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"Allegations of failure to declare interest which amounts to a 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 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(2A)(a) 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 by Honourable KC Dugmore, a Member of the African National Congress and Western Cape Provincial Legislature (Complainant) on 29 August 2017 in terms of section 4(1)(b) of the Executive Members’ Ethics Act, 1998 (EMEA).

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

(a) There was an exchange of emails between the Premier, the Director General and senior officials of the Western Cape Education Department (WCED) around September and October 2014 in which the Premier actively supported a process which resulted in the procurement of computer tablets for use in certain schools in the Western Cape Province;

(b) Paper Video, an initiative co-founded by the Premier’s son, Mr Paul Maree, was given preferential treatment by both the WCED and the Department of the Premier of the Western Cape in that the tablets were delivered to him to load the Paper Video resources onto the 150 tablets;
(c) The email exchange revealed that emergency procurement was undertaken to secure the tablets arising from the Premier's instruction based on the request to her made by her son;

(d) There is no evidence that a formal process was followed with regard to what appears to be an informal unsolicited bid to conduct a pilot project in the Western Cape schools from Paper Video. The Premier intervened in this process, on behalf of her son, to create an opportunity for a single service provider to "have the first bite at the cherry and install a learning resource onto the computer tablets";

(e) The aim of Paper Video workshops was to test the viability of its platform on the WCED's resources and to create awareness around its products and services which amounts to an unfair advantage to one service provider. It would also appear that there was no budget allocation for these tablets by the WCED; and

(f) By participating in the process of procurement of the tablets for the use of her son's product and marketing and promotion thereof, her conduct was in violation of the EMEA and the Executive Ethics Code No 41 of 2000 (Code) by advancing her son's business.

(v) On analysis of the complaint and following a preliminary investigation in which the Premier's alleged involvement and intervention in the procurement process was clarified, the following were issues considered and investigated:

(a) Whether Premier Zille communicated with the Western Cape Education Department's senior officials, Director General and MEC Schafer around September and October 2014 in which she allegedly actively sought to intervene in the management of performance and the execution of a contract of tablets for use in certain schools in the Western Cape in order to promote
and secure certain educational endeavours in which her son had an interest, and thereby exposing herself to a situation involving the risk of a conflict of interest between her public duties and her private interests; and

(b) Whether Premier Zille's communication with the Western Cape Education Department's senior officials, Director General and MEC Schafer 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) 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;

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

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

(d) The EMEA provides for a code of ethics governing the conduct of the Cabinet, Deputy Ministers and members of provincial Executive Councils; and
(e) 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 intended findings were disclosed to her and to offer her an opportunity to respond before the final report is issued.

(ix) In response to the section 7(9)(a) notice in a letter dated 12 December 2018, the Premier indicated, in a summary form, that her correspondence with the WCED officials, DG and MEC Schafer in connection with the procurement of the laptops and the role of her son did not amount to a violation of the Code, instead it was a way of managing the potential or perceived conflict of interest in the matter. She further reported that she or her office never participated in the procurement process of the tablets. The process was the sole responsibility of the WCED.

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

(a) Regarding whether Premier Zille communicated with the Western Cape Education Department’s senior officials, Director General and MEC Schafer around September and October 2014 in which she allegedly actively supported a process which resulted in the procurement of computer tablets for use in certain schools in the Western Cape Province:

(aa) While the specific allegation that the Premier was in 2014 improperly involved in the procurement process of certain computer tablets for the use in public schools in the Western Cape, is not borne from the facts and evidence at my disposal, my investigation, however, revealed evidence that the Premier's
relationship with her son in this matter constituted private interest which was sufficient to influence or appear to influence the exercise of her official duties.

(bb) The Premier engaged the MEC for Education and the Director General in 2014 to escalate performance by the supplier for the delivery of the said tablets in order to facilitate access to the tablets by her son and another teacher to use these tablets for the learners wanting to attend matric revision workshops.

(cc) Even though her son was employed as a teacher within the WCED, the access to the tablets was not secured as tools of trade through normal departmental channels, but through the intervention of the Premier, which created an appearance of impropriety;

(dd) The access facilitated by the Premier enabled her son’s Company, Paper Video to utilise its software and educational resources through the use of the tablets during the revision workshops, which although primarily intended as a public benefit exercise, inadvertently had the potential of promoting her son’s business interests, thereby creating a conflict of interests as envisaged in Clauses 2.3 and 3.4 of the Code.

(b) Regarding whether the Premier’s communication with the Western Cape Education Department’s senior officials, Director General and MEC Schafer violated the provisions of the Executive Ethics Code:

(aa) The allegation that the Premier’s communication with the WCED’s senior officials, Director General and MEC Schafer violated the provisions of the Code is substantiated.

(bb) By intervening in the execution of a contract for the delivery of computer tablets for the use in public schools in the Western Cape Province in 2014 in order to ensure that her son and his Company, Paper Video, had access to
these tablets for the purpose of presenting revision workshops for a group of matriculants during the October 2014 School Holidays, the Premier exposed herself to a risk of a conflict of interests between her official responsibilities and her private interests.

(cc) Section 136(2) of the Constitution requires the Premier not to expose herself to any situation involving the risk of a conflict between her official responsibilities and private interests. Accordingly, any situation exposing the Premier to any risk of conflict between her official responsibilities and private interests constitute violation of the Constitution. The test is not actual conflict of interest, but a risk of conflict is sufficient to constitute a violation of the Constitution.

(dd) The Premier’s involvement in the process that has resulted in securing access to the tablets in question by her son, and in the acquiring of her son’s Company’s services and resources, has exposed her to the risk of a conflict between her official responsibilities, as a first citizen of the Province and private interests which involved her son. This conduct of the Premier has consequently resulted in the violation of her constitutional obligation to avoid an exposure to the aforesaid risk, in terms of section 136(2)(b) of the Constitution.

