
PUBLIC PROTECTOR SOUTH AFRICA

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"Allegations of a possible violation of the Executive Ethics Code by the Premier of the Western Cape Province, Honourable Helen Zille"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF BREACH OF THE PROVISIONS OF THE EXECUTIVE ETHICS CODE BY THE PREMIER OF WESTERN CAPE PROVINCIAL GOVERNMENT, HONOURABLE HELEN ZILLE
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Executive Summary

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 3(2)(a) of the Executive Members' Ethics Act, 1998 (EMEA) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of a possible violation of the Executive Ethics Code (Code) by the Premier of the Western Cape Province, Honourable Helen Zille (Premier).

(iii) The complaint was lodged with my office on 07 July 2017 by Honourable K Magaxa, Member of the African National Congress and Western Cape Provincial Legislature (Complainant) in terms of section 4(1)(b) of the EMEA.

(iv) In the main, the Complainant alleged that the Premier violated sections 2.1(c) and (d); and 2.3(c) of the Code by conducting herself as follows:

a) She tweeted, amongst others, that "for those claiming legacy of colonialism was ONLY negative, think of our independent judiciary, transport, infrastructure, piped water etc." The tweet has brought back a lot of pain and suffering to victims of apartheid and colonialism in South Africa. She celebrated the oppression, exploitation, racism and poverty which are the direct results of the legacy of colonialism;

b) She failed to act in good faith and in the best interest of good governance by making such statements. The Premier's action did not comply with what was expected from a person holding the office of the Premier of a province;

c) She also failed to act in a manner that is consistent with the integrity of her office;
d) She violated the principles of the Constitution and divided the society on racial grounds; and

e) By undermining South Africans with her personal beliefs on colonialism she failed to uphold her oath of office which requires the Premier to hold office with honour and dignity.

(v) On analysis of the complaint, the following were issues considered and investigated:

a) Whether the Premier of the Western Cape Provincial Government, Honourable Helen Zille, allegedly made the tweets on colonialism in the media?

b) Whether the alleged tweets on colonialism made by the Premier of the Western Cape Provincial Government, Honourable Helen Zille, violated the provisions of the Executive Ethics Code?

(vi) The investigation process was conducted through correspondence with the Complainant and Premier; analysis of all relevant documentation; and consideration and application of all relevant laws and related prescripts.

(vii) Key laws taken into account to determine if there had been a violation of the Code by the Premier were principally those imposing ethical standards that should have been complied with by the Premier are the following:

a) The Preamble of the Constitution which provides that the people of South Africa recognise the injustices of the past, honour those who suffered for justice and freedom in our land, respect those who have worked to build and develop our country and heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

b) Section 10 of the Constitution provides for the right to human dignity;
c) Section 16 of the Constitution provides for the freedom of expression;

d) Section 114 of the Constitution provides powers to the Provincial Legislatures which include, *inter alia*, to ensure that Provincial Executive Councils, which include a Premier, are accountable to them;

e) Section 133 of the Constitution provides for the accountability of the Provincial Executive Councils;

f) Section 136(1) of the Constitution regulates the conduct of members of Provincial Executive Councils;

g) The EMEA provides for a code of ethics governing the conduct of the Cabinet, Deputy Ministers and members of provincial Executive Councils; and

h) The Code regulates the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils in performing their official responsibilities.

(viii) I issued a notice to the Premier in terms of section 7(9)(a) of the Public Protector Act in which her conduct of posting the tweets on colonialism was found to be in violation of the Code.

(ix) In response to the section 7(9)(a) notice in a letter dated 15 March 2018, the Premier indicated, *inter alia*, that my conclusion that her “tweets gave rise to the constitutional and statutory infringements…will amount to and represent an arbitrary and irrational decision which will not withstand judicial review scrutiny.”

(x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
(a) Regarding whether the Premier of the Western Cape Provincial Government, Honourable Helen Zille, allegedly made the tweets on colonialism in the media:

(aa) The allegation that the Premier made the tweets on colonialism in the media is substantiated.

(bb) The Premier, through her Legal Adviser, confirmed in a letter addressed to me dated 03 October 2017 to having tweeted on colonialism. The tweet was published in the media on 16 March 2017.

(b) Regarding whether the alleged tweets on colonialism made by the Western Cape Provincial Government, Honourable Helen Zille, violated the provisions of the Executive Ethics Code:

(aa) The allegation that the alleged tweets on colonialism made by the Premier violated the provisions of the Code is substantiated.

(bb) It cannot be said that the Premier's tweet sought to show concern and respect for those who were the victims of apartheid and colonialism. The Premier "subsequently apologised for any harm perceived by any alternative interpretation" of the tweet. Her apology can be interpreted as recognition of the negative impact the tweet had on the dignity of a section of the South African population.

(cc) Although the tweet could have been made in the context of the Premier's right to freedom of expression as provided in section 16 of the Constitution and in good faith, it was however, offensive and insensitive to a section of the South African population which regarded it as re-opening a lot of pain and suffering to the victims of apartheid and colonialism, particularly considering the position of influence she holds.
Alleged violation of the EMEA by Premier Zille

(dd) Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b) was created to curb such statements.

(ee) Taking into account the negative responses to the Premier’s tweet, the statements were not consistent with the integrity of her office and position. The negative responses to the tweet imply that divisions of the past are still not healed.

(ff) The conduct of the Premier in the circumstances is in violation of sections 2.1 (d) and 2.3(c) of the Code and the Preamble, sections 10, 16, 136(1) and (2)(b) of the Constitution.

(gg) The conduct of the Premier also constitutes improper conduct in terms of section 182(1)(a) of the Constitution.

(xi) In the light of the above findings I am directing the following remedial action, as contemplated in section 182(1)(c) of the Constitution:

(aa) The Speaker of the Western Cape Provincial Legislature (Speaker) must, within 30 working days from the date of the report, table it before the Western Cape Provincial Legislature for it to take appropriate action to hold the Premier accountable as contemplated in sections 114(2), 133(2) & (3)(a) and 136(1) & (2)(b) of the Constitution.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF BREACH OF THE PROVISIONS OF THE EXECUTIVE ETHICS CODE BY THE PREMIER OF WESTERN CAPE PROVINCIAL GOVERNMENT, HONOURABLE HELEN ZILLE

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), section 3(2)(a) 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 is submitted to the President of the Republic of South Africa, Honourable CM Ramaphosa, in terms of section 3(3) of the EMEA.

1.3. Copies of the report are also provided to Honourable K Magaxa, Member of the African National Congress and Western Cape Provincial Legislature and Honourable Helen Zille, the Premier of the Western Cape Provincial Government to inform them of the outcome of the investigation.

1.4. The report relates to an investigation into allegations of a possible violation of the Executive Ethics Code, 2000 (Code) by Honourable Helen Zille, the Premier of the Western Cape Provincial Government (Premier).

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 07 July 2017 by Honourable K Magaxa, Member of the African National Congress and Western Cape Provincial Legislature (Complainant) in terms of section 4(1)(b) of the EMEA.

2.2 In the main, the Complainant alleged that the Premier violated sections 2.1(c) & (d) and 2.3(c) of the Code by conducting herself as follows:
2.2.1 She tweeted, amongst others, that “for those claiming legacy of colonialism was ONLY negative, think of our independent judiciary, transport, infrastructure, piped water etc.” The tweet has brought back a lot of pain and suffering to victims of apartheid and colonialism in South Africa. She celebrated the oppression, exploitation, racism and poverty which are the direct results of the legacy of colonialism;

2.2.2 She failed to act in good faith and in the best interest of good governance by making such statements. The Premier’s action did not comply with what was expected from a person holding the office of the Premier of a province;

2.2.3 She also failed to act in a manner that is consistent with the integrity of her office;

2.2.4 She violated the principles of the Constitution and divided the society on racial grounds; and

2.2.5 By undermining South Africans with her personal beliefs on colonialism she failed to uphold her oath of office which requires the Premier to hold office with honour and dignity.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Mandate of the Public Protector

3.1.1 The Public Protector is an independent constitutional institution established in terms of section 18(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.1.2 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”.

3.1.3 Section 182(2) directs that the Public Protector has additional powers as regulated by national legislation. These additional legislative powers include the EMEA, which authorises the Public Protector to investigate and report to the President of the Republic of South Africa on breaches of the Executive Ethics Code in terms sections 3 and 4 of the EMEA. Section 3(4) of the EMEA further states that when conducting an investigation, the Public Protector is vested with all the powers prescribed under the Public Protector Act.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.1.5 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 Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. 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

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
consequences." The Court further confirmed the Public Protector's powers as follows:

1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

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);

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 that effect, if it is the best attempt at curing the root cause of the complaint. (paragraph 68);

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);

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);

\[\text{Supra at para [73].}\]
6. The Public Protector's power to take appropriate 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);

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 these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence. (paragraph 71(e));

8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation. (paragraph 71(d)); and

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)).”

3.1.6 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:

“The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (paragraphs 85 and 152)

There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is
empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92)

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):

Conduct an investigation;
Report on that conduct; and
To take remedial action.

The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104);

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. (paragraph 105).

The fact that there is 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);

Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution, sections 3 and 4 of the EMEA and sections 6 and 7 of the Public Protector Act.

4.1.2 Section 3(1) of the EMEA provides that "the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4." Section 4(1)(b) of the EMEA states that "the Public Protector must investigate, in accordance with section 3, an alleged breach of the code of ethics of a complaint by-

(a) ... 

(b) The Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province." EMEA defines an MEC as a member of an Executive Council, and includes the Premier.

4.1.3 The investigation process commenced with a preliminary investigation which included correspondence with the Complainant and Premier; analysis of the relevant documentation; conducted research; and consideration and application of the relevant laws, regulatory framework and jurisprudence.

4.2 Approach to the Investigation

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

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 violation of the Code by the Premier?

4.2.1.4 In the event of a violation of the Code what would the appropriate remedial action be?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Premier conducted herself in violation of the provisions of the Code when she tweeted as alleged by the Complainant.

4.2.3 The enquiry regarding what should have happened, focuses on the law or Code that regulates the standard that should have been met by the Premier.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of a violation of the Code.

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

4.3.1 Whether the Premier of the Western Cape Provincial Government, Honourable Helen Zille, allegedly made the tweets on colonialism in the media?

4.3.2 Whether the alleged tweets on colonialism made by the Premier of the Western Cape Provincial Government, Honourable Helen Zille, violated the provisions of the Executive Ethics Code?
4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 A copy of the Complainant’s letter dated 06 July 2017 outlining the nature of the complaint

4.4.1.2 Copies of the tweets between the members of the public and the Premier

4.4.1.3 A copy of the Daily Maverick newspaper on the Premier’s tweet titled “From the inside: Lessons from Singapore” dated 20 March 2017

4.4.1.4 Copies of the IOL and News24 reports on the Premier’s tweets dated 19 July 2017

4.4.1.5 A copy of the Equality Court of the Western Cape High Court judgement dated 20 April 2017

4.4.2 Correspondence sent and received

4.4.2.1 A copy of an email by my Investigator, Mr Sydney Mathebula, to Gushwell Brooks and Lloyd Lotz of the South African Human Rights Commission (SAHRC) dated 24 July 2017 regarding the Premier’s matter

4.4.2.2 A copy of an email dated 24 July 2017 from Lloyd Lotz in response to Mr Sydney Mathebula

4.4.2.3 A copy of an email dated 27 July 2017 from Mr Sydney Mathebula to Lloyd Lotz making a follow up on the Premier’s matter

4.4.2.4 A copy of an email dated 27 July 2017 from my Senior Investigator, Ms Shireen Lengeveldt, to Gushwell Brooks and Lloyd Lotz regarding the matter
 Alleged violation of the EMEA by Premier Zille

4.4.2.5 Copies of an email and a letter dated 01 August 2017 from Mr Sydney Mathebula to the Complainant updating him on the matter

4.4.2.6 A copy of an email dated 01 August 2017 from Mr Sydney Mathebula to the Equality Court regarding the Premier’s matter

4.4.2.7 A copy of an email dated 01 August 2017 from Bahia Steeris of the SAHRC in connection with the Premier’s matter

4.4.2.8 Copies of an email and a letter dated 08 September 2017 from Mr Sydney Mathebula and Ms Sune Griessel, the Provincial Representative, respectively to the Premier

4.4.2.9 A copy of an email dated 08 September 2017 from the Premier’s Office acknowledging receipt of Mr Sydney Mathebula’s email above

4.4.2.10 A copy of an email dated 12 September 2017 to the Complainant updating him on the matter

4.4.2.11 A copy of an email dated 13 October 2017 from Fiona Stewart from the Premier’s office responding to my letter of 08 September 2017

4.4.2.12 A copy of an email dated 23 October 2017 from Mr Sydney Mathebula to Ms Fiona Stewart from the Premier’s office

4.4.2.13 A copy of an email dated 10 November 2017 from Fiona Stewart from the Premier’s office responding to my letter of 08 September 2017

4.4.2.14 A copy of a letter dated 10 November 2017 to President JG Zuma informing him of the matter in terms of the EMEA
4.4.2.15 Copies of a cover email dated 29 January 2018 and letter dated 26 January 2018 from Mr Sello Mothupi, Senior Manager, Provincial Investigations and Integration and new assigned Investigator, to the Complainant updating him on the matter

4.4.2.16 A copy of a section 7(9)(a) notice dated 02 March 2018 to the Premier

4.4.2.17 A copy of the Premier's response dated 15 March 2018 to the section 7(9) notice

4.4.2.18 A copy of my acknowledgement of receipt of the Premier's response dated 27 March 2018

4.4.2.19 Copies of emails dated 27 April 2018 and 31 May 2018 from Mr Sello Mothupi updating the Complainant

4.4.3 Legislation and other Prescripts

4.4.3.1 Preamble of the Constitution

4.4.3.2 Section 10 of the Constitution provides for the right to human dignity

4.4.3.3 Section 16 of the Constitution provides for the freedom of expression

4.4.3.4 Section 114 of the Constitution provides powers to the Provincial Legislatures which include, inter alia, to ensure that Provincial Executive Councils, which include a Premier, are accountable to them

4.4.3.5 Section 133 of the Constitution provides for the accountability of the Provincial Executive Councils
4.4.3.6 Section 136(1) of the Constitution regulates the conduct of members of Provincial Executive Councils

4.4.3.7 The EMEA provides for a code of ethics governing the conduct of the Cabinet, Deputy Ministers and members of provincial Executive Councils

4.4.3.8 The Code regulates the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils in performing their official responsibilities

4.4.4 Case Law and other references

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] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC)

4.4.4.2 S v Makwanyana 1995(3) SA 391 (CC)

4.4.4.3 Case of Leroy v France (application number 3610/03), European Court of Human Rights of 02 October 2008

4.4.4.4 https://citizen.co.za/category/talking-point 2.10.2017 02:15 pm

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 Premier of the Western Cape Provincial Government, Honourable Helen Zille, allegedly made the tweets on colonialism in the media:

Common cause issues
5.1.1 Upon receipt of the complaint from the Complainant in a letter dated 06 July 2017, my investigation team raised the matter with the Premier in a letter dated 08 September 2017. In the letter it was indicated that the Premier made the following tweets, published on 16 March 2017:

"Would we have had a transition into specialised health care and medication without colonial influence? Just be honest, please;"

"There were deaths caused by colonialism worldwide, and that is deplorable. Now piped water and medication prevent death;"

"Getting into the aeroplane now and won’t get onto wi-fi so that I can cut off those who think EVERY aspect of colonial legacy was bad;"

"For those claiming legacy of colonialism was ONLY negative, think of our independent judiciary, transport, infrastructure, piped water etc."

5.1.2 A written response dated 03 October 2017 was received from Ms Fiona Stewart, Legal Adviser in the Premier’s Office (Legal Adviser) and acting on behalf of the Premier, in which she stated, inter alia, the following in connection with the Premier’s tweet:

"The tweets by the Premier to which you have made reference to [sic] were only part of a series of tweets published on 16 March 2017, which have been well documented in the media and which are not denied by the Premier."

Conclusion

5.1.3 It can be concluded from the evidence obtained that the Premier indeed made the tweets published on social media on 16 March 2017.
5.2 Regarding whether the alleged tweets on colonialism made by the Premier of the Western Cape Provincial Government, Honourable Helen Zille, violated the provisions of the Executive Ethics Code:

*Common cause issues*

5.2.1 It is common cause that the Premier tweeted on colonialism on the social media as alleged by the Complainant. The tweet was published on 16 March 2017.

*Issues in dispute*

5.2.2 The Complainant alleged in his complaint letter of 06 July 2017 that the Premier’s tweets brought back suffering to victims of apartheid and colonialism in South Africa. He indicated that by making such tweets, she was celebrating the oppression, exploitation, racism and poverty which are the direct results of the legacy of colonialism.

5.2.3 He further stated that the Premier failed to act in good faith and in the best interest of good governance by making such statements. He further, amongst others, alleged as follows:

"Her actions do not comply with what is expected from a person holding the office of the Premier of a province. By her reckless statements, she failed to act in a manner that is consistent with the integrity of her office.

By undermining South Africans with her personal beliefs on colonialism she failed to uphold her oath of office which requires the Premier to hold office with honour and dignity."
5.2.4 The Complainant argued that by making such statements, the Premier’s conduct amounted to a violation of the provisions of the Code, particularly sections 2.1(b), (c) and (d); and 2.3(c).

5.2.5 As indicated in paragraph 5.1.1 above, my team raised the matter with the Premier in a letter of 08 September 2017.

5.2.6 In a letter dated 03 October 2017 from the Office of the Premier, the Legal Adviser argued that by making such tweets the Premier did not violate the Code. She argued as follows:

"8.1 The tweets by the Premier to which you have made reference to [sic] were only part of a series of tweets published on 16 March 2017, which have been well documented in the media and which are not denied by the Premier. Six of the series, to give the direct context, are set out below:

1. Much to learn from Singapore, colonized for as long as SA, and under brutal occupation in WW2. Can we apply the lessons in our democracy?
2. Singapore had no natural resources and 50 years ago was poorer than most African countries. Now they soar. What are the lessons?
3. I think Singapore lessons are: 1) Meritocracy; 2) multiculturalism; 3) work ethic; 4) open to globalism; 4) English. 5) Future orientation.
4. Other reasons for Singapore’s success: Parents take responsibility for children, and build on valuable aspects of colonial heritage.
At this point various responses were received such as:
South Africa would be better if your people left and we drive forward Africa instead of embracing colonialism heritage.
Another said: “There was nothing valuable in the colonization of South Africa… NOTHING!”
To which the Premier then responded:
5. For those claiming legacy of colonialism was ONLY negative, think of our independent judiciary, transport infrastructure, piped water etc.
6. Would we have had a transition into specialised health care and medication without colonial influence? Just be honest, please.
7. Getting onto an aeroplane now and won’t get onto wi-fi so that I can cut off those who think EVERY aspect of colonial legacy was bad.”

5.2.7 The Legal Adviser further pointed out that the tweets were made in the context of the Premier’s right to freedom of expression, particularly tweet numbers 5, 6 and 7 above which were made in response to tweets by others.

5.2.8 She indicated further in her letter of 03 October 2017 that the Premier subsequently apologised for any harm perceived by any alternative interpretation of the tweets. She quoted the Premier’s tweet as follows “I apologise unreservedly for a tweet that may have come as a defence of colonialism, it was not.”

5.2.9 In her follow up letter dated 10 November 2017 to the Public Protector, the Legal Adviser quoted the Constitutional Court matter of Democratic Alliance v African National Congress and Another\(^3\) relating to the right to freedom of expression as follows:

“The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth both by individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinize political argument and deliberate social values.”

\(^3\) 2015(2) SA 232 (CC) at pa 122
5.2.10 She further argued that the tweets were an articulation of a view that the Premier held and did not fall foul of the constitutional right to freedom of expression. Furthermore, the EMEA or the Code cannot and does not limit the constitutional guarantees which the Premier enjoys. She further pointed out that the Premier intended to raise the tweets as a legitimate and important issue for public engagement. According to her, transparent and informed engagement are the hallmarks of good governance and consistent with the integrity of her office and therefore not in violation of the Code.

5.2.11 In the same letter of 10 November 2017 the Legal Adviser stated further as follows:

"While it is true that they (tweets) caused offence and given the response to them the Premier realised that they were insensitive, it must be emphasised that unpopular, insensitive or offensive statements or tweets do not fall foul of the Executive Ethics Code."

Section 7(9)(a) notice

5.2.12 Based on the information gathered and legal prescripts considered, I issued a notice to the Premier in terms of section 7(9)(a) of the Public Protector Act in which her conduct of posting the tweets on colonialism was found to be in violation of the Code. The section provides that

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."
5.2.13 The Legal Adviser responded to the notice as per a letter dated 15 March 2018. In brief, she stated the following:

"The Public Protector misconceived and incorrectly interpreted the Code because sections 2.1(a)-(d), 2.2 and 2.3(c) "cannot be employed or construed to limit the right to freedom of expression as protected by section 16 of the Constitution";

What the Premier's tweets served to do was to initiate a public conversation about whether the legacy of colonialism was exclusively, and only, negative. The Premier believed that the Public Protector's proposed finding was that such a public conversation cannot take place, at least not with the Premier's participation.

The issues raised in the Premier's tweets are by no means novel. On the contrary, sentiments to this effect have for a long time been part of South Africa's (and the international community's) political and academic discourse. In supporting her argument, she referred to several politicians and academics, including the late former President Nelson Mandela when he allegedly gave the following speech at Magdalene College Cambridge on 02 May 2001:

"Britain", he said, "was the main colonial power in our history, with all of the attendant problems and consequences of such a relationship." He went on to state:

"Much of our traditional systems and institutions still carry the scars of the distortions inflicted by colonial rule."
"At the same time, so much of what we have to build on in the competitive modern world is also the result of what we could gain from that interaction and engagement with Britain."

"Our indigenous understanding of the rule of law, viz that not kings or chiefs but the institutions of law and democracy are supreme, was strengthened and enhanced by our reference to the British understanding of that concept."

"If there were one single positive aspect that I had to identify from the history of colonial contact between our two countries, it would be that of the educational benefits our country derived from it."

The Public Protector's findings was to “close down the public debate on this topic in South Africa, or at the least, to censor certain views when expressed by particular politicians, but to permit debate on the same issue in other political and academic settings. In so doing, it sets a dangerous precedent of proscribing certain speech by reference to specific persons involved."

"The basis on which the Public Protector sought to limit the Premier’s right to speech was also unlawful for the following reasons:

The Public Protector’s conclusion that because of the negative response to the tweets, the Premier’s statements were not in the best interest of good governance or the integrity of the Office of the Premier or her position, simply does not follow. This is all the more so when no explanation is given explaining this seemingly incongruous conclusion. The issue raised by the Premier is, as has been shown, one openly debated both in South Africa and abroad. It raises strong and sometimes conflicting views, which should be ventilated and not closed down. It is this shutting down of debate which profoundly damages our constitutional democracy, rather than any views expressed by the Premier."
Alleged violation of the EMEA by Premier Zille

"The Public Protector's conclusion that the Premier's tweets gave rise to the constitutional and statutory infringements...will amount to and represent an arbitrary and irrational decision which will not withstand judicial review scrutiny."

Application of the relevant legal prescripts

5.2.14 The Preamble of the Constitution (Preamble) provides that:

"We, the people of South Africa;
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country;
...
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;"

5.2.15 As the Executive Authority of the Province, the Premier was expected to uphold the undertakings as outlined in the Preamble by making public statements which seek to, inter alia, honour those who suffered for justice and heal the divisions of the past. However, the Premier did admit that "...it is true that they (tweets) caused offence and given the response to them the Premier realised that they were insensitive."

5.2.16 Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected. It was expected of the Premier to make statements on social media which seek to respect the dignity of others. In the case of S v Makwanyana⁴, Justice O'Reagan held as follows:

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⁴ 1995(3) SA 391 (CC).
"[para 328] Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched..." (Own emphasis)

5.2.17 There was an outcry and dissatisfaction from a section of the South African population who regarded the Premier’s tweet as offensive and insensitive, particularly taking into account the position of influence she holds. The affected members of the public regarded the tweet as opening “the pain and suffering to the victims of apartheid and colonialism in South Africa.”5 She “subsequently apologised for any harm perceived by any alternative interpretation.” The simple meaning of the word “apology” includes “admission of guilt, request for forgiveness or regret.” Apology can be interpreted to mean that the Premier recognised the impact the tweets had on the dignity of a section of the South African population.

5.2.18 Section 16(1) and (2) of the Constitution provides that “everyone has the right to freedom of expression which includes freedom to receive or impart information or ideas, but the right does not extend to propaganda of war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.” This exclusion recognises the fact that the right to freedom of expression is not absolute or unencumbered. The Premier was expected to make statements on social media which did not cause war, violence, hatred and harm.

5.2.19 The Premier indicated that the tweets were made in the context of her right to freedom of expression as provided in section 16 of the Constitution. She further indicated that her tweet, as has been shown, is one openly debated both in South Africa and abroad. It raises strong and sometimes conflicting views, which should be ventilated and not closed down. As indicated above,

5 As indicated by the Complainant in his letter of complaint dated 06 July 2017 to the Public Protector.
she made reference to different authorities in her response to the section 7(9) notice.

5.2.20 However, in the article reported in the Citizen titled “The US academic who 'did a Zille' and paid the price” it was indicated that “when Prof Bruce Gilley had a paper published in a respected journal about the 'benefits of colonialism', it caused an outcry, with a petition of over 10 000 signatures calling for its removal. The said Professor similarly argued that "Western colonialism was both "objectively beneficial and subjectively legitimate" in most places where it existed." This article led to the resignation of the journal's 15 editorial board members and the Professor issuing a public apology for the "pain and anger the article" could have caused. Some of the pictures depicting the horrific history of human rights abuses caused by colonialism included the following:

6 [https://citizen.co.za/category/talking-point/12.10.2017 02:15 pm]
Pic. A: The Bengal famine of 1943 was the final British-administered famine in India and claimed around 3 million lives. When Winston Churchill was asked to stop shipping desperately needed foodstuffs out of Bengal, he said Indians were to blame for their own deaths for breeding like rabbits.
Pic. B: A controversial article in a respected academic journal recently made the argument for colonialism. Here, a man is carried by Congolese men in a photo from the early 20th century.

5.2.21 It is further argued in the article that "colonialism inflicted grave political, psychological and economic harms on the colonised."

5.2.22 Such statements made by Professor Gilley and the Premier are likely to cause racial tensions, divisions and violence in South Africa. Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b) was created to curb such statements.

5.2.23 In the case of Leroy v France (application number 36109/03) the European Court of Human Rights (Court) also dealt with the right of freedom of expression where a cartoonist was convicted by a court a quo for complicity in condoning terrorism following the publication of a cartoon relating to the United States of America's attacks of 11 September 2001.
5.2.24 The applicant relied on Article 10 of the Convention guaranteeing freedom of expression. He argued that his expression of an opinion through a cartoon should be protected under Article 10 of the Convention.

5.2.25 The Court held that the cartoon was in principle entitled to Article 10 protection, but "having regard to the sensitive nature of the fight against terrorism, namely the maintenance of public safety [sic] and the prevention of disorder and crime, it especially remained to be determined whether the interference by the ... authorities was necessary in a democratic society."

5.2.26 The Court concluded that "the impact of such a message in a politically sensitive region... was not to be overlooked. According to the Court, the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region...the grounds put forward by the domestic courts in convicting Mr Leroy had been "relevant and sufficient."

5.2.27 Similarly, in principle the Premier's tweet was protected by section 16 of Constitution, but its impact in South Africa where racial perceptions are still prevalent should not be overlooked. Subsection 16(2)(b) of the Constitution prohibits statements which could provoke a certain public reaction, capable of stirring up racial violence. The reaction of the South African public towards the Premier's tweet is indicative of the likelihood of such tweets stirring up violence based on race and therefore in contravention of subsection 16(2)(b) of the Constitution.

5.2.28 Section 114(2)(a) of the Constitution provides for the powers of the provincial legislatures which include, _inter alia_, to ensure that Provincial Executive Councils, which include a Premier, are accountable to them. It states that:

"(2) A provincial legislature must provide for mechanisms-"
(a) to ensure that all provincial executive organs of state in the province are accountable to it."

5.2.29 Similarly, section 133(2) and (3)(a) of the Constitution further provides that members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions. They must act in accordance with the Constitution.

5.2.30 The implication of the above provisions is that the Premier is accountable to the Western Cape Provincial Legislature when exercising her powers and performing official duties.

5.2.31 Section 136(1) and (2)(b) of the Constitution deals with the conduct of members of Provincial Executive Councils. It states 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 may not-
(b) act in a way that is inconsistent with their office..."

5.2.32 The EMEA provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils.

5.2.33 Section 2(1) of the EMEA states "the President must, after consultation with Parliament, by proclamation in the Gazette, 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.” The Code was proclaimed in 2000.
5.2.34 Section 2.1 of the Code provides that "Members of the Executive must to the satisfaction of the President…

"a …
(b) …
(c) act in good faith and in the best interest of good governance; and
(d) act in all respects in a manner that is consistent with the integrity of their office or the government."

5.2.35 Section 2.2 provides that "in deciding whether members of the Executive complied with the provisions of clause 2.1, the President…, must take into account the promotion of an open, democratic and accountable government."

Section 2.3 provides that "Members of the Executive may not
(a) …
(b) …
(c) act in a way that is inconsistent with their position."

5.2.36 It was expected of the Premier that when making public statements or tweets the intention should be in the best interest of good governance and to act in all respects in a manner that is consistent with the integrity of her office. She indicated that she intended to raise the tweets as a legitimate and important issue for public engagement, but subsequently realised they were insensitive and offensive.

Conclusion

5.2.37 Based on the evidence and legal prescripts obtained, analysed and evaluated it can be concluded that the Premier's conduct did not comply with the provisions of the Constitution and Code.
6. FINDINGS

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

6.1 Regarding whether the Premier of the Western Cape Provincial Government, Honourable Helen Zille, allegedly made the tweets on colonialism in the media:

6.1.1 The allegation that the Premier made the tweets on colonialism in the media is substantiated.

6.1.2 The Premier, through her Legal Adviser, confirmed in a letter addressed to me dated 03 October 2017 to having tweeted on colonialism. The tweet was published in the media on 16 March 2017.

6.2 Regarding whether the alleged tweets on colonialism made by the Western Cape Provincial Government, Honourable Helen Zille, violated the provisions of the Executive Ethics Code:

6.2.1 The allegation that the alleged tweets on colonialism made by the Premier violated the provisions of the Code is substantiated.

6.2.2 It cannot be said that the Premier's tweet sought to show concern and respect for those who were the victims of apartheid and colonialism. The Premier “subsequently apologised for any harm perceived by any alternative interpretation” of the tweet. Her apology can be interpreted as recognition of the negative impact the tweet had on the dignity of a section of the South African population.

6.2.3 Although the tweet could have been made in the context of the Premier's right to freedom of expression as provided in section 16 of the Constitution and in
good faith, it was however, offensive and insensitive to a section of the South African population which regarded it as re-opening a lot of pain and suffering to the victims of apartheid and colonialism, particularly considering the position of influence she holds.

6.2.4 Section 16 of the Constitution was therefore not created to allow anyone, particularly those in positions of influence, to make such statements. Subsection 16(2)(b) was created to curb such statements.

6.2.5 Taking into account the negative responses to the Premier’s tweet, the statements were not consistent with the integrity of her office and position. The negative responses to the tweet imply that divisions of the past are still not healed.

6.2.6 The conduct of the Premier in the circumstances is in violation of sections 2.1 (d) & 2.3(c) of the Code and the Preamble, sections 10, 16, 136(1) and (2)(b) of the Constitution.

6.2.7 The conduct of the Premier also constitutes improper conduct in terms of section 182(1)(a) of the Constitution.

7 REMEDIAL ACTION

The appropriate remedial action that I take in pursuit of section 182(1)(c) of the Constitution is the following:

7.1 The Speaker of the Western Cape Provincial Legislature (Speaker) must, within 30 working days from the date of the report, table it before the Western Cape Provincial Legislature for it to take appropriate action to hold the Premier accountable as contemplated in sections 114(2), 133(2) & (3)(a) and 136(1) & (2)(b) of the Constitution.
8. MONITORING

8.1. The Speaker must, within 60 working days from the date of this report, inform me of action taken by the Western Cape Provincial Legislature in respect of paragraph 7 referred to above.

8.2. I will monitor the implementation of this report on a quarterly basis.

ADV BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 11/06/2018