details of the court action that he referred to in his statement, such as the court case numbers, and the names of the applicants. The MEC did not reply to the questions that he had raised.
- 5.1.7 The Complainant further averred that he submitted the questions again for written reply to the Western Cape Provincial Legislature on 6 September 2019, but that the MEC failed to reply. He then, in terms of the Standing Rules of the Western Cape Provincial Legislature, requested that the unanswered written questions be placed on the Question Paper for oral reply.
- 5.1.8 In the MEC’s oral reply to the Legislature on 3 October 2019 he stated, according to the Complainant, *inter alia* that:

“...due to my limitation in expressing myself in the Queen’s language, I think I might have omitted one very important word that would have changed my response when I spoke about this...”

“Indeed I did say that some of the projects, almost all of his projects were halted by the court, but in fact what I meant was they were halted by court challenges

but I do want to concede that I did omit a very important word. Instead of saying “court challenges” I then said “court”.

- 5.1.9 The Complainant further stated that he responded to the MEC’s oral reply and requested the details of the court challenges that he had referred to in his speech. In the MEC’s reply, he referred to the “*Foreshore Freeway*” project. The Complainant pointed out to the MEC that the Foreshore Freeway Project was cancelled by the City of Cape Town and not by a court challenge. He further indicated to the MEC that it was the decision of the City Manager to cancel the project that was challenged in court. The MEC replied that it was the “*Maidens Cove*” project that is the subject of a court challenge.
- 5.1.10 In his third question for written reply, submitted to the Western Cape Provincial Legislature on 18 October 2019, the Complainant requested the details of the court challenges that the MEC had referred to. The Complainant also requested that the MEC indicates whether he deliberately misled the Legislature by suggesting that the Maidens Cove project was the Complainant’s project, when it was led by the Deputy Mayor, Mr Ian Neilson.
- 5.1.11 In the MEC’s written response dated 1 November 2019, he stated that the maintenance of records of the courts is not within the sphere of jurisdiction of the Western Cape Provincial Legislature. He also denied that there was any intention on his part to mislead the Legislature by any comments he had made about the Maidens Cove project.
- 5.1.12 The Complainant stated further in his complaint that he was a Member of the Council of the City of Cape Town from June 2009 to November 2018. According to him, he was not responsible for any of the decisions that were taken by the City of Cape Town to cancel or terminate any of the projects that the MEC referred to in the statements that he made to the Western Cape Provincial Legislature, referred to above. He therefore contends that the MEC’s failure to withdraw the

misleading statements, his persistence therewith and his refusal to answer the questions for written reply meaningfully or at all, demonstrate that he misled the Western Cape Provincial Legislature and breached paragraph 2.3(a) of the Executive Ethics Code.

- 5.1.13 During the investigation, the MEC responded to the complaint on 8 July 2020 and 30 October 2020. His response did not deny that he made the statements as indicated by the Complainant.
- 5.1.14 The MEC questioned whether the Public Protector has the jurisdiction to investigate the complaint, as he did not make the statements in his capacity as MEC, but as a member of the Democratic Alliance (DA) political party, participating in the State of the Province debate. In essence, the MEC submitted therefore that the provisions of the EMEA and the Executive Ethics Code did not apply to the speech that he made and the statements complained of. According to the MEC's response, the EMEA and the Executive Ethics Code would only apply when the action complained of was undertaken by a Member of the Executive Council, acting in that capacity.
- 5.1.15 Further, that the State of the Province debate in the Western Cape Provincial Legislature is a political debate, during which each speaker that is nominated by his or her political party to participate, does so in his or her capacity as a Member of the Legislature and not as a MEC, leader of a political party or even a Whip.
- 5.1.16 In this regard, the MEC referred to the judgment in the case of *President of the Republic of South Africa and Another v the Public Protector and Others* [2020] ZAGPPH 9 (10 March 2020)(CR17 judgement) and stated *inter alia* that:

“As to the finding by your office against Mr Ramaphosa under the EMEA, it being a finding the President had, at the time when he was Deputy President, breached the code of ethics by failing to disclose the CR17 Campaign

donations, in its ruling the Court found that the Public Protector made a misdirected conflation of the activities of the CR17 Campaign and the President, which permeated his findings. In this conflation the court found that she had ignored the uncontested evidence before her. The Court found that to the extent that Mr Ramaphosa was involved in the CR17 Campaign, he was as a member of the ANC and not the executive.

