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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A
VIOLATION OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE
EXECUTIVE COUNCIL OF THE WESTERN CAPE PROVINCIAL
GOVERNMENT FOR HUMAN SETTLEMENTS, MR BONGINKOSI
MADIKIZELA**

1. INTRODUCTION

- 1.1 This is a closing report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), Section 3 of the Executive Members' Ethics Act, 1998 (the EMEA) and section 8(1) of the Public Protector Act, 1994 (the 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 of the Western Cape Provincial Government for Human Settlements, Mr Bonginkosi Madikizela (hereinafter referred to as MEC Madikizela).
- 1.3 The report is submitted to the Premier of the Western Cape, in terms of section 3(2)(b), read with section 3(3) of the EMEA.
- 1.4 The complaint was lodged with the Public Protector by the Leader of the African National Congress (ANC) in the Western Cape Provincial Legislature, Mr Khayaletu Elvis Magaxa MPL (the Complainant), in terms of Section 4(1)(b) of the EMEA.
- 1.5 The Complainant alleged that MEC Madikizela *"received benefits/sponsorships on or around 15 March 2017 during special birthday celebrations in his honour."*
- 1.6 He further stated in his complaint that:

"By accepting gifts from contractors and consultants he failed to act in a manner that is consistent with the integrity of his office. The benefit received by the MEC could improperly influence him in the performance of his duties as various contractors to whom bids/tenders have been awarded to do work for his department had been in attendance and contributed to the private birthday party arranged by his office and spouse MEC Mbombo. At the function at least one contractor publicly said he contributed and expect good returns of his investment."

At least one benefactor, Phumla Zantzi of Jawula Trading and Construction admitted to have donated a multi-tier and coloured cake for Madikizela to the declarable value of R3 000. Other contractors present were: Faizal Motlekar of Motlekar Holdings (specialising in RDP house construction)/ Group Five, Brothers Siraajudien and Niyaaaz Jainoodien of Autoworld-division of Velocity Cars and various other business interests, Nazeem Price of Citrine Construction and Tobile Madikizela of TM Construction who claims to be the brother of the MEC."

- 1.7 The Complainant concluded that by failing to declare the benefits/sponsorships that he received on or about 15 March 2017 at his birthday celebrations (it appeared that the event took place on 11 March 2017), MEC Madikizela breached the Executive Ethics Code. He requested the Public Protector to investigate the breach and to take action against MEC Madikizela.
- 1.8 Allegations of impropriety made against MEC Madikizela by political parties relating to his birthday party that was held on 11 March 2017 appeared in several newspaper reports.
- 1.9 The gist of these allegations was that MEC Madikizela acted unethically *"by allowing his birthday party to be sponsored by people in the construction industry who deal with his department, which awards housing contracts worth billions"*. (Sunday Times, 21 May 2017)
- 1.10 In his response to the allegations referred to in newspaper articles, MEC Madikizela reportedly denied that he ever approached anyone to sponsor his birthday party and that he acted improperly in respect of the event. He confirmed that Ms Phumla Zantsi, who it was reported contributed R3000 towards the birthday cake, did some work for the Western Cape Department of Human Settlements before he became MEC. He was reported as having stated that she was his friend from 1998 and that the contribution had

nothing to do with her company doing work for the Department. (*Cape Times*, 22 May 2017).

1.11 When Ms Zantsi was approached by the media, she was reported as having confirmed that her company, *Lawula Trading and Construction* “does business with the Western Cape government, including projects with the department of human settlements (sic).”

1.12 She further explained that:

“...it was their culture as friends to throw surprise birthday parties for each other, with health MEC Nomafrench Mbombo’s having been held at the sea facing Radisson Blu hotel last year.

‘I had to contribute from my pocket. I paid for the cake, for about R3000. I don’t involve my company in these things...I’m not a politician but its raising concerns, we organised his 40th two years ago and none of this happened.’
(*Sunday Times* 21 May 2017)

1.13 It was also reported in May 2017, that the Premier of the Western Cape was looking into the allegations against MEC Madikizela. (*Cape Times* 23 May 2017).

1.14 Sections 3(1) and 4(1)(b) of EMEA provide that the Public Protector must investigate any alleged violation of the Executive Ethics Code by a MEC on receipt of a complaint by a Member of the Provincial Legislature of a province.

2. THE ISSUES CONSIDERED AND INVESTIGATED

2.1 On analysis of the complaint and the information and documentation received during preliminary enquiries, the following issues were considered and investigated:

- 2.1.1 Whether MEC Madikizela received any benefit/gift and/or sponsorship for or in respect of a birthday party that was held for him on 11 March 2017, and if so;
- 2.1.2 Whether MEC Madikizela failed to disclose the benefit/gift and/or sponsorship in terms of the Executive Ethics Code; and if so;
- 2.1.3 Whether MEC Madikizela acted in breach of the Executive Ethics Code.

