

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO 75 OF 2021/22

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“Complaint of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Education of the KwaZulu-Natal Provincial Government”

**REPORT ON AN INVESTIGATION OF A COMPLAINT OF A BREACH OF THE
EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR EDUCATION OF THE KWAZULU-NATAL PROVINCIAL
GOVERNMENT, MR K.I. MSHENGU**

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EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 8(1) of the Public Protector Act, 1994 (Public Protector Act) and in terms of section 3 of the Executive Members' Ethics Act, 1998 (EMEA) on an investigation of a complaint of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Education of the KwaZulu-Natal Provincial Government, Mr K I Mshengu (MEC).
- (ii) The complaint was lodged by Dr I Keeka, a Member of the KwaZulu-Natal Provincial Legislature (Complainant) following an article published by the *Sunday Times* on 10 November 2019, titled "*MEC's faulty Merc scam*". In this article, it was in the main alleged that a forged letter from the car manufacturing company, Mercedes Benz South Africa (Mercedes Benz SA) had been created to enable the MEC not to use the official vehicle previously used by his predecessor and instead to use hired vehicles, at huge expense to the state.
- (iii) The newspaper article stated *inter alia* in this regard that: "*a KwaZulu-Natal MEC has been caught using an elaborate scam to justify his not using the state car used by his predecessor-instead blowing hundreds of thousands of rand in tax-payer's money on car hire. Officials answering to education MEC Kwazi Mshengu appear to have forged a letter from Mercedes Benz dealership advising him not to make use of a one year old Mercedes Benz GLE 350 because it was so unsafe it could kill him*".
- (iv) The Complainant stated that "*it is possible that in the event that there is confirmation of this, Honourable Mshengu will also be in breach of the Code of Conduct and Ethics of the KZN Provincial Legislature applicable to all members. It is my view that a determination or decision in this specific regard is imperative in the final findings by your office.*"

- (v) Based on the analysis of the complaint, the following issues were identified for the investigation:
- (a) Whether the MEC used hired vehicles in his official capacity at state expense instead of an official car, and if so, whether his conduct in this regard was improper and constitutes a breach of the Executive Ethics Code.
 - (b) Whether the purchase of a new official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant law and other prescripts regulating the procurement of official vehicles for Members of the Executive and if yes, whether such conduct was improper and constitutes maladministration.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution, sections 6 and 7 of the Public Protector Act and in in terms of sections 3 and 4 of the EMEA. It included correspondence with the MEC and the former Head of the KwaZulu-Natal Department of Education (HOD), meetings with officials of the KwaZulu-Natal (KZN) Department of Education (Department), consideration of the information and documents obtained and consideration and application of the relevant law and legal and other prescripts.
- (vii) The MEC and HOD and other affected parties were afforded an opportunity to respond to the evidence obtained during the investigation, in terms of section 7(9) of the Public Protector Act. Only the MEC responded.
- (viii) Having considered the evidence and information obtained during the investigation, the following findings are made:
- (a) **Regarding whether the MEC used hired vehicles in his official capacity at state expense instead of an official car, and if so, whether his conduct in this regard was improper and constitutes a breach of the Executive Ethics Code**

- (aa) It is not in dispute that vehicles were hired for the MEC to use in his official capacity at state expense instead of an official car from the time he took office in May 2019 to November 2019.
- (bb) No evidence was found that the MEC was involved in any “*elaborate scam*” not to use the official car that was used by his predecessor. There is also no evidence that the MEC or the Department was involved in the forging of a letter, ostensibly from Mercedes Benz Garden City Motors, dated 2 November 2019. The origin of this letter could not be determined during the investigation.
- (cc) The Complainant confirmed during the investigation that he lodged the complaint in terms of the EMEA. The investigation was also conducted in terms of sections 6 and 7 of the Public Protector Act and section 182(1) of the Constitution.
- (dd) The evidence shows that the MEC relied on the information provided to him by the HOD in respect of the non availability of the official car and that he had no reason not to accept it. It was also at the insistence of the HOD that the MEC accepted that vehicles would be hired for him for official purposes.
- (ee) As it is the responsibility of the Department in terms of the *Ministerial Handbook* and the *Guide for Members of the Executive 2019* (Guide) to provide the MEC with an official vehicle, he had no positive duty in this regard.
- (ff) It therefore cannot be concluded that the MEC acted in a manner that is inconsistent with his position and therefore in breach of the Executive Ethics Code, acted improperly or that he was involved in maladministration.

(b) Regarding whether the purchase of a new official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant law and other prescripts regulating the procurement of official cars for Members of the Executive and if yes, whether such conduct was improper and constitutes maladministration.