This case confirms that the Code addresses how executive members conduct themselves in performing their official responsibilities as members of the executive only and illustrates the core difficulty in the interpretation of section 2(1) of the EMEA and the Code of ethics that you have applied. The difficulty arises from the fact that while a person may act in different capacities at different times, there are inevitably situations where the private capacity overlaps with or impacts on the performance of the official capacity and there is not a bright line between the different capacities in which a person may act.”

5.1.17 The MEC stated further that:

“In making the comments I did in the SOPA debate on the 23rd of July 2019, which are the crux cause of Member Herron’s complaint, I was neither exercising a duty nor performing a power bestowed upon me in my capacity as MEC. Rather, my aim in that speech was to deal with the Good Party and specifically Member Herron’s public assertions in the lead up to that debate and the very clear implications pertaining to his own track record whilst he had occupied a position as a member of the executive of the City of Cape Town under his prior membership with the Democratic Alliance.” (emphasis added)

5.1.18 The MEC indicated that English is not his first language and that he had made an error in good faith by using the words “court” and “court challenge” instead of “legal challenge” which was more correct, and that he had no intent to mislead the Legislature. He denied that by making the statements in question he acted in

breach of the Executive Ethics Code. According to the MEC's response, the Complainant is only trying to score "*political points*".

- 5.1.19 In the MEC's response of 30 October 2020, he concluded that in so far as he might have to withdraw "*the allegation of 'court and court process'*" and replace it with the correct terminology i.e. "*legal process*", it in no way equates to a finding of intentionally misleading the Legislature by him as MEC and an abuse of his position as MEC in terms of the Executive Ethics Code
- 5.1.20 The MEC responded on 19 January 2021 to the Notice issued to him in terms of section 7(9) of the Public Protector Act on 11 December 2020, affording him an opportunity to respond to the evidence obtained during the investigation. The MEC again did not deny making the statements as alleged by the Complainant, and persisted with his earlier response to the complaint that the speech he made in the State of the Province debate on 23 July 2019 was not delivered by him in his executive capacity and that the Public Protector therefore has no jurisdiction to determine the matter under the EMEA.
- 5.1.21 He reiterated that the CR17 judgement confirms that the Executive Ethics Code "*addresses how executive members must conduct themselves **only** when performing their official responsibilities as members of an executive and illustrates not only that it is clearly possible for persons to be members of an executive and NOT be performing official responsibilities, but also illuminates the core difficulty in the interpretation of section 2(1) of the EMEA and the Code of ethics...*". *This difficulty arises from the fact that while a person may act in different capacities at different times, there are inevitably situations where the private capacity overlaps with or impacts on the performance of the official capacity and there is not a bright line between the different capacities in which a person may act.*" (emphasis added)
- 5.1.22 He elaborated further that:

“In the face of this difficulty, to determine, as your office has done, that ALL actions of a person who is an MEC fall under the ambit of the Code is unreasonable and illogical and is rejected.”

5.1.23 The MEC asserted instead that, in his view:

“...the correct approach is that one must always look to the purpose of the prohibition in the Code, and the action in question so as to lawfully determine the scope and application of the prohibition in the Code.”

5.1.24 In support of the approach suggested by him, the MEC stated that:

“The need to do so is demonstrated by the wording of the Act itself i.e. in that the phrase “in performing their official responsibilities” must be interpreted in its proper context, which is aimed at ensuring ethical conduct by the Executive members when carrying out those functions.”

5.1.25 In light of the aforesaid, the MEC maintained that in regard to his actions, i.e. in relation to his statements, he was:

“...neither addressing matters within my portfolio as MEC, nor answering questions raised of me in that regard but rather acting only as member of a political party participating in the SOPA debate...”

5.1.26 According to the MEC his,

“...comments about the track-record of member Herron’s development success during his time as a City of Cape Town Mayco member under the banner of my own political party, in the 2019 SOPA were intended to peel off

the rosy gloss that, in my view, had been unfairly capitalized on, i.e. by indicating the legal impediments those developments fact.”

5.1.27 The MEC concluded his response by stating that:

“Whilst I have conceded that my comments in question were not technically legally correct I deny that this equate to any intention to wilfully make false or misleading statements. My only intention in so saying was to highlight the impediments that the success of those developments have faced so far, which are, as I understood it, legal in nature. I deny my actions were ever intended to wilfully mislead or that my speech was in breach of section 136(2)(b) of the Constitution as you suggest; but more fundamentally deny that in any event the Executive Ethics Code, has any application to the SOPA speech made by me as part of the DA team at the time.”