3. THE INVESTIGATION

3.1 Scope of the investigation

- 3.1.1 The investigation was conducted in terms of section 182(1) of the Constitution, section 3 of the Executive Members` Ethics Act of 1998, and sections 6 and 7 of the Public Protector Act of 1994.
- 3.1.2 The scope of the investigation focused on the issues referred to in paragraph 2 above.
- 3.1.3 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.

3.2 The investigation approach

- 3.2.1 The approach to the investigation commenced by analysis of the complaint and the information the complainant relied upon, relevant documentation, and consideration and application of the relevant laws, regulatory framework and prescripts.
- 3.2.2 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to establish:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?

3.2.3 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 case, the factual enquiry principally focused on whether or not MEC Madikizela received a benefit/gift and/or sponsorship for or in respect of a birthday party that was held for him on 11 March 2017, and if so whether he failed to disclose it and violated the Executive Ethics Code.

3.2.4 The enquiry regarding what should have happened, focused on the law or rules that regulate the standard that should have been met by MEC Madikizela in compliance with the Executive Ethics Code.

4. KEY SOURCES OF INFORMATION

4.1 Applicable Legislation.

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

4.1.2 The Public Protector Act, 23 of 1994.

4.1.3 The Executive Members Ethics Act, 82 of 1998.

4.1.4 The Executive Ethics Code.

4.2 Documents and information received.

4.2.1 The relevant information and documents obtained and analyzed, were primarily:

4.2.1.1 The complaint lodged by Mr Magaxa.

4.2.1.2 Newspaper report-*Contractors 'paid for DA MEC's bash'*- *Sunday Times*, 21 May 2017.

4.2.1.3 Newspaper report-*Madikizela birthday party sleaze*-*Cape Times*, 22 May 2017.

4.2.1.4 Newspaper report-*Zille seeks provincial leader birthday splurge facts*-*Cape Times*, 23 May 2017.

4.2.1.5 Invoices obtained from the *One and Only Hotel* in Cape Town, where MEC Madikizela's birthday party was held.

4.2.1.6 List of donors provided by the organisers of the birthday party.

4.2.1.7 Western Cape Provincial Parliament: Register of Members' Interests; 2017.

4.3 Correspondence sent and received.

4.3.1 Letter to the Premier of the Western Cape, Ms H Zille in connection with the allegations made against MEC Madikizela, dated 27 July 2017.

4.3.2 Response received from the Premier of the Western Cape, dated 3 August 2017.

4.3.3 Letter to the Premier of the Western Cape, requesting further information, dated 7 August 2017.

4.3.4 Response received from the Premier of the Western Cape, dated 28 August 2017.

4.3.5 Letter to MEC Madikizela requesting him to respond to the allegations, dated 5 October 2017.

4.3.6 Response received from MEC Madikizela, dated 20 October 2017.

4.3.7 Letter to the Premier of the Western Cape, informing her in terms of section 3(3) of the EMEA that the investigation could not be concluded in 30 days, dated 23 November 2017.

4.4 Consultation and interviews

4.4.1 Consultation held with the Complainant on 24 July 2017

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

5.1 Regarding whether MEC Madikizela received any benefit/gift and/or sponsorship for or in respect of a birthday party that was held for him on 11 March 2017

Common cause or facts not in dispute

5.1.1 It was not in dispute that a birthday party was held for MEC Madikizela on 11 March 2017 at a hotel in Cape Town.

Issues in dispute

5.1.2 The main issue for determination was whether MEC Madikizela received benefits/gifts or sponsorship for, or in respect of his birthday party.

5.1.3 The allegations were also investigated by the Premier of the Western Cape, Ms H Zille.

5.1.4 In her response to enquiries by the Western Cape Provincial Office of the Public Protector South Africa (PPSA) in this regard, dated 3 August 2017, Premier Zille stated that her investigation was conducted in terms of section 132(2) of the Constitution of the Republic of South Africa, 1996 and sections 42(2) and 46 of the Constitution of the Western Cape, 1997.

5.1.5 Premier Zille indicated that during her investigation, she telephonically contacted and spoke to:

5.1.5.1 MEC Madikizela;

5.1.5.2 MEC Nomafrench Mbombo;

5.1.5.3 The person who *“donated the cake for the party”*;

5.1.5.4 The Chief Financial Officer of the Western Cape Department of Human Settlements;

5.1.5.5 A friend of MEC Madikizela who attended and contributed to the cost of the party, but is not a contractor to the Western Cape Provincial Government;

5.1.5.6 The Manager of the hotel where the party was held; and

5.1.5.7 Two other persons who attended and had done work for the Western Cape Department of Human Settlements in the past, but did not contribute to the costs of the party.