- (aa) The purchase of a new the official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant laws and other prescripts regulating the procurement of official cars for Members of the Executive.
- (bb) There is no indication in the evidence that the HOD made any attempt to obtain a “*detailed mechanical report by the vehicle manufacturer or approved dealer*” in order to take an informed decision on the replacement of the Mercedes Benz as the official vehicle, as stipulated by paragraph 2.9 of the Guide, when he commenced the process in July 2019. It was only after the article was published by the *Sunday Times* on 10 November 2019, that the HOD obtained a technical report from Mercedes Benz SA. This report indicated that the engine of the vehicle had to be replaced. However, there was no indication that it was otherwise in a poor condition.
- (cc) The purchasing of a new vehicle for the official use of the MEC, was therefore not justified in terms of paragraph 2.9 the Guide.
- (dd) Under the circumstances, it is concluded that the approval by the HOD of the purchasing of the BMW X4 for the official use of the MEC was not in line with the provisions of the Guide and his responsibilities as the accounting officer of the Department in terms of section 38 of the Public Finance Management Act, 1999 (PFMA). It was therefore

improper and amounts to maladministration. It also resulted in irregular and fruitless and wasteful expenditure, as contemplated by section 1 of the PFMA.

- (ee) The conduct of the HOD accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.
- (ix) Regulation 4 of the Treasury Regulations made in terms of the PFMA deals with financial misconduct.
- (x) Regulations 4.1.3 and 4.1.4 provides that:
 - (a) *“4.1.3 If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with applicable and agreements applicable in the public service.*
 - (b) *4.1.4 A relevant treasury may-*
 - (a) *direct that an official other than an employee of the institution conducts the investigation; or*
 - (b) *issue any reasonable requirement regarding the way in which the investigation should be performed.”*
- (xi) **The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution the following:**
 - (a) **The Premier of KwaZulu-Natal to:**
 - (aa) In terms of section 3(6) of the EMEA within a reasonable time, but not later than 14 days after receiving this report on the investigation,

submit a copy thereof and any comments thereon, to the KwaZulu-Natal Provincial Legislature.

(b) The KwaZulu-Natal Provincial Treasury to:

- (aa) Take the appropriate steps in terms of Regulations 4.1.3 and 4.1.4 of the Treasury Regulations to ensure that an investigation is conducted into the conduct of the HOD in respect of and that of the other officials of the Department involved in the purchasing of a new vehicle for the official use of the MEC as referred to in this report, within 60 days from the date of this report, and that action appropriate to the findings of the investigation are taken.

REPORT ON AN INVESTIGATION OF A COMPLAINT OF A BREACH OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR EDUCATION OF THE KWAZULU-NATAL PROVINCIAL GOVERNMENT, MR K.I. MSHENGU

1. INTRODUCTION

1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 8(1) of the Public Protector Act, 1994 (Public Protector Act) and in terms of section 3 of the Executive Members' Ethics Act, 1998 (EMEA) on an investigation of a complaint of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Education of the KwaZulu-Natal Provincial Government, Mr K I Mshengu.

1.2. The report is submitted in terms of section 8(1) of the Public Protector Act and section 3(2)(b) and 3(3) of the EMEA to the Premier of KwaZulu-Natal, Mr Sihle Zikalala.

1.3. The report is also submitted to:

1.3.1 Mr K I Mshengu, the KwaZulu-Natal Member (KZN) of the Executive Council for Education, (MEC),

1.3.2 Dr B J M Mthembu, the Acting Head of the KZN Department of Education;

1.3.3 Ms Dube Ncube, the KZN MEC for Finance;

1.3.4 Ms N Shezi, the Acting Head of Department of the KZN Provincial Treasury;

1.3.5 Ms P Nkonyeni, the KZN MEC for Transport; and

1.3.6 Mr J Mbhele, the Head of the KZN Department of Transport

1.4 Copies of the report are also provided to Dr I Keeka, a Member of the KwaZulu-Natal Provincial Legislature, who lodged the complaint and Dr E V Nzama, the former Head of the KZN Department of Education (HOD).

2. THE COMPLAINT

2.1. The complaint was lodged by Dr I Keeka, a Member of the KwaZulu-Natal Provincial Legislature (Complainant) following an article published by the *Sunday Times* on 10 November 2019, titled “*MEC’s faulty Merc scam*”. In this article, it was in the main alleged that a forged letter from the car manufacturing company, Mercedes Benz South Africa (Mercedes Benz SA) had been created to enable the MEC not to use the official vehicle previously used by his predecessor and instead to use hired vehicles, at huge expense to the state.

2.2. The newspaper article stated *inter alia* in this regard that: “*a KwaZulu-Natal MEC has been caught using an elaborate scam to justify his not using the state car used by his predecessor-instead blowing hundreds of thousands of rand in tax-payer’s money on car hire. Officials answering to education MEC Kwazi Mshengu appear to have forged a letter from Mercedes Benz dealership advising him not to make use of a one year old Mercedes Benz GLE 350 because it was so unsafe it could kill him*”.