5.1.28 The MEC also requested to be informed of the intended remedial action to be taken against him before the report of the Public Protector is issued, so that he could respond to it. His office was referred to the provisions of section 3 of the EMEA in terms of which the Public Protector’s report on the investigation of a breach of the Executive Ethics Code by the MEC has to be submitted to the Premier, who then has to submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken by the Premier in regard thereto, to the Provincial Legislature.

5.1.29 The MEC responded on 15 February 2021, in essence repeating what was stated in his previous responses referred to above.

Application of the relevant law

- 5.1.30 In terms of section 125 of the Constitution, the executive authority of a province is vested in the Premier of that province. The Premier exercises the executive authority, together with the other members of the Executive Council. It further provides that the provincial executive must act in accordance with the Constitution.
- 5.1.31 Section 132 of the Constitution provides that the Premier of a province appoints the members of the Executive Council from among the members of the provincial legislature, assigns their powers and functions, and may dismiss them.
- 5.1.32 Members of the Executive Council are, in terms of section 133 of the Constitution, responsible for the functions of the executive assigned to them by the Premier. Section 133(3) provides that Members of the Executive Council of a province *inter alia*, must act in accordance with the Constitution.
- 5.1.33 Before Members of the Executive Council of province begin to perform their functions, they must, in terms of section 135 of the Constitution swear or affirm faithfulness to the Republic and obedience to the Constitution in accordance with Schedule 2, as follows:
- “I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.”*
(In the case of an oath: So help me God.)
- 5.1.34 Furthermore, the conduct of Members of Provincial Executive Councils is primarily regulated by section 136 of the Constitution. It provides that:

- “(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.*
- (2) Members of the Executive Council of a province may not-*
- (a) undertake any other paid work;*
 - (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or (emphasis added)*
 - (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”*

5.1.35 It is thus clearly expected by section 136 of the Constitution of Members of the Executive Council of a province not to act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests.

5.1.36 Section 2(1) of the EMEA enjoins the *President* “*to publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government, and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.*”

5.1.37 Sections 3(1) and 4 of the EMEA provide that the Public Protector must investigate any alleged breach of the Executive Ethics Code on receipt of a complaint against an MEC by a member of the Provincial Legislature and must report on the investigation to the Premier of the Province.

5.1.38 The Executive Ethics Code was published in terms of section 2(1) of the EMEA on 28 July 2000.

5.1.39 Paragraph 2.1 provides that Members of the Executive must, to the satisfaction of the President or the Premier, as the case may be-

- 5.1.39.1 Perform their duties and exercise their powers diligently and honestly;
- 5.1.39.2 Fulfil all the obligations imposed on them by the Constitution and the law;
- 5.1.39.3 Act in good faith and in the best interest of good governance; and
- 5.1.39.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.

5.1.40 Paragraphs 2.3 (a)-(c) of the Executive Ethics Code provides that Members of the Executive may not:

- 5.1.40.1 Wilfully mislead the legislature to which they are accountable;
- 5.1.40.2 Wilfully mislead the President or Premier, as the case may be;
- 5.1.40.3 Act in a way that is inconsistent with their position.

5.1.41 In terms of paragraph 2.3(f) of the Executive Ethics Code, Members of the Executive may not expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

5.1.42 The Executive Ethics Code therefore clearly distinguishes between the “*official responsibilities*” and “*private interests*” (such as political interests) of a member based on the nature of the activity in which the member is engaged.

5.1.43 The *Guide for Members of the Executive* approved by the President and which became effective on 20 November 2019 covers Ministers, Deputy Ministers, Premiers and Members of the Executive Council of Provincial Governments (referred to as members). It provides *inter alia* that Members are required at all times to ensure compliance with the Executive Ethics Code while they continue to hold office as a Member.

5.1.44 It follows therefore that Members of the Executive Council are appointed by the Premier, and for the duration of their tenure do not cease to be Members at any

time. Moreover, there is no provision in the Constitution or any other legislation, regulating the powers and functions of Members of the Provincial Executive Council, that provides for a temporary relinquishing of membership of the Executive Council, whereby a member may address the Legislature only as an member thereof representing a political party, and that once this role has ended, then subsequently taking on the position as Member of the Executive Council again.