(ee) Clause 2.3(f) of the Code provides that “Members may not expose themselves to a situation involving the risk of a conflict between their official responsibilities and their private interests”. Accordingly, any situation exposing the Premier to any risk of conflict between her official responsibilities and private interests constitute violation of the Code. The test is not actual conflict of interest, but a risk of conflict is sufficient to constitute a violation of the Code.

(ff) The Premier’s involvement in the process that has resulted in securing access to the tablets in question by her son, and in the acquiring of her son’s
Company's services and resources, has exposed her to the risk of a conflict between her official responsibilities, as a first citizen of the province and private interests, which involved her son. This conduct of the Premier has consequently resulted in the violation of the Code, which requires her to avoid an exposure to the aforesaid risk, in terms of section 2.3(f) of the Code.

(gg) Section 136(2)(c) of the Constitution also prohibited the Premier from using her position to improperly benefit any other person. Similarly, clause 2.3(d) of the Code also prohibits the Premier from using her position to improperly benefit any other person. In terms of section 132(2) of the Constitution, "the Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them". Accordingly, the Premier has direct power and influence over members of the Executive Council and indirect power and influence over those who report to the members of the Executive Council. As a result of the Premier's involvement in the decision to escalate delivery, she directly and/or indirectly influenced the procurement of her son's Company's services. Although the learners may have benefited, the potential or perceived benefit to her son's Company was sufficient to affect the public trust that promoting the welfare of the public was the only or primary motivation.

(hh) Accordingly, the Premier appears to have used her position for the benefit of her son and this is a direct violation of section 136(2)(c) of the Constitution and of clause 2.3(d) of the Code.

(ii) Even though the Premier averred that MEC Schafer was aware of the fact that Mr Maree was her son, the Premier failed to declare such private interests in her engagement with and representations to MEC Schafer, in violation of Clause 3.4 of the Code.
(jj) The Premier's conduct also constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act and unjustifiable abuse of power in terms of section 6(4)(a)(ii) of the Public Protector Act.

(kk) The Premier's conduct has also resulted on an improper advantage to the her son, as envisaged in section 6(4)(a)(iv) of the Public Protector Act.

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

(aa) The President of the Republic of South Africa must, in terms of section 3(5)(b) of Executive Members' Ethics Act, 1998, within 14 days after receiving this Report, submit a copy of the Report and his comment on my findings to the National Council of Provinces;

(bb) The Chairperson of the National Council of Provinces must, within 30 days of this Report, ensure that this Report is processed in accordance with the applicable rules of the National Council of Provinces; and

(cc) 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)(b)(i) and 133(2) and of the Constitution.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF BREACH 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 published in terms of section 8(2A)(a) 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 KC Dugmore, 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 by Honourable KC Dugmore, a Member of the African National Congress and Western Cape Provincial Legislature (Complainant) on 29 August 2017 in terms of section 4(1)(b) of the EMEA.

2.2 In the main, the Complainant alleged the following:
2.2.1 There was an exchange of emails between the Premier, the Director General of the Western Cape Provincial Government, Adv Brent Gerber (Director General) and senior officials of the Western Cape Education Department (WCED) around September and October 2014 in which the Premier actively supported a process which resulted in the procurement of computer tablets for use in certain schools in the Western Cape Province and that Paper Video, an initiative co-founded by her son, Mr Paul Maree, was given preferential treatment by both the WCED and the Department of the Premier of the Western Cape in that the tablets were delivered to him to load the Paper Video resources onto the 150 tablets;

2.2.2 The email exchange revealed that emergency procurement was undertaken to secure the tablets arising from the Premier’s instruction based on the request to her made by her son;

2.2.3 There is no evidence that a formal process was followed with regard to what appears to be an informal unsolicited bid to conduct a pilot project in the Western Cape schools from Paper Video. The Premier allegedly intervened in this process, on behalf of her son, to create an opportunity for a single service provider to “have the first bite at the cherry and install a learning resource onto the computer tablets”;

2.2.4 The aim of Paper Video workshops was to test the viability of its platform on the WCED’s resources and to create awareness around its products and services which amounts to an unfair advantage to one service provider. It would also appear that there was no budget allocation for these tablets by the WCED; and

2.2.5 By participating in the process of procurement of the tablets for the use of her son’s product and marketing and promotion thereof, the Premier’s conduct was in violation of the EMEA and the Code by advancing her son’s business.
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 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

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
2 Supra at para [73].
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);

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(a));

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.”

4.1.3 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.

4.1.4 I conducted an investigation in terms of section 7(1) read with section 1 \(^3\) of the Public Protector Act which included a preliminary investigation to determine, \textit{inter alia}, the manner in which the allegations should be dealt with. The investigation process included correspondence with the Complainant and Premier; analysis of the relevant documentation; research, consideration and application of the relevant laws 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

\(^3\) In terms of section 1 of the Public Protector Act, 1994 an 'Investigation' means an investigation referred to in section 7, \textit{including any preliminary investigation related thereto}. (own emphasis)
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 participated in the process of procurement of the tablets for the use of her son’s product and marketing and promotion thereof.

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.

4.2.5 I had to make a distinction between the Premier’s alleged conduct in terms of the EMEA and conduct failure by the WCED in the improper procurement of the tablets for the benefit of Paper Video. This report focuses on the Premier’s alleged improper conduct in allegedly, after the award of a contract by the WCED for the supply of tablets for use in certain schools in the Western Cape, facilitating preferential access to these resources by her son.

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

4.3.1 Whether Premier Zille communicated with the Western Cape Education Department’s senior officials, Director General and MEC Schafer around September and October 2014 in which she allegedly actively supported a process which resulted in the procurement of computer tablets for use in certain schools in the Western Cape Province; and

4.3.2 Whether the Premier Zille’s communication with the Western Cape Education Department’s senior officials, Director General and MEC Schafer violated the provisions of the Code.
4.4 The key sources of information

4.4.1 Documents

4.4.1.1 A copy of the Complainant’s letter dated 29 August 2017 outlining the nature of the complaint

4.4.1.2 A memorandum dated 20 October 2017 from Ms Griessel to my office transferring the file from my Western Cape Provincial office to Head Office in Pretoria

4.4.2 Correspondence sent and received

4.4.2.1 A letter dated 05 October 2017 from Ms Sune Griessel, the Public Protector Provincial Representative in the Western Cape, to the Premier

4.4.2.2 An email dated 19 November 2017 from Ms Fiona Stewart, the Premier’s Legal Adviser, in response to Ms Griessel’s letter above

4.4.2.3 A letter from my office dated 13 December 2017 to the Premier

4.4.2.4 An email from Ms Lorika Elliot, Chief of Staff in the Office of the Premier, dated 15 December 2018 in response to my letter of 13 December 2017

4.4.2.5 A letter from my office dated 16 January 2018 to the Premier in response to Ms Elliot’s email above

4.4.2.6 A letter from the Premier dated 29 January 2018 in response to my letter of 16 January 2018 referred to above
Alleged violation of the Executive Ethics Code by Premier H Zille

4.4.2.7 A letter from my office dated 27 March 2018 to Honourable President CM Ramaphosa

4.4.2.8 A notice to the Premier dated 11 November 2018 issued in terms of section 7(9)(a) of the Public Protector Act

4.4.2.8 The Premier's response dated 12 December 2018 to my notice

4.4.3 Legislation

4.4.3.1 The Constitution

4.4.3.2 The EMEA

4.4.3.8 The Code

4.4.4 Touchstones

4.4.4.1 Report number 9 of 2011/2012 of the Public Protector

4.4.4.2 Report number 13 of 2013/2014 of the Public Protector

4.4.5 Other relevant authorities

4.4.5.1 Managing conflict of interest in Public Sector- ISBN 92-64-01822-0-@ OECD 2005
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 Premier Zille communicated with the Western Cape Education Department’s senior officials and MEC Schafer around September and October 2014 in which she allegedly actively supported a process which resulted in the procurement of computer tablets for use in certain schools in the Western Cape Province:

Common cause issues

5.1.1 The following background information that led to the Premier’s correspondence with the Director General is not in dispute:

5.1.1.1 In 2014, the Department of the Premier, in conjunction with Western Cape Department of Cultural Affairs and Sport and WCED, launched an initiative in 2014 aimed at youth development in the Western Cape Province by, *inter alia*, improving learner performance in underperforming schools, with specific focus on improvements in Language and Mathematics;

5.1.1.2 This specific initiative has been termed: “The Year Beyond Project or YEBO Project” which involved placing matriculants and graduate interns in disadvantaged schools in order to help with academic support after school hours, using face-to-face and E-learning methods;

5.1.1.3 The YEBO tutorial sessions included facilitated learning groups, technology-assisted learning aids in the computer laboratories at the identified schools. All these sessions were facilitated and supported by volunteer tutors. A need for tablets to run the Project at certain schools was
identified due to the aims of the Project and the nature of the support being provided;

5.1.1.4 Once the volunteers had been recruited, schools situated in underprivileged areas which could benefit from this Project were identified. Each school was projected to require 20 tablets, making a total of 440 tablets required for the full implementation of the Project at 24 schools, and additional 40 tablets which would be used by YEBO tutors; and

5.1.1.5 This eventually led to the procurement of tablets in 2014, following a procurement process managed by the WCED in cooperation with the Department of the Premier.

5.1.2 The Premier’s explanation of the circumstances that led to the involvement of her son are also not in dispute and are encapsulated as follows:

5.1.2.1 Mr Paul Maree, a math teacher at COSAT High School in Khayelitsha, a Provincial school with a focus on Math and Science and the son of the Premier, approached his Principal in mid-2014 with a suggestion that he would like to offer and run visionary math workshops at the school for matric math learners, during the upcoming October 2014 school holidays, using eLearning techniques, material and equipment;

5.1.2.2 Mr Maree was engaged in the process of refining and developing a tablet software application (app) to be used by learners on the mobile phones for this purpose, under the brand name Paper Video, and it was made clear by him that this app would be provided and used by the learners in the course of his workshops, free of charge;

5.1.2.3 In order to enable these revision workshops to take place, connectivity and electronic devices were required and Mr Maree was advised to contact the
WCED in order to ascertain whether there would be any possibility of devices being made available to the learners who wished to attend the workshops, so as to enable the revision classes to take place and the revision app to be used;

5.1.2.4 Given that the procurement of the tablets for the YEBO Project had, at that stage, already been finalised and that payment for and delivery of these tablets were being coordinated between the WCED and the Centre for E-Innovation in the Department of the Premier, this was brought to the Premier's attention; and

5.1.2.5 In order to use these tablets for the learners wanting to attend the matric revision workshops being offered free of charge during the holidays by Mr Maree, the delivery date of the already procured first tranche of YEBO tablets would only need to be accelerated by approximately 12 days. Given that the tablets were being procured for just such a purpose and it perfectly fitted the intended use of the tablets and would involve no extra costs, this was viewed as an ideal solution."

5.1.3 The Director General wrote an email to the Premier dated 23 September 2014 about the progress on the procurement process of the school tablets and the Premier responded the same day by email, copied other Department officials in which she stated as follows:

"Dear DG, thanks for this. I just want to make it clear, as discussed with Minister Schafer, that these tablets should be available for use by ALL service providers who provide FREE services to students in the run-up to the examinations till the end of the year (not necessarily only matrics). This approach was prompted by the fact that Paul Maree and Chris Mills wanted to provide this service in the holidays, which I believe can benefit matrics, who will also get a free workbook of matric exemplars and a free DVD with all the
solutions being explained by a teacher (Paul). This could be invaluable resources available to matric maths students.

But it is obviously not the ONLY service out there, and I want the government to facilitate such support, especially where it is DEMAND DRIVEN and FREE.

...That is what Paul and Chris were aiming for and worked day and night for eight weeks to be ready in time. I am keen to encourage that level of dedication wherever it raises its head.

Helen"

5.1.4 Subsequent to the Premier's email to the Director-General, the delivery of the tablets were secured, and a number of tablets were allocated to Mr Maree to enable him to upload the app and conduct the revision workshops which took place at 3 schools during the October 2014 school holidays.

Conclusion

5.1.5 The evidence confirms that the Premier was not directly involved in the Procurement of the contract for the supply of computer tablets for use in certain schools in the Western Cape Province.

5.1.6 However, from her own evidence, the Premier, indeed communicated with the WCED's senior officials, Director General and Member of the Executive Council for Education, Honourable Debbie Schafer (MEC Schafer) during September 2014 to intervene in the execution of the contract in order to:

a) Escalate performance by the suppliers for the delivery of the said tablets; and
b) Facilitate access to the tablets by her son and another teacher to use them for the learners wanting to attend matric revision workshops

5.2 Regarding whether the Premier’s communication with the Western Cape Education Department’s senior officials, Director General and MEC Schafer violated the provisions of the Executive Ethics Code:

_**Common cause issues**_

5.2.1 Factually, it is not in dispute that:

5.2.1.1 The Premier’s son was a teacher at COSAT High School in Khayelitsha, a Provincial school, who wanted to offer and run revisionary math workshops at the school for matric math learners during the October 2014 school holidays, using eLearning techniques, material and equipment;

5.2.1.2 The WCED was in the process to procure computer tablets for use in certain schools in the Western Cape Province, the delivery date of which was not expected in time for the October 2014 school holidays;

5.2.1.3 The Premier communicated with the WCED’s senior officials, Director General and MEC Schafer during September 2014 regarding the escalation of the delivery of the said tablets;

5.2.1.4 Performance of the supplier was consequently coordinated with the request or wishes of the Premier and her son’s company, Paper Video, was afforded access to the tablets to upload Paper Video app and/or resources; and

5.2.1.5 The tablets were available for math revision workshops at the school for matric math learners.


Issues in dispute

5.2.2 The Complainant argued in his complaint letter of 29 August 2017 that by participating in the procurement of computer tablets for use in certain schools in the Western Cape Province in which the Premier’s son’s app was marketed and promoted, she violated the Code by advancing his business.

5.2.3 The Complainant further argued that the Premier failed to perform her duties and exercise her powers diligently and honestly, act in good faith and in all respects in a manner that is consistent with the integrity of the office of the Premier as she failed to uphold the above general standards as provided for in the Code. It is alleged that the Premier used her position to improperly benefit her son and thereby exposing herself to a situation involving the risk of a conflict between her official responsibilities and her private interests.

5.2.4 The Premier submitted in her letter to my office dated 16 January 2018 that there is no legal and factual basis for a conclusion that a de facto conflict of interest existed between her personal interests and those of the state in this matter.

5.2.5 The Premier denied that her communication to the Director General and MEC Schafer was intended or could be construed to actively support a process which resulted in the emergency procurement of tablets for use in certain schools in the Western Cape, which led to an unfair preferment of her son’s alleged "company" over "other service providers."

5.2.6 The Premier reiterated in her written response that she was never part of any decision relating to the procurement of the tablets or the workshops. She stated that any impression that she was a regular, active and integral participant in the arrangement of, and details pertaining to the delivery of these tablets, were untrue:
"...The only email I was sent on this entire aspect is that from the DG referred to above. I was sent this as I had expressed my concern that the electronic devices, which I understood were required in order to provide matric learners with free maths revision classes in October, could only take place if such devices were in fact in the possession of the WCED by the October school holiday. It was this risk which Adv Gerber was dealing with in his email of 23 September."

5.2.7 An accelerated delivery date for the first 150 tablets, which had been procured for the YEBO Project, was duly negotiated (without any inconvenience or extra cost) and the WCED accepted the donation (from Mr Maree) of the revision workshop. These duly went ahead during the October 2014 school holidays.

5.2.8 The Premier also contended that while a conflict of interest implied that there was a secondary (often financial) interest that consciously or subconsciously could influence a person into taking a decision that is not supportive of, or aligned with their primary interest, it was incorrect that her son's app was given exposure to a market in a manner that benefited him financially.

5.2.9 The Premier submitted that the use of these tablets for free matric revision by a teacher working for the WCED was intended to promote the public interest by advancing the interests of the learners who would otherwise have not received such help.

5.2.10 In terms of the donation of his time and resources by her son, the WCED tablets were uploaded with the Paper Video app free of charge for the period of the workshops in order to enable the learners to access the tutorials on answering exam questions, which were available on the app, and then cleaned and returned to the custody of the WCED for use on the YEBO pilot thereafter. Free DVDs were also provided for learners to use at home.
5.2.11 While the workshops may have created awareness regarding the Paper Video app amongst those matric learners who attended the workshops, those learners matriculated in 2014 and would have no further need to the app. She further argued that every donation accepted by an organ of state creates some awareness of the service, or item being so donated. If this is considered a problem, the State, and schools in particular, will no longer be able to receive donations. “This would be untenable as all schools receive donations of a whole range of products and services all the time. The creation of awareness of a product, to the benefit of matric maths learners, at no cost to government, is neither unlawful nor irregular…”

5.2.12 The Premier therefore denied that Paper Video was given any preferential treatment by either her or the WCED with regard to the offer made by her, whilst still a WCED teacher, to provide free matric revision to matric maths learners at certain schools (whose headmaster agreed to same) in the October 2014 holidays.

5.2.13 The Premier indicated that as such, her personal and public interests were “aligned,” as the procurement of the tablets, intended for the purpose of utilizing e-Learning Applications by the WCED and YEBO project, was from the start, in the interest of the affected learners, the WCED, the Western Cape Province and the National Government:

“Equally it was in the interest of all our 2014 matric mathematics learners (especially those in disadvantaged schools) to receive all and any assistance they could in their preparation for their Matric Exams. Thus, my son’s offer of free revision workshops in his capacity as a teacher employed by the Western Cape Government, was entirely aligned to the government’s objectives. His request to utilize some of those WCED tablets (already properly procured and potentially available) in the October 2014 holidays, supported a government objective. My support for my son’s
work as a WCED mathematics teacher in developing and testing new innovative ways to teach maths to WCED learners (during the holidays and without remuneration) by utilizing WCED resources was completely aligned to the goals of the state. Many other innovators have done the same with these tablets, (often -- unlike my son -- with remuneration from the government). The drive to uplift our youth by introducing innovative learning methods and after school activities was a key priority of our executive and one which I drove across departments via our policy unit. The YEBO project encapsulated this aim, and I ensured that that unit furnished reports to me so as to update me as to what this government was doing in that regard."

5.2.14 At my meeting with the Premier on 12 December 2018, she furthermore submitted that she nevertheless, took steps to manage any perception of risk of an actual or perceived conflict of interest that might arise because of the fact that Mr Maree was her son.

5.2.15 According to her, this was done by sending the email to the recipients (who already knew that Mr Maree was her son) by insisting that any support offered to Mr Maree in respect of his free matric revision workshops utilising WCED resources also be offered to any other person similarly wishing to assist learners.

5.2.16 She argued that the email was also openly copied to a number of officials by her which was indicative of the fact that her views on the benefit and lawfulness of this initiative were openly and transparently made known.

5.2.17 She stated that she endeavoured to manage any risk of conflict of interest, or perceived conflict of interest by stressing that everyone in a similar position was to be treated exactly the same way. She said that “in my view, this email openly managed any genuine or perceived conflict.
5.2.18 She further indicated that to the best of her knowledge, no similar offer of a free service was made by any other person at the time, and this donation of time and intellectual capital by her son and Paper Video was, as far as she knew, a unique offer which had no financial or legal down-side for either the WCED or the learners who elected to take up the offer.

5.2.19 The Premier emphasised that “in so far as it is in any way inferred that her son’s application was given exposure to a market in a manner that benefited him financially, that is incorrect.” The schools he chose to offer his workshops to be situated in some of the City’s more underprivileged areas where access to any type of tutoring through private electronic resources is simply unaffordable.

5.2.20 Information obtained by my office, independently from available resources in the public domain, including newspaper reports, the official website of Paper Video ⁴ as well as the Companies and Intellectual Property Commission reveals the following:

a) Paper Video was founded by Chris Mills and Paul Maree in June 2014 with, seed funding from the Millennium Trust and went on to release their first set of resources (353 exam questions and solution videos for Grade 12 Mathematics) in September 2014;

b) It is a Company registered with the Companies and Intellectual Property Commission since 2015;

c) It also sells its resources in high school accounting, mathematics, physical sciences, natural sciences and life sciences to schools and parents;

d) Some of the resources are available free of charge, but Paper Video has also have partnered with the Actuarial Society of South Africa

⁴https://Paper Video.co.za/
(ASSA) to make it possible for companies to donate towards the sponsorship of resources for students who would otherwise not be able to afford them;

e) According to media reports, Mr Maree is quoted as saying that Paper Video "first turned a profit in 2016, and had 30 000 registered online users in June 2018, a figure which the founders expect will increase before the final exams this year," and

f) Paper Video promotes the Company and obtain sponsorships through, *inter alia*, public endorsements on its website of customers as well as partners and sponsors.

*Application of the relevant legal prescripts*

5.2.21 Section 114 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 it. Section 133(2) and (3) 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 and provide the legislature with full and regular reports concerning matters under their control.

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

5.2.23 Section 136(1) of the Constitution deals with the conduct of members of Provincial Executive Councils. It states that:

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5 venturesburn.com/2018/06/paper-video-helen-zille-son/
“Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.”

5.2.24 On the Constitutional obligations of public officer bearers, the Constitutional Court\(^6\) highlighted that

“...that certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.”

5.2.25 The High Court further emphasised that the Constitution requires a person in Public Office to act in the Public interest and to avoid exposing himself (or herself) to any situation “involving the risk of conflict between his official duties and his private interests, or uses his position or information at the behest of a private family and to further its financial interests.”\(^7\) (Emphasis added) This is in line with the statement by the Constitutional Court that:

“Public office in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are

\(^6\) Nyathi v MEC Council for Department of Health, Gauteng and Another, 2008 (5) SA 94 (CC), as discussed in Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

\(^7\) President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747
therefore not to be used for the advancement of personal or sectarian interests.”

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

5.2.27 Section 2(1) of the EMEA states that “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.

5.2.28 Clause 2.1 of the Code provides that “Members of the Executive must to the satisfaction of the President…

“(a) perform their duties and exercise their powers and honestly
(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.”

5.2.29 Most of the requirements in clause 2.1 such as “honestly”, “good faith” and “integrity” all point the level of ethical standards of behaviour that a member of the Executive is expected to uphold. The Code stipulates the values that should guide conduct, provide clarity on acceptable conduct, and set clear rules on how public representatives should conduct themselves with dignity and decorum, and to uphold the integrity of their office.

5.2.30 Clause 2.3 of the Code provides that “Members of the Executive may not
(a) …
(b) ... 
(c) ... 
(d) use their position...to...improperly benefit any other person; 
(e)... 
(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests...”

5.2.31 A conflict of interest generally involves a conflict between the public duty and the private interest of a public official, in which the official’s private-capacity interest could improperly influence the performance of their official duties and responsibilities.⁸

5.2.32 In this regard the Premier submitted in her response dated 12 December 2018 to my notice that in order to find that a conflict of interest did de facto exist, it is insufficient to simply assert that because a member of the executive had two interests in a matter, they were in conflict. She reiterated that it would be a wrong presupposition “that a comity, congruence, or overlap of interest can never exist between the interests of a member of the executive in her private capacity (e.g. as a mother) and that of the state (e.g. as Premier).”

5.2.33 In her understanding, whilst the existence of a conflict of interest does not imply that an individual is improperly motivated, it does imply that there is a secondary (often financial) interest that consciously or subconsciously may influence that person into taking a decision that is not supportive of, or aligned with their primary interest.

5.2.34 She further reiterated that, when the Public Service Commission (PSC) formulated its rules applicable to the public service, it noted the possibility of a different scenario when a member of the executive has two interests in a

⁸ Managing conflict of interest in Public Sector- ISBN 92-64-01822-0-@ OECD 2005
matter. This is a comity (or congruence) of interests. She indicated that on the basis of these rules, the PSC stated in its 2007 report:

"It is safe to assume that... public officials have a wide variety of interests. Such interest could be complimentary or they could be competing interests. The nature of such interest could be political, personal and economic. These interests, once in competition with the work environment of a person may pose a problem to any organisation". [Premier's emphasis.]

5.2.35 The identification and management of a conflict between the personal interests of a decision maker in the private and public sector and that of the entity that he/she serves, has been the subject of much discussion and debate in academic, business and public administration circles for centuries.

5.2.36 She said that the PSC conducted a comprehensive study into to occurrence and management of conflicts of interest in the public service in its report issued in July 2006. In dealing with the question as to whether it is wrong to have a conflict of interests, she argued that the PSC report makes the following important observation:

"There are many misconceptions about conflicts of interest. Some of them are that it is something to be ashamed of and should be hidden or ignored. In terms of media commentary on the matter it would appear that in the South African context we have fallen into these misconceptions. Conflicts of interest are not wrong in themselves. It is how they are managed that is important. In this regard it should be noted that public officials are also private individuals, and there will be occasions when an official's own private interests may come into conflict with his/her public duty which is to put public interest first at all times. Where reasonably possible, a public official should avoid conflicts between his/her personal interest and the
public interest. However, where conflicts of interest cannot reasonably be avoided, an official has a responsibility to identify and effectively manage any conflicts of interest he/she may have, in consultation with his/her supervisor."

5.2.37 The Premier reiterated that that PSC advised in the abovementioned report that:

"A too-strict approach to controlling private interests may conflict with other rights or be unworkable or deter experienced and competent potential candidates from entering public office or public service...

Effectively managing conflicts of interest requires a balanced approach. This would entail a conflict of interest policy that seeks to strike a balance by: identifying risk; prohibiting unacceptable forms of private interest; raising awareness of the circumstances in which conflicts can arise; and ensuring effective procedures to resolve conflict of interest situations."

5.2.38 The high standards of ethical conduct expected from the Executive as envisaged under clauses 2.1 and 2.3 of the Code seek to create and foster a culture of integrity and reduce the opportunity for corruption and malfeasance arising from any perception of favouritism shown to relatives or close friends by those with power or influence.

5.2.39 Clause 3 of the Code makes it clear that a conflict of interest does not only relate to private financial or business interests, but also includes any matter in which a Member of the Executive has a personal interest by virtue of the financial or business interest which, to the Member's knowledge, the Member's spouse, permanent companion or family member has. [own emphasis]
5.2.40 Clause 3.4 of the Code expressly requires a member of the Executive who makes representations to another Member of the Executive with regard to a matter in which the Member has a personal or private financial or business interest, to declare that interest to the other Member.

5.2.41 The Premier submitted in her letter of 12 December 2018 that clause 3.4, "on a proper reading of this section of the Code", has no application to the facts in this matter. In her understanding, clause 3.4 clearly relates to a situation where a member of the executive is tasked with deciding or making a decision in a matter in which another member of the executive has a potential conflict of interest and that other member deems it prudent to make representations to the decision-maker in respect of the decision in question. In those circumstances the member of the executive making the representations is clearly obligated to disclose any personal or financial interest he or she may have in the decision.

"This was never the case here. Minister Schafer played no part in either the procurement of the tablets in question, or my son's maths revision workshops at the schools in question, as the documents provided to you clearly show. Neither Minister Schafer nor I had anything to do with the procurement of the tablets for the YEBO project, and she accordingly never had "a matter" before her such as to trigger the application of section 3.4 of the Code. This is not to say that Minister Schafer did not know about either the YEBO project or the fact that Paul Maree was my son and a teacher in the employ of her department who had offered free metric maths revision to learners at some of the more disadvantaged schools. Minister Schafer was aware of all of this at the time given her role as MEC of Education, but it certainly does not imply that she had any matter before her to decide upon in this respect. She did not."
5.2.42 In my view however, the Code does not specify the capacity in which the member of the Executive to whom representations are made, should receive or entertain such representations. Declaration of interests is one of the measures by means of which a conflict of interest should be proactively managed by enabling the person or body to whom the representations are being made, to identify the interest. The Premier did not dispute the fact that she engaged the MEC in respect of official departmental business, namely the delivery of the tablets in question.

5.2.43 Clause 3.2 also provides that it is not for the Member to decide if a personal interest in a matter is trivial or not relevant, confirming that the Member should consider the situation from the perspective of an outsider and whether the relationship is of a nature that it could raise an allegation of an apparent or actual conflict of interest, and then err on the side of transparency. Full disclosure helps to alleviate or avoid future misunderstandings.

5.2.44 The possible reasoning behind an objective rather than subjective test for a conflict of interest is because its existence is not limited to situations where parties benefit or are prejudiced as a result of an actual conflict of interest, but also include situations where there is a perceived or potential conflict (from a third party perspective).\(^9\)

5.2.45 The Organisation for Economic Co-operation and Development (OECD) emphasised in its work titled "Managing Conflict of Interest in the Public Sector A Toolkit"\(^10\) that it is equally important to manage perceived and potential conflicts of interest:

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\(^9\) Rules of the Public Service Commission: Managing Conflicts Of Interest 2009

\(^10\) Managing conflict of interest in Public Sector- ISBN 92-64-01822-0-@ OECD 2005
"In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials have the potential to weaken citizens’ trust in public institutions…

While a conflict of interest is not ipso facto corruption, there is increasing recognition that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption. …The immediate objective should be to maintain the integrity of official policy and administrative decisions and of public management generally, recognising that an unresolved conflict of interest may result in abuse of public office."

5.2.46 The OECD Guidelines\textsuperscript{11} developed four core principles for public officials and public office bearers to follow when dealing with conflict of interest situations in order to maintain trust in public institutions:

a) \textit{"Serving the public interest:} Public officials should make decisions and provide advice without regard for personal gain. The decision-maker's religious, professional, party-political, ethnic, family, or other personal preferences should not affect the integrity of official decision-making. At the same time, public officials should dispose of, or restrict the operation of, private financial interests, personal relationships or affiliations that could compromise official decisions in which they are involved.

b) \textit{Supporting transparency and scrutiny:} Public office bearers are expected to act in a way that will bear the closest public scrutiny. Public officials should disclose any private interests and affiliations that could compromise the disinterested performance of public duties when taking up office and afterwards if circumstances change, to enable adequate control and management of the situation.


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c) **Promoting individual responsibility and personal example:** Public officials, particularly public office bears should act in a manner that demonstrates integrity and thus serve as an example to other officials and the public. When dealing with individual cases, senior officials and managers should balance the interests of the organisation, the individual and the public.


d) **Creating an Organisational Culture:** Public organisations should create an organisational culture that does not tolerate conflict of interest. This can be done in a number of ways, such as raising awareness by publishing the conflict of interest policy, giving regular reminders, developing learning tools to help employees apply and integrate the policy and by providing concrete advice when the need arises.”

5.2.47 Such an approach is also consistent with previous findings of the Public Protector\(^{12}\) that appearance of a conflict of interest may be said to exist when a reasonable person would conclude that a public office bearer, while performing official duties, conducted himself/ herself in a manner that conflicted with the interests of government and the values which he was meant to promote or in a manner that is perceived or has the potential to benefit another person by virtue of his/her relationship with the office bearer.

5.2.48 In the Public Protector’s Report number 13 of 2013/2014 titled “\textit{Inappropriate Moves}\(^{13}\), similar general principles on the concept of conflict of interest were discussed in detail.

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\(^{12}\) Report 9 of 2011/2012 of the Public Protector on an investigation into a complain of conflict of interest against Mr. J. Manyi

\(^{13}\) Paragraph 9.16 Conflict of interests: The General Principles- p 194-200.
Conclusion

5.2.49 In respect of the issue raised by the Premier that no conflict of interest existed, as there was an overlap (and congruence) of complementary interests between the aims of her son and those of the Western Cape Government, some experts are of the view that a conflict of interest can arise when private interests of a government official coincide with public interests. They state that "such a tension raises an ethical dilemma" when the private interest is sufficient to influence or appear to influence the exercise of official duties to such an extent that promoting the welfare of the public may not be the only or primary motivation.14

5.2.50 The Premier also emphasised that she endeavoured to manage any perceptions about favouritism or that her judgment might have been impaired as a resolution of her private intrusts by communicating to the relevant officials that the same opportunity should accrue to others who are members of the same class or group of persons as her son.

5.2.51 While the Premier emphasised that her son was acting in the capacity of a teacher in the employment of the WCED, and that the same opportunity to access government resources (tablets) should be afforded to other teachers who wanted to pursue similar educational endeavours, it might have been a different matter if her son needed to access tools of trade through the appropriate channels and levels of authority within the administration of the WCED and escalated his request outside those channels to his mother, the Premier. If the Premier had acted with the intention to address administrative deficiencies or service delivery failures within her administration like she did in the examples of all the matters provided to the Public Protector where she

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intervened on behalf of members of the public, there would probably have been no basis for any risk that her actions would be perceived as acting outside the scope of her office to address and deal with legitimate concerns in the public interest.

5.2.52 However, the fact that her son did not only engage her as a teacher who wanted to access tools of trade, but was also the Director of a registered Company whose business interest was closely aligned to the provisions of educational resources in electronic format, and that access was primarily facilitated through the Premier's intervention as opposed though departmental channels, in itself, created an appearance of impropriety and the risk that the public could assume he was given access because of his relationship with the Premier.

5.2.53 The fact the Premier's son was willing to donate time and his Company's resources to the revision workshops free of charge is highly commendable and I am in no way asserting that he sought to gain any value or benefit from the exercise.

5.2.54 The objective facts, however, make it extremely difficult to agree with the Premier's contention that the exposure did not have the potential of adding value to the Company's profile or ability to attract customers based on the endorsements or support from those students and parties who might have benefitted from the workshops conducted in October 2014. From the Company's profile and *modus operandi*, it is clear that such goodwill may translate or may even be perceived to translate to increased sales and more customers even if it was not the intention of the Company to benefit financially from the workshops in question.

5.2.55 In the circumstances I am satisfied that any public interest that the Premier sought to promote and indeed promoted through her intervention in the
execution of a contract for the delivery of computer tablets for use in certain schools in the Western Cape, coincided with a private interests that may be sufficient to influence or appear to influence the exercise of her official duties to such an extent that may have inadvertently led to the unfair promotion of the business interests of her son’s company, Paper Video.

5.2.56 I am furthermore satisfied that through her conduct, the Premier exposed herself to a situation involving the risk of a conflict between her official responsibilities and her private interests as the mother of Mr Paul Maree in the manner in which she facilitated accelerated delivery by the service provider in order to secure access to the tablets in question by her son and his company, Paper Video.

6. FINDINGS

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

6.1 Regarding whether Premier Zille communicated with the Western Cape Education Department’s senior officials, Director General and MEC Schafer around September and October 2014 in which she allegedly actively supported a process which resulted in the procurement of computer tablets for use in certain schools in the Western Cape Province:

6.1.1 While the specific allegation that the Premier was in 2014 improperly involved in the procurement process of certain computer tablets for the use in public schools in the Western Cape, is not borne from the facts and evidence at my disposal, my investigation, however, revealed evidence that the Premier’s relationship with her son in this matter constituted private interest which was sufficient to influence or appear to influence the exercise of her official duties.
6.1.2 The Premier engaged the MEC for Education and the Director General in 2014 to escalate performance by the supplier for the delivery of the said tablets in order to facilitate access to the tablets by her son and another teacher to use these tablets for the learners wanting to attend matric revision workshops.

6.1.3 Even though her son was employed as a teacher within the WCED, the access to the tablets was not secured as tools of trade through normal departmental channels, but through the intervention of the Premier, which created an appearance of impropriety.

6.1.4 The access facilitated by the Premier enabled her son’s Company, Paper Video to utilise its software and educational resources through the use of the tablets during the revision workshops, which although primarily intended as a public benefit exercise, inadvertently had the potential of promoting her son’s business interests, thereby creating a conflict of interests as envisaged in Clauses 2.3 and 3.4 of the Code.

6.2 Regarding whether the Premier’s communication with the Western Cape Education Department’s senior officials, Director General and MEC Schafer violated the provisions of the Executive Ethics Code:

6.2.1 The allegation that the Premier’s communication with the WCED’s senior officials, Director General and MEC Schafer violated the provisions of the Code is substantiated.

6.2.2 By intervening in the execution of a contract for the delivery of computer tablets for the use in public schools in the Western Cape Province in 2014 in order to ensure that her son and his Company, Paper Video, had access to these tablets for the purpose of presenting revision workshops for a group of matriculants during the October 2014 School Holidays, the Premier exposed
herself to a risk of a conflict of interests between her official responsibilities and her private interests.

6.2.3 Section 136(2) of the Constitution requires the Premier not to expose herself to any situation involving the risk of a conflict between her official responsibilities and private interests. Accordingly, any situation exposing the Premier to any risk of conflict between her official responsibilities and private interests constitute violation of the Constitution. The test is not actual conflict of interest, but a risk of conflict is sufficient to constitute a violation of the Constitution.

6.2.4 The Premier’s involvement in the process that has resulted in securing access to the tablets in question by her son, and in the acquiring of her son’s Company’s services and resources, has exposed her to the risk of a conflict between her official responsibilities, as a first citizen of the Province and private interests which involved her son. This conduct of the Premier has consequently resulted in the violation of her constitutional obligation to avoid an exposure to the aforesaid risk, in terms of section 136(2)(b) of the Constitution.

6.2.5 Clause 2.3(f) of the Code provides that “Members may not expose themselves to a situation involving the risk of a conflict between their official responsibilities and their private interests”. Accordingly, any situation exposing the Premier to any risk of conflict between her official responsibilities and private interests constitute violation of the Code. The test is not actual conflict of interest, but a risk of conflict is sufficient to constitute a violation of the Code.

6.2.6 The Premier’s involvement in the process that has resulted in securing access to the tablets in question by her son, and in the acquiring of her son’s Company’s services and resources has exposed her to the risk of a conflict between her official responsibilities, as a first citizen of the province and
private interests, which involved her son. This conduct of the Premier has consequently resulted in the violation of the Code, which requires her to avoid an exposure to the aforesaid risk, in terms of section 2.3(f) of the Code.

6.2.7 Section 136(2)(c) of the Constitution also prohibited the Premier from using her position to improperly benefit any other person. Similarly, clause 2.3(d) of the Code also prohibits the Premier from using her position to improperly benefit any other person. In terms of section 132(2) of the Constitution, “the Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them”. Accordingly, the Premier has direct power and influence over members of the Executive Council and indirect power and influence over those who report to the members of the Executive Council. As a result of the Premier's involvement in the decision to escalate delivery, she directly and/or indirectly influenced the procurement of her son's Company's services. Although the learners may have benefited, the potential or perceived benefit to her son’s Company was sufficient to affect the public trust that promoting the welfare of the public was the only or primary motivation.

6.2.8 Accordingly, the Premier appears to have used her position for the benefit of her son and his Company, Paper Video, and this is a direct violation of section 136 (2)(c) of the Constitution and clause 2.3(d) of the Code.

6.2.9 Even though the Premier averred that MEC Schafer was aware of the fact that Mr Maree was her son, the Premier failed to declare such private interests in her engagement with and representations to MEC Schafer, in violation of Clause 3.4 of the Code.
6.2.10 The Premier’s conduct also constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act and unjustifiable abuse of power in terms of section 6(4)(a)(ii) of the Public Protector Act.

6.2.11 The Premier’s conduct has also resulted on an improper advantage to the her son, as envisaged in section 6(4)(a)(iv) of the Public Protector Act.

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 President of the Republic of South Africa must, in terms of section 3(5)(b) of Executive Members’ Ethics Act, 1998, within 14 days after receiving this Report, submit a copy of the Report and his comment on my findings to the National Council of Provinces;

7.2 The Chairperson of the National Council of Provinces must, within 30 days of this Report, ensure that this Report is processed in accordance with the applicable rules of the National Council of Provinces; and

7.3 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)(b)(i) and 133(2) and 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. The implementation of my remedial action 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 BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2018