2.3. The Complainant stated that “*it is possible that in the event that there is confirmation of this, Honourable Mshengu will also be in breach of the Code of Conduct and Ethics of the KZN Provincial Legislature applicable to all members. It is my view that a determination or decision in this specific regard is imperative in the final findings by your office.*”

2.4. Dr Keeka indicated during the investigation on 8 December 2021 that the intention of his complaint to the Public Protector was indeed to lodge a complaint of a breach of the Executive Ethics Code issued in terms of the Executive Members' Ethics Act, hence the reference in his letter to a "*breach of the code of conduct and ethics*" that are applicable to all members of the KwaZulu-Natal Provincial Legislature. Further, that should a breach be found, it might also constitute a violation of the relevant provisions relating to the KwaZulu-Natal Provincial Legislature.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has the power, as regulated by national legislation, -

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action".

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

- 3.4. Section 6(4) of the Public Protector Act provides, *inter alia*, that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint any alleged:
- 3.4.1 Maladministration in connection with the affairs of government at any level;
- 3.4.2 Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.
- 3.5. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.6. Section 4(3) of the EMEA provides that nothing in section 4 thereof may prevent the Public Protector from investigating any complaint by a member of the public in accordance with the Public Protector Act.
- 3.7. In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²

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

² *Supra* at para [73].

- 3.8. In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.8.1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.8.2. 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);
- 3.8.3. 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);
- 3.8.4. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow; (paragraph 69) ;
- 3.8.5. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to; (paragraph 70);
- 3.8.6. 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);

- 3.8.7. 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));
- 3.8.8. The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.8.9. “*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)).”
- 3.9. In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017)*, the Court held as follows when confirming the powers of the Public Protector:
- 3.9.1. The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.9.2. The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);
- 3.9.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers; (paragraphs 100 and 101):
- 3.9.3.1. Conduct an investigation;
 - 3.9.3.2. Report on that conduct; and
 - 3.9.3.3. To take remedial action.

- 3.9.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings; (para 104).
- 3.9.5. The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court; (para 105).
- 3.9.6. The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct; and (paragraphs 107 and 108);
- 3.9.7. *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action. (para 112)
- 3.10. Paragraph 4 of the EMEA provides, *inter alia* that the Public Protector must investigate an alleged breach of the Executive Ethics Code on receipt of a complaint by a member of the provincial legislature if the complaint is against a Member of the Executive Council of the province. The MEC is a Member of the Executive Council of the KwaZulu-Natal Provincial Legislature. His conduct is accordingly subject to the provisions of the EMEA and the Executive Ethics Code and therefore falls within the Public Protector's mandate.
- 3.11. In the matter of *The Public Protector v Mail and Guardian Ltd*³ the Supreme Court of Appeal held *inter alia* (at par 11) that the powers of the Public Protector emphasise that the Public Protector has a pro-active function and that she or he is not expected to sit back and wait for proof where there are allegations of malfeasance, but is enjoined to actively discover the truth.

³ [2011]zasca 108 (1 June 2011)

4. THE INVESTIGATION

4.1. Methodology

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

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2. Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to a breach of the Executive Ethics Code, improper conduct and/or maladministration?

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

4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case and on the basis of the information received, the factual enquiry principally focused on whether or not the MEC used hired vehicles in his official capacity at state expense, instead

of an official car and if so whether his conduct in this regard was improper and constitutes a breach of the Executive Ethics Code. Further, whether the purchase of a new official vehicle for the MEC by the KZN Department of Education (Department) in December 2019 was not in accordance with the relevant law and other prescripts regulating the procurement of official vehicles for Members of the Executive and if yes, whether such conduct was improper and constitutes maladministration.

4.2.1.6 The enquiry regarding what should have happened, focusses on the provisions of the EMEA, the Executive Ethics Code and the law or rules that regulate the standard that should have been complied with by the MEC, to prevent a breach of the Executive Ethics Code, and by the Department in procuring a new official vehicle for the MEC to prevent improper conduct and maladministration.

4.2.1.7 The enquiry regarding the remedy or remedial action sought to explore options for redressing the consequences of violations of the Executive Ethics Code, improper conduct and/or maladministration, where possible and appropriate.

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

4.3.1 Whether the MEC used hired vehicles in his official capacity at state expense instead of an official car, and if so, whether his conduct in this regard was improper and constitutes a breach of the Executive Ethics Code.

4.3.2 Whether the purchase of a new official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant law and other prescripts regulating the procurement of official vehicles for Members of the Executive and if yes, whether such conduct was improper and constitutes maladministration.