5.1.45 The constitutional imperative of ethical conduct as also provided for in paragraphs 2.1 and 2.3 of the Executive Ethics Code therefore also applies when a Member of the Executive Council makes a statement in the Legislature in the interest of the political party that he or she represents. The standard of ethics imposed on him or her by the Constitution and the Executive Ethics Code, not to act in any way that is inconsistent with their office still stands

5.1.46 Section 116 of the Constitution provides that a provincial legislature may determine and control its internal arrangements, proceedings and procedures and make rules and orders concerning its business.

5.1.47 In terms of section 117(1)(a) of the Constitution, members of a provincial legislature have freedom of speech in the legislature, subject to its rules and orders.

5.1.48 Rule 59 of the Standing Rules of the Western Cape Provincial Legislature issued in March 2019 provides as follows:

“59 (1) No member may-

(a) Impute improper motives on;

(b) Reflect on the integrity of; or

(c) Verbally abuse

another member.”

Conclusion

- 5.1.49 The MEC's reliance on the judgement in the matter of the *President of the Republic of South Africa and Another v the Public Protector and Others* [2020] ZAGPPH 9 (10 March 2020) (the CR-17 Judgment) to profess that he was acting as a member of the DA during the proceedings in the Western Cape Provincial Legislature (in pursuit of private political interests outside the scope of the Executive Ethics Code), and not as a member of the Provincial Executive Council, is misconstrued.
- 5.1.50 There were two issues before the Court in the CR-17 Judgment in this regard, namely:
- 5.1.50.1 The President's conduct during the proceedings in the National Assembly, and
- 5.1.50.2 His conduct in relation to the activities of the CR-17 campaign.
- 5.1.51 The Court's finding that the President was acting as a member of the African National Congress (ANC) political party and not as a member of the Executive, did not apply to his conduct during the proceedings before the National Assembly. In fact, the Court confirmed that he was then acting within the public sphere, bound by the duties of his oath of office, but that the facts did not support the Public Protector's findings that he acted in breach of the ethical duties as envisaged in the Executive Ethics Code.
- 5.1.52 The Court further found that the activities of the CR-17 campaign were, by nature "*the activities of members of a private group of people, **and not a statutory body**, in furtherance of a matter that concerned their relationship with their party.*" (emphasis added). The Court held that:

“These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities ... the conduct of political party members in conformity with their party structures and in furtherance of their own personal party ambitions is squarely within the private domain.”

- 5.1.53 The suggestion or contention by the MEC that he acted exclusively in furtherance of a matter that concerned his relationship with his political party and that his actions fell exclusively within the pursuance of private interests as envisaged in the Executive Ethics Code, and therefore within the private sphere, is misdirected.
- 5.1.54 This is also borne from his position as a member of the Western Cape Provincial Legislature, and on account of having been appointed to Public Office, created by the Constitution, as a representative of a political party. Membership of a political party is thus a requirement to be elected to and appointed to public office in terms of the Electoral Act 73 of 1998 and not a default “capacity” to which he can revert at will (*New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020)*).
- 5.1.55 The MEC participated in the proceedings in the Legislature, by virtue of being a **public office bearer** of a statutory body (“*created by a constitution or legislative act ... and involving the power to carry out some governmental function*” - Merriam-webster Legal Dictionary) which he cannot relinquish in pursuit of “internal party-political activity” as envisaged in the CR-17 judgment. Furthermore, the proceedings in the Western Cape Provincial legislature did **not** equate to activities of a “private group of people” within an internal political party structure, acting in the furtherance of their relationship with their party and therefore within the “private domain” and outside the scope of the Executive Ethics Code, as established by the Court on the CR-17 Judgement.

5.1.56 The following dictum from the matter of *Marr v MEC Department of Health Eastern Cape Provincial Government and Another* (3908/05 , ECJ29/06) [2006] ZAECHC 16 (10 April 2006), is also of relevance:

*“Section 1 (c) of Act 108 of 1996 (hereafter the Constitution) makes it clear that the rule of law is one of the cornerstones of the constitution. Various other sections of the Constitution emphasize (the) responsibility (of an public office bearer)..., not least of all by the oath which a person such as the respondent must take to the effect that one will obey, respect and uphold the Constitution and all other law of the Republic. Sections 95, 107 and 129 set out the oath which various political heads must take when assuming office. On assuming office, the respondent would have to have taken the oath referred to in section 107 of the constitution. This oath also includes a commitment by the person that such person will perform the functions of (his/ her) office conscientiously and to the best of (his/ her) ability. In this regard it is also clear from **Jayiya** supra at page 617 that the respondent **cannot delegate himself out of responsibility.**” (emphasis added)* (Referring to *Jayiya v MEC for Welfare, Eastern Cape, And Another* 2004 (2) SA 611 (SCA))

5.1.57 The Constitution and the Executive Ethics Code therefore require of Members of the Executive to conform to the prescribed ethical standards at all times, irrespective of the capacity in which they perform their actions. They are expected to behave in an exemplary and ethical manner, whether performing their official functions or not and in whatever capacity.

5.1.58 This is also evident from the provisions of section 136 of the Constitution and paragraph 2.3 of the Executive Ethics Code, which prohibit Members of the Executive from exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

5.1.59 Proceedings of provincial legislatures relate to state affairs and the conduct of all members at such meetings should therefore comply with the standard expected of them as public office bearers. The conduct of a member during proceedings of the Legislature, and particularly that of a MEC, as regulated by section 136 of the Constitution and the Executive Ethics Code, whether it was with the objective of the furtherance of a political objective or not, falls under the jurisdiction of the Public Protector and have to be investigated if a complaint of a breach of the Executive Ethics Code is lodged.

5.1.60 In this case, the Public Protector therefore had to investigate the Complaint that the MEC acted in breach of the Executive Ethics Code, in terms of the provisions of the EMEA.

5.1.61 In terms of paragraph 2.3(a) of the Executive Ethics Code, Members of the Executive may not wilfully mislead the legislature to which they are accountable. The Code does not provide for a situation where an MEC makes a speech in the Legislature to whom he/she is accountable, only as a member thereof representing a political party. It therefore follows that an MEC is subject to the provisions of section 136 of the Constitution and the Executive Ethics Code not to act in any way that is inconsistent with his/her office. If an MEC therefore wilfully makes a statement in the Legislature about another member that is not true, he/she would not be acting in a manner that is consistent with his/her office.

5.1.62 In the CR 17 judgment [from paragraph 53], the Court considered the Public Protector's finding that President Ramaphosa had misled Parliament as follows:

“As best we can understand, the Public Protector appears to have found that the President misled Parliament (either deliberately and inadvertently, or inadvertently) by answering Mr Maimane’s question on the spot, and not allowing himself time to go away and consider the question so that he could make a well-

informed response. At best, this conclusion seems to point to carelessness on the President's part, or, with the benefit of hindsight, an ill-judged decision to answer Mr Maimane's question then and there. However, by no stretch of law, logic or even ethics, could conduct of this nature (answering a question in Parliament on the spot) be said to amount to wilful, or deliberate misleading of Parliament such as to amount to a violation of paragraph 2.3(a) of the Executive Code. That would be inconsistent with the right of members of the Executive to be protected in their freedom of speech when they appear in the National Assembly under section 58 of the Constitution. It would also be contrary to the obvious purpose of the Executive Code, viz to hold members of the Executive to account for their deliberate, wilful or intentional (however one might wish to phrase it) misleading of Parliament. (emphasis added).

5.1.63 It is not in dispute that during the State of the Province debate held in the Western Cape Provincial Legislature on 23 July 2019, the MEC stated that:

"I also want to deal with the factual inaccuracies that are coming from member Herron about his track record in the City of Cape Town on three aspects: My CITI N2 Express, housing delivery and inner city development".

and

"So he went on to say exactly two years ago, in his then capacity at the City of Cape Town, he initiated Inner-City developments. I can tell you now Mr Speaker, that almost all the projects that were initiated by member Herron in the Inner-City were halted by court, all of them" (emphasis added)

5.1.64 In the MEC's oral reply on 3 October 2019 to the Complainant's written questions submitted to the Western Cape Provincial Legislature, he indicated that when he made the statement that all the projects initiated by the Complainant were halted by court, he actually meant "*halted by court challenges*" and that the error was due to his limitation of expressing himself in English.

- 5.1.65 However, in the MEC's response to the complaint during the investigation, dated 30 October 2020, he stated that "*court challenges*" would also have been an error and that he should have referred to "*legal challenges*" or "*legal process*". Again, he blamed the error on English not being his mother tongue.
- 5.1.66 In his response to the section 7(9) Notice, the MEC stated that his comments in the Legislature about the Complainant's involvement in development projects when he was a member of the Council of the City of Cape Town were "*intended to peel off the rosy gloss that, in my view, had been unfairly capitalised on, i.e. by indicating the legal impediments those developments faced.*"
- 5.1.67 The MEC's explanation of blaming his limitations of expressing himself in English for the two errors in respect of what he wanted to convey to the Western Cape Provincial Legislature on 23 July 2019 about the Complainant cannot be accepted. There is clearly a significant difference in the meaning of a project that was halted by a court action, "*halted by court challenges*" and a project that stopped due to a legal challenge. "*Halted by court*" is a decisive intervention of a court of law after having adjudicated on the matter concerned, "*halted by court challenges*" refers to an application or action that was brought in a court of law, whilst a legal challenge can, for example, be a letter of demand from an individual or attorney. It was also noticeable during the investigation that the MEC has a proper command of the English language.
- 5.1.68 From the responses of the MEC during the investigation, it is clear that the intention of the statement that he made in the Legislature about the Complainant was to cast aspersions on his performance as a member of the Council of the City of Cape Town. His oral reply in the Legislature on 3 October 2019 and subsequent further explanations provided during the investigation clearly indicate that the MEC was fully aware at the time of making the statement that it was false.
- 5.1.69 In addition, the freedom of speech of members of a provincial legislature provided for in section 117 of the Constitution, is subject to the legislature's rules and

orders. Rule 59 of the Standing Rules of the Western Cape Provincial Legislature provides that no member may impute improper motives on or reflect on the integrity of another member. These rules are applicable to proceedings in the Western Cape Provincial Legislature and do not automatically translate or equate to the provisions of the Executive Ethics Code published in terms of the EMEA and which only apply to members of the Executive.

- 5.1.70 As confirmed by the High Court in the CR-17 judgment, the purpose of the Executive Ethics Code is to hold members of the Executive accountable for wilfully misleading the legislature. Therefore, in as much as an MEC might have freedom of speech as a Member of the Western Cape Provincial Legislature in terms of section 117 of the Constitution, section 136 requires of the MEC to not to act in any way that is inconsistent with his/her office and not to expose himself/herself to any situation of conflict between his/her official responsibilities and private interests.
- 5.1.71 By wilfully misleading the Western Cape Provincial Legislature about the achievements or lack thereof of one of its members, the MEC did not act in a way that is consistent with his office. Instead of withdrawing the false statement and apologising to the Legislature and the Complainant, the MEC tried to change the obvious meaning of his statement in question thereafter and blamed the false statement on his limitations to converse in English.
- 5.1.72 The MEC's conduct was therefore inconsistent with the integrity of his office and not in the best interests of government.
- 5.1.73 The MEC's conduct was accordingly improper and in violation of section 136(2)(b) of the Constitution. It also constitutes a breach of paragraphs 2.1(c), 2.1(d), 2.3(a), 2.3(c) and 2.3(f) of the Executive Ethics Code.

6. FINDINGS

6.1 Regarding whether the MEC for Transport and Public Works, Mr B Madikizela wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code:

- 6.1.1 The allegation that the MEC for Transport and Public Works, Mr B Madikizela wilfully made false and misleading statements to the Western Cape Provincial Legislature about Mr Brett Herron on 23 July 2019, is substantiated.
- 6.1.2 The allegation that the MEC's conduct in this regard constitutes a breach of the Executive Ethics Code, is also substantiated.
- 6.1.3 The MEC's conduct was improper and in violation of the provisions of section 136(2) of the Constitution. It also constitutes a breach of paragraphs 2.1(c), 2.1(d), 2.3(c), and 2.3(f) of the Executive Ethics Code.

7. REMEDIAL ACTION

- 7.1 The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

7.1.1. The Premier of the Western Cape to:

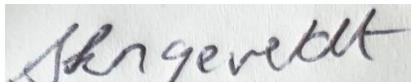
- 7.1.1.1. In terms of section 3(6) of the EMEA within a reasonable time , but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the Western Cape Provincial Legislature.

8 MONITORING

- 8.1.1 The Premier of the Western Cape to inform the Public Protector within 30 days of the date of this report of the implementation of the remedial action taken in paragraph 7.1.1, and of the action taken or to be taken in response thereto.
- 8.1.2 The implementation of the remedial action taken shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 2021/03/31



Assisted by: Ms Shireen Lengeveldt
Senior Investigator: Western Cape Provincial Office