5.1.6 According to Premier Zille, she firstly raised the matter with MEC Madikizela himself. He explained that the party had been organized as a surprise for him. MEC Madikizela further indicated to the Premier that:

“He has for years been part of a 20-strong network of friends who support each other, specifically in times of celebration and bereavement, helping to raise money for events ranging from parties to funerals. This group (loosely based on the traditional stokvel model) meets on a regular basis. When

Bonginkosi was elected the DA's interim Western Cape leader, they wanted to throw a celebration party for him.

Bonginkosi vetoed the idea. He said it was not appropriate in the circumstances, and could potentially be interpreted as lauding it over other candidates. They accepted his reservations, and later hatched a plan to give him a surprise birthday party instead. It was a closely guarded secret. After the event, when he enquired who had paid for it, they told him that a fundraising subcommittee had called on people to make donations. He accepted their word and thought nothing further of it. This was normal in his friendship circle, he said."

5.1.7 Further, Premier Zille stated that MEC Madikizela had confirmed that Ms Puma Zantsi, a partner in a construction firm doing business with the Provincial Government, had contributed a multi layered, multi coloured cake, worth R3000. That was the only contractor involved with the Western Cape Provincial Government, as far as he was aware.

5.1.8 Premier Zille expanded on MEC Madikizela's explanation to her as follows:

"Bonginkosi told me that he and Pumla were part of the mutually supporting friendship circle. They had been friends for 20 years, from the time they were both activists in Khayelitsha and long before he had even thought of joining the DA. For her part, Pumla had been a contractor to the province long before Bonginkosi became provincial Minister of Human Settlements. She had never used her presence in their 'stokvel' network to seek a business advantage or political favour."

5.1.9 In Premier Zille's discussion with Ms Pumla Zantsi, the latter confirmed that a surprise party was organized for MEC Madikizela, as he had explained, and she provided a list of the donors. Premier Zille requested the Chief Financial Officer of the Western Cape Department of Human Settlements to

determine if any of the donors were contractors to the Department or the Province. His response was in the negative.

- 5.1.10 She then contacted the main donor, who indicated that he had no business interests in the Western Cape and none in construction. He also indicated that none of the other financial donors did work for the Western Cape Provincial Government.
- 5.1.11 The Premier's Office obtained the invoices for the party from the organisers and conducted a reconciliation, *"which showed the accuracy of the information we had been given."*
- 5.1.12 On the basis of the investigation that she conducted, Premier Zille decided that MEC Madikizela had not acted in a manner that required and sanction by her office.
- 5.1.13 She concluded in her response to me that she only investigated allegations of impropriety published by the media pertaining to assertions that: *"Contractors paid for DA MEC's bash"*. She emphasized that her investigation never purported to make findings in relation to an alleged breach by MEC Madikizela of the Executive Ethics Code.
- 5.1.14 It appeared from information subsequently provided by Premier Zille, which included invoices and information obtained from the hotel where the party was held, that 130 guests were to be hosted and the total cost, including the birthday cake amounted to R134 028.
- 5.1.15 The list of donors provided by the organisers to Premier Zille did not include the names of any of the contractors referred to in the complaint, with the exception of Ms Pumla Zantsi.
- 5.1.16 It was established during the investigation that a complaint of a violation of the *Code of Conduct for Members of the Western Cape Provincial Parliament* was also lodged in connection with MEC Madikizela's birthday

party with the Registrar of Members' Interests, appointed in terms of the Members of the Western Cape Provincial Parliament Code of Conduct Act, 2002. The Registrar's report on the investigation has not been issued to date.

5.1.17 MEC Madikizela responded to me in connection with the complaint on 20 October 2017. He stated, *inter alia* that:

"On the 11th of March, I was taken by my partner to celebrate my pre birthday which is on the 15th of March. This has been a norm for years amongst a group of friends, including Phumla Zantsi who's been touted as the contractors who paid for my party.

To my surprise, the venue was packed with people I wouldn't have invited myself. Family members, friends, colleagues, acquaintances and work colleagues. My friends told me they organized the party and decided to surprise me and I didn't see anything wrong with that."

5.1.18 He further indicated that he has been friends with Ms Phumla Zantsi for almost 20 years, long before she was a service provider for the Department of Human Settlements and before he became the MEC.

5.1.19 According to MEC Madikizela, he had no idea which of his friends paid for what to contribute to his birthday party before the investigation by Premier Zille.

5.1.20 Further that: *"I had no way of knowing the price of the cake and who paid for it. Until I received a call from Jan-Jan Joubert (a journalist) in May, I had no way of knowing that there were alleged irregularities about my birthday.*

....

In a surprise birthday party, which is a norm between family and friends you don't go around asking the price of gifts people give to you."

Application of the relevant legislation and the Executive Ethics Code

- 5.1.21 Paragraph 4 of the Executive Ethics Code regulates the receipt of gifts by, *inter alia*, Members of the Provincial Executive Councils.
- 5.1.22 It provides that a member may not solicit or receive a gift which is in return for any benefit received from the member in his/her official capacity, constitutes an improper influence on the member or constitutes an attempt to influence him or her in the performance of his/her duties.
- 5.1.23 The Complainant suggested that if MEC Madikizela accepted gifts or benefits from contractors doing business with the Western Cape Department of Human Settlements, it could have improperly influenced him in the performance of his official duties. However, it does not appear from the evidence and information obtained during the investigation that MEC Madikizela solicited any gift or that he received a gift that constituted an improper influence on him or an attempt to do so. It was also not suggested and there is no evidence indicating that that anyone received any improper benefit from MEC Madikizela.
- 5.1.24 The essence of the complaint was that MEC Madikizela received a gift in the form of the hosting of his birthday party, and that he failed to declare it, as required by the Executive Ethics Code.
- 5.1.25 Paragraph 4.2 of the Executive Ethics Code deals specifically with the receipt of a gift in the course of a member's duties. It is not in dispute that the birthday party was not held in the course of MEC Madikizela's duties, but was private event.
- 5.1.26 However, this paragraph provides an indication of the meaning of "gift" as contemplated by the Executive Ethics Code, in the absence of a definition. If a member in the course of his or her duties received a gift or more than R1000 he/she may request permission from the Premier to retain it. Where

such permission was not requested or granted, the member may return the gift or donate it to the state.

- 5.1.27 The hosting of a private a birthday party is clearly not an item that a member can first ask permission for, especially if he/she is not even aware of it in advance, and then return it or donate it to the state after the event, if permission is not granted.
- 5.1.28 The hosting by MEC Madikizela's friends/guests of his birthday party, payment in respect of which were clearly made during and after the event, cannot be regarded as a gift or benefit that he received, as contemplated by paragraph 4 of the Executive Ethics Code. He was not the only beneficiary thereof, as the hosting was shared by all those present. It also did not represent an item or object that became his sole property and that he could dispose of or return.
- 5.1.29 There is no indication in the complaint, the newspaper reports and the other evidence obtained during the investigation that MEC Madikizela received any personal gift at his birthday party.
- 5.1.30 Paragraph 6 of the Executive Ethics Code regulates the disclosure by members of financial interests. It provides that the source and description of direct financial sponsorship or assistance, which benefits the member in his or her personal and private capacity must be disclosed. The hosting of MEC Madikizela's birthday celebrations was clearly not a direct financial sponsorship that benefitted only him in his private or personal capacity. Most of the expense incurred was enjoyed by the other 129 guests at the event.
- 5.1.31 In terms of paragraph 6.3(c), hospitality intended as a personal gift of a value of more than R350 must be disclosed. The hosting of the birthday party was enjoyed by 130 people and was clearly not for the benefit of MEC Madikizela only. According to him, he was not even aware that the event was to take place and that a birthday cake would be part of it. No evidence

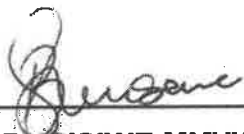
to the contrary was presented or obtained during the investigation. It cannot be construed that the hosting of the birthday party constituted hospitality that was intended as a personal gift for MEC Madikizela only, as contemplated by the Executive Ethics Code.

5.1.32 Lastly, paragraph 6.3(d) provides that hospitality intended as a gift and received from a single source and which cumulatively exceeds the value of R350 in any calendar year, must be disclosed. As already indicated, the hosting of the birthday party did not constitute a personal gift, in terms of the Executive Ethics Code. Moreover, it did not come from a single source.

6. REASON FOR CLOSURE

6.1 The complaint lodged by Mr Magaxa against MEC Madlikizela that he failed to declare benefits or sponsorships that he received during a birthday party that was held for him on 11 March 2017, 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. He did not respond.



ADV BUSISIWE MKHWEBANE

PUBLIC PROTECTOR

REPUBLIC OF SOUTH AFRICA

DATE: 15/11/2018

Assisted by: Western Cape Provincial Office