4.4 Key Sources of information

4.4.1 Correspondence exchanged:

4.4.1.1 Letter of complaint submitted by Dr. I Keeka MPL dated 10 November 2019;

4.4.1.2 The alleged forged letter from Mercedes Benz Garden City Motors, dated 02 November 2019;

4.4.1.3 Response to the allegations from the KZN Director-General, Dr N Mkhize dated, 13 March 2020;

4.4.1.4 Response to the allegations from the KZN MEC Mshengu MPL, dated 17 February 2020;

4.4.1.5 Response from the HOD, Dr E V Nzama, dated 17 February 2020;

4.4.1.6 Letter from the HOD to the Public Protector South Africa (PPSA), dated 03 March 2020;

4.4.1.7 Letter from Mr LS Magagula, the Head of Department of the KZN Provincial Treasury to the PPSA, dated 03 February 2020;

4.4.1.8 Letter from the MEC to the PPSA, dated 07 June 2021;

4.4.1.9 Letter from Mercedes Benz, Garden City Motors, Pietermaritzburg to the PPSA, dated 13 January 2020;

4.4.1.10 Letter from former MEC of Education Mr Mthandeni Dlungwana to the PPSA, dated 05 March 2020;

4.4.1.11 Letter received from the MEC to the PPSA, dated 27 July;

2021; and

4.4.1.12 Letter from Willem de Klerk Attorneys on behalf of the *Sunday Times* Newspaper dated 26 June 2020;

4.4.2 **Documents provided and received from the Department :**

4.4.2.1 Public statement by the MEC on the issue of the usage of the hired car and attendant costs, dated 11 November 2019;

4.4.2.2 Internal Memorandum from the KZN HOD of Education to Mr BS Ndlovu: Director Facilities Management of the Department under the heading: *"MOTIVATION FOR THE PURCHASE OF A VEHICLE FOR THE MEMBER OF THE EXECUTIVE (MEC)"* dated, 29 November 2019;

4.4.2.3 Memorandum from the HOD to Mr S Magagula, the Head of Department of the KZN Provincial Treasury Mr LS Magagula, under the heading: *"REQUEST FOR AUTHORITY TO PURCHASE A VEHICLE: G05 X DRIVE30DSAV(CV62)CARBON BLACK METALLIC (416) FOR THE MEC"*, dated 8 July 2019;

4.4.2.4 Memorandum from the KZN Provincial Accountant General and the Head of Department of the KZN Provincial Treasury under the heading: *"REQUEST FOR AUTHORITY TO PURCHASE A VEHICLE: G05 X DRIVE30DSAV(CV62)CARBON BLACK METALLIC (416) FOR THE MEC"*, dated 19 July 2019

4.4.2.5 Memorandum for the HOD to the Head of Department of the KZN Provincial Treasury under the heading: *"REQUEST FOR PURCHASING OF AN EXECUTIVE BMW X5 FOR THE MEMBER OF THE EXECUTIVE COUNCIL (MEC)"* , dated 12 August 2019;

- 4.4.2.6 Memorandum from the Accountant-General and the Head of Department of the KZN Provincial Treasury to the HOD, under the heading: *“REQUEST FOR PURCHASING OF AN EXECUTIVE BMW X5 FOR THE MEMBER OF THE EXECUTIVE COUNCIL (MEC)”*, dated 16 August 2019
- 4.4.2.7 Memorandum from the HOD to Mr S B Ndlovu, Director-Facilities Management under the heading: *“PURCHASE OF A VEHICLE TO BE USED BY THE MEC FOR EDUCATION”*, dated 28 November 2019;
- 4.4.2.8 Memorandum from Mr S B Ndlovu to the HOD under the heading *“PURCHASE OF A VEHICLE TO BE USED BY THE MEC FOR EDUCATION”*, dated 29 November 2019
- 4.4.2.9 Affidavit made by Mr J M L Ngubane, former Head of Security in the Office of the KZN MEC, dated 02 March 2020;
- 4.4.2.10 Affidavit made by Mr Sandile Quintin Mbanjwa former Personal Assistant to the former KZN MEC for Education, Mr M Dlungwana, dated 02 March 2020;
- 4.4.2.11 Affidavits made by Mr. Bhekumuzi Zuma and Mr M K Zakwe, SAPS VIP Protectors of former MEC Dlungwane, dated 02 March 2020;
- 4.4.2.12 Affidavit made by Nkosinathi Petros Mpungose, Director in the Office the HOD dated 7 November 2021.
- 4.4.2.13 Affidavit made by Mangwanonke Mthetho, an official in the Office of the HOD dated 9 November 2021.
- 4.4.2.14 Affidavit made by Bongani Gilbert Mngadi, Transport Officer of the KZN Department of Education dated 14 October 2021.

4.4.2.15 Logbook of the official Mercedes Benz with records from 1 to 28 May 2019 and 1 June 2019 to 18 June 2019 received from Mr B Mngadi, Transport Officer of the Department.

4.4.3 Meetings

4.4.3.1 Meeting with the MEC and HOD of Education, on 07 December 2020;

4.4.3.2 Meeting with Dr Keeka (Complainant) on 24 February 2020;

4.4.3.3 Meeting with Mr S Naidoo, the Head of Security in the Office of the MEC on 18 March 2020;

4.4.3.4 Meeting with Mr S Phakathi, the Head of the Office of the MEC, on 18 March 2020;

4.4.3.5 Meeting with Mr L. Rambarran, the Acting Chief Financial Officer of the Department on 18 March 2020;

4.4.3.6 Meeting with Mr B. Mngadi, a Transport/Fleet Officer of the Department on 11 September 2020;

4.4.3.7 Meeting with Mr Kwazi Mthethwa, the Spokesperson of the MEC on 11 September 2019;

4.4.3.8 Meeting with Mr S. A. Mbanjwa, the Personal Assistant to the former MEC for Education, dated 23 October 2020;

4.4.3.9 Meeting with Warrant Officer Zakwe of the South Africa Police Service (SAPS) SPP VIP Unit (former MEC protector) on 23 October 2020;

4.4.3.10 Meeting with Warrant Officer B Zuma of the SAPS SPP VIP Unit (former MEC protector) on 23 October 2020.

4.4.4 **Telephonic interviews**

4.4.4.1 Telephonic interview with Dr I Keeka, the Complainant, on 8 December 2021.

4.4.5 **Legislation and other prescripts**

4.4.5.1 The Constitution of the Republic of South Africa, 1996;

4.4.5.2 The Public Protector Act 23 of 1994;

4.4.5.3 The Executive Members Ethics Act 82 of 1998;

4.4.5.4 The Public Finance Management Act No. 1 of 1999 (PFMA);

4.4.5.5 Executive Ethics Code published in terms of section 2(1) of the EMEA on 28 July 2000; and

4.4.5.6 The Treasury Regulations made in terms of the PFMA.

4.4.5.7 *Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers* (approved by Cabinet on 7 February 2007)

4.4.5.8 *Guide for Members of the Executive 2019*.

4.4.6 Jurisprudence considered

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

4.4.6.2 *President of the Republic of South Africa vs Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) (13 December 2017).

4.4.6.3 *The Public Protector v Mail and Guardian Ltd*⁴

4.5 Notices issued in terms of section 7 (9) of the Public Protector Act, 1994

4.5.1 A Notice was issued in terms of section 7(9) of the Public Protector Act on 19 July 2021 to:

4.5.1.1 The MEC, Mr. K Mshengu.

4.5.1.2 The HOD;

4.5.1.3 The Head of Ministry: KZN Department of Education, Mr S. F. Phakathi; and

4.5.1.4 The Director: Facilities Management & Auxiliary Services of the KZN Department of Education Mr S. B. Ndlovu.

4.5.2 The purpose of issuing the Notice in terms of section 7(9) was to allow the addressees an opportunity to respond to the evidence obtained during the investigation. Only the MEC responded, on 17 November 2021.

⁴ [2011]zasca 108 (1 June 2011)

- 4.5.3 The MEC attached, *inter alia* the following documents to his comprehensive response:
- 4.5.3.1 Affidavit made by Nkosinathi Petros Mpungose, Director in the Office of the KZN HOD of Education, dated 7 November 2021.
- 4.5.3.2 Affidavit made by Mangwanonke Mthetho, an official in the Office of the KZN HOD OF Education, dated 9 November 2021.
- 4.5.3.3 Affidavit made by Bongani Gilbert Mngadi, Transport Officer of the KZN Department of Education, dated 14 October 2021.

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

- 5.1. Regarding Whether the MEC used hired vehicles in his official capacity at state expense instead of an official car, and if so, whether his conduct in this regard was improper and constitutes a breach of the Executive Ethics Code**

Common cause or undisputed facts

- 5.1.1. It is common cause that in 2016 and 2018 respectively, two vehicles were purchased within a period of two years by the Department for the official use of the MEC for Education, namely a BMW X5 in 2016 at a cost of R1, 194. 807 and a Mercedes Benz GLE 350 (Mercedes Benz) in 2018, at a cost of R1, 274,186.

- 5.1.2. It is also not in dispute that during his tenure as MEC for Education, the former MEC (Mr Dlungwana) used the Mercedes Benz as an official vehicle and a BMW X5.
- 5.1.3. Further, that upon taking office on 28 May 2019, the MEC did not use the official vehicle assigned to the Office of the MEC, (Mercedes Benz) and that vehicles were hired for his official use by the Department.
- 5.1.4. It is common cause that it is the responsibility of the Department to procure and maintain one official vehicle for the MEC, in particular that of the HOD as the accounting officer and as the vehicle is one of the assets of the Department.
- 5.1.5. It is also not in dispute that NMI Durban South Motors (Pty) Ltd, trading as Garden City Motors, is an authorised Mercedes Benz dealership and was responsible, when required to do so, to conduct mechanical, service and/or maintenance on the Department's Mercedes Benz, according to the standards, procedures and protocols prescribed by Mercedes Benz South Africa (Mercedes Benz SA).

Issues in dispute

- 5.1.6. In his first response to the complaint, dated 17 February 2021, the MEC confirmed that he made use of hired vehicles between May and November 2019. He further stated that he started to make use of a hired vehicle in the first month that he took office as the MEC, when he was advised by the HOD that the official vehicle, (the Mercedes Benz) was not roadworthy and in need of a mechanical assessment. He had no reason to doubt the information provided by the HOD in this regard and is not qualified to express an opinion on a vehicle's roadworthiness.
- 5.1.7. The MEC further stated that he had not made use of hired vehicles for official

purposes since the end of November 2019, when he returned a courtesy vehicle that was provided to him by Mercedes Benz Garden City Motors. In this regard he stated also that: *“Given the outcry over my use of hired cars, I elected to terminate the use of a hired car and make use of my own car until the issue has been resolved.”* (emphasis added)

- 5.1.8. He further indicated that the poor condition of the official vehicle was confirmed by Mercedes Benz on 19 November 2019 in a letter stating that it had *“suffered damage due to external fluid ingress”* into the engine and that the vehicle required a complete engine replacement. A copy of the letter from Mercedes Benz was provided during the investigation.
- 5.1.9. The MEC stated in this regard that: *“However, if I am wrong on this, then I was misled. I dispute any suggestion that I was aware of and involved in, what the newspaper calls ‘a scam’ or directed those answerable to me to obtain a fraudulent letter from the dealership”*. The MEC further stated that he never interacted with the dealership or with any junior officials of the Department, but only with the HOD regarding the matter. He had never seen any form of communication between the Department and the dealership, but was briefed that there was internal communication on the status of the vehicle.
- 5.1.10. Due to the nature of his work, so the MEC explained, he has to travel extensively for official purposes. At the time when he was informed that the official vehicle was not fit to drive, he offered to use his private car for official purposes, but was advised by the HOD that it would be more expensive than for the Department to hire a vehicle, due to the considerable distances that he has to travel for official purposes.
- 5.1.11. In this regard the MEC stated in his response that: *“Had I elected to use my personal vehicle, I would have personally benefitted through making travel and subsistence claims. Therefore, in order to avoid overspending (and to avoid the misappropriation of public funds) as well as to ensure my safety on the*

road, it was decided that I would make use of hired vehicles until the Department was able to fix the GLE (Mercedes Benz)."

5.1.12. According to the MEC, the using of hired vehicles was in accordance with the provisions of the *Ministerial Handbook 2007* and the *Guide for Members of the Executive 2019*, which, in his view, in essence provide that where the vehicle allocated for official purposes is not available, Members may make use of hired vehicles.

5.1.13 The MEC stated that he acted reasonably, ethically and sought at all times to avoid the misuse of public funds.

5.1.14 In a further response to the complaint, submitted by the MEC on 15 June 2021, he referred to the media statement that he issued on 11 November 2019 in response to the article published by the *Sunday Times* on 10 November 2019, referred to above, wherein he stated, *inter alia*, that he would be using his personal car *"until the issue of the status of the Department's car finalised (sic)*.

5.1.15 The MEC further stated in this response that:

"Indeed, the status of the Department's car was finalised when the new BMW X4 was procured, using the provisions of the RT 57 in late December 2019."

5.1.16 Further, that the quotation for the BMW X4 was received on 13 December 2019 and the car was delivered to the Department for the official use of the MEC on or about 20 December 2019.

5.1.17 According to the MEC, he ceased using his private vehicle for official purposes, when the BMW X4 was delivered and started using it as the official vehicle, with effect from 23 December 2019.

- 5.1.18 The MEC emphasised that: *I utilised my private vehicle for a very short period of time, between the end of November 2019 (when I returned the courtesy vehicle that had been provided to me by Mercedes Benz Garden City Motors) to 20 December 2019 (when I took delivery of the Department's newly procured vehicle) barely a month.*
- 5.1.19 The MEC further stated that he did not submit any travel claim for the period that he used his private car.
- 5.1.20 The HOD also responded to the complaint on 3 and 17 February 2020. According to him, the MEC started to make use of hired vehicles when he took office, as the official vehicle was still with the former MEC for Education and it was only returned after the current MEC took office.
- 5.1.21 The HOD further indicated that he was advised by the former Head of Security, Mr Jeremiah Ngubane, that on its return, the Mercedes Benz was faulty, not roadworthy and required an assessment. Mr Ngubane continued to report that the issue of the faulty vehicle was being addressed. However, it later transpired that the vehicle was only taken to Mercedes Benz by the new Head of Security after his appointment in October 2019 (approximately five months after the MEC took office). Mr Ngubane has since left the Department when his contract expired in December 2019, before any investigation could be conducted on his role in the management of the vehicles allocated to the former MEC.
- 5.1.22 Attached to the MEC's response to the section 7(9) notice was an affidavit made by Mr N P Mpungose, Director in the Office of the HOD, on 7 December 2021 in which he stated inter alia that:

"I would like to state the following, that on or about June 2019, I had a meeting with the Head of the Department Dr E V Nzama. During our meeting he made mention of the handover between the former MEC Mr

Dlungwane and the current MEC Mr K Mshengu. He also mentioned that he had been advised by the former Head of Security in the Department Mr Ngubane about the mechanical issues of the vehicle which was used by the former MEC.

- 5.1.23 Mr Mpungose further stated in the same month (June 2019), Mr Ngubane told him that he had an engagement with the HOD where he advised him of the mechanical issues of the vehicle which was used by the former MEC, Mr Dlungwane and that the HOD advised him of the same.
- 5.1.24 The MEC also submitted an affidavit made by Mr M Mthetho, an official in the Office of the HOD. He stated *inter alia* that in the first week after the MEC took office, the HOD informed him that the Department had to find temporary transport for the MEC as the Mercedes Benz allocated to the former MEC had not been returned yet. About a week later, Mr Ngubane, the former Head of Security visited him and requested to meet with the HOD urgently as he wanted to speak to him about the Mercedes Benz. He further informed Mr Mthetho that the vehicle was faulty and needed serious attention and that he as the Head of Security was uncomfortable for the MEC to use it until it was fully assessed by the dealership.
- 5.1.25 In his response during the investigation, the HOD stated that when he received the report from Mercedes Benz dated 19 November 2019, it confirmed that the vehicle was not roadworthy.
- 5.1.26 The HOD reiterated that the MEC only acted on his advice in regard to the official vehicle. He confirmed that when the MEC was informed that the Mercedes Benz was not driveable, he suggested that he should use his own car. However, the HOD explained to the MEC that this was not advisable as in terms of the relevant prescripts, the amount payable by the Department to him, should the MEC use his own car for official purposes, would be more than to hire a vehicle.

- 5.1.27 According to the HOD, the Ministerial Handbook which was applicable in May 2019 when the MEC took office, provided that the claim for using a private vehicle for official purposes is calculated by multiplying the applicable tariff as determined by the National Department of Transport, by three. On the distances that the MEC has to travel for official purposes, it would be more expensive to pay his travel claims when using his own car, than to hire a vehicle. The MEC accepted his advice at the time and vehicles were hired for his official use, until November 2019.
- 5.1.28 The HOD further indicated that the hiring of vehicles for the MEC under the circumstances was entirely proper as the Ministerial Handbook and Guide for Members of the Executive, 2019 provide that the hiring of vehicles is permissible when the official vehicle is not available.
- 5.1.29 The former MEC, Mr Dlungwane, stated during the investigation that when he was the MEC for Education, he used two official vehicles, a Mercedes Benz, GLE 350 and a BMW X5, which were returned to the Department on or before 7 May 2019, before the new MEC took office. According to him, the Mercedes Benz was in a good condition when it was returned. In affidavits deposed by the former Head of Security, Mr Ngubane, two South African Police VIP Protectors and the Personal Assistant of the former MEC, it is stated that the Mercedes Benz was in a good condition when it was returned to the Department.
- 5.1.30 However, in an affidavit made by Mr B G Mngadi, a Transport Officer of the Department on 14 October 2021, he denied that the Mercedes Benz was returned by the officials of former MEC Dlungwane to the Department on 7 May 2021. According to him, the official monthly log sheet of the vehicle for May 2019 shows that the vehicle was still being used by Mr Dlungwane between 8 and 28 May 2019. Mr Mngadi provided the said log sheets supporting his affidavit. The records in the log sheet indicate that the vehicle was used to travel from Ashburn to different destinations from 1 May 2019 to

28 May 2019. The log sheet was signed by Mr Zuma as the driver of the vehicle. The log sheet further indicate that the vehicle was taken from Ashburn to the Head Office Car Wash on 1 June 2019.

- 5.1.31 Mr Mngadi stated further that he collected the vehicle from Mr Dlungwane's residence in Ashburn on 28 May 2019, because Mr Zakwe had contacted him and advised that the Mercedes Benz had a fault and a warning light was on, showing "*Add Blue Solution*". He therefore took the vehicle to Mercedes Benz Garden City Motors for the problem to be attended to and the vehicle to be serviced. Thereafter he returned the vehicle to Mr Dlungwane's residence. It was only returned to the Department on 31 May/1 June 2019.
- 5.1.32 The HOD further explained in his response to the allegations that that "*every reasonable effort*" was made to procure an official vehicle for the MEC "*in good time*" (due to the reported mechanical failures of the Mercedes Benz).
- 5.1.33 The HOD approached the KwaZulu-Natal Provincial Treasury (Provincial Treasury) on 8 July 2019, requesting approval to purchase a BMW X5 for the MEC, by means of a deviation from the normal procurement prescripts. The Memorandum was not approved as the Provincial Treasury was of the view that there was insufficient information to justify a deviation from the ordinary procurement processes and as the appointment of a supplier for the "*RT57*" (*Transversal Contract*) was not yet finalised. In December 2019, the National Treasury confirmed that end users could commence with the procurement of vehicles utilising the Transversal Contract. It was only then that the procurement process of a vehicle for the MEC could proceed.
- 5.1.34 The HOD indicated that his response to the complaint (as set out above) explained why the MEC's new official vehicle was not procured earlier in 2019 and why the use of hired vehicles was required up to November 2019. He denied that the MEC was involved in an elaborate scam, as alleged by the article in the *Sunday Times*.

- 5.1.35 It was established from the documents obtained during the investigation that a Memorandum was submitted to the HOD by Mr S F Phakati of the Office of the MEC, on 8 July 2019, recommending that a new official vehicle is purchased for the MEC. The motivation for the request was that although the official vehicle that was used by the former MEC was purchased in October 2018 and had only done about 40 000 km, *“the drivers have advised that this vehicle has some limitations with road handling in the terrain where MEC travels. This may have an adverse on (sic) on the daily activities of the MEC. It is the considered view of the Dr Zama (sic) that to proceed with this vehicle despite of the concerns raised, may cause the Department to spend a lot of costs on repairs that could otherwise be avoided.”*
- 5.1.36 The Memorandum of the HOD to the Provincial Treasury, dated 8 July 2019, was based on Mr Phakati’s Memorandum and the reasons provided therein, requesting approval to purchase BMW X5 for the MEC at a cost of approximately R1 338 396,00.
- 5.1.37 Mr S Moodley, the Provincial Accountant General and Mr L S Magagula, the HOD of the KZN Provincial Treasury responded on 16 and 19 July 2019 respectively, stating that the request for a deviation from normal procedure when purchasing a new vehicle for the MEC, could not be supported, as important information was omitted from the submission which:
- “1. Did not explain the root course (sic) of the vehicle limitations:*
- 1.1 Did not provide clarity as to whether or not the vehicle was damaged;*
- 1.2 Did not indicate if the decision to buy is influenced by inferior technical specifications of the vehicle, explanation was also not provided as to why the vehicle was purchased if it did not meet the needs of the Department;*
- 2. Did not provide any information regarding planned future use of the current vehicle and the impact of the early retirement of the vehicle on the department’s budget.”*

- 5.1.38 The Provincial Treasury referred the HOD to the provisions of paragraph 2.7(b) of the Guide for Members of the Executive, in terms of which a new vehicle can be purchased if the current vehicle *experiences serious mechanical problems and is in poor condition, in which event a detailed mechanical report by the vehicle manufacturer or approved dealer is required.*” It was further indicated that the National Treasury had advised that the appointing of suppliers of vehicles on the RT 57 transversal contract had not been finalised.
- 5.1.39 The HOD approached the Provincial Treasury again on 12 August 2019, requesting approval to purchase a BMW X5 vehicle for the official use of the MEC. In the Memorandum, the HOD indicated that the current vehicle of the MEC (Mercedes Benz) *“has just travelled over 40 000 km. This can still be utilised until 100 000 km.”* (emphasis added). He further stated that the vehicle used by the former MEC (Mercedes Benz) would be *“redeployed”* to provide transport for national delegates while monitoring schools at districts across the province and for the transportation of the MEC whenever there is a breakdown of his official vehicle.
- 5.1.40 In its response, dated 16 August 2019, the Provincial Treasury indicated that the process of the Transversal Contract (RT 57) had been finalised and that purchasing a vehicle in terms of it was not regarded as a deviation that had to be approved by the Provincial Treasury. The accounting officer of the Department has the authority to approve the purchase. It was stated that:
- “The Department is advised that purchasing vehicles from the Transversal RT57 contract is not considered as a deviation from SCM processes, therefore approval by Provincial Treasury as prescribed by National Treasury Instruction Note 3 of 2016/2017 is not a requirement.”*
- 5.1.41 On 29 November 2019, Mr S B Ndlovu, the Director: Facilities Management & Auxiliary Services of the Department submitted a Memorandum to the HOD,

requesting that an official vehicle is purchased for the MEC by the Department through the RT57 Transversal Contract. According to the Memorandum, the vehicle chosen by the MEC was a Mercedes Benz GLC at a cost of R687 697,36. It was stated that the purchase price was within the prescribed threshold. The Memorandum was approved by the HOD on the same day (29 November 2019).

5.1.42 The *Sunday Times* newspaper was approached during the investigation for information and supporting documents relating to the article that was published on 10 November 2019. The newspaper's attorneys responded on its behalf, on 26 June 2020 and stated *inter alia* that:

"Our clients received a tip-off that the MEC for Education on KwaZulu-Natal was refusing to use the official vehicle that was assigned to his predecessor and was spending tax payers' money on a hired car. A former official of the department of education gave the reporter a letter he received from his former colleagues who are still working for the department. The department claimed this letter was from Mercedes Benz which they used as "proof" that the car was not roadworthy.

5.1.43 The attorneys provided a copy of the letter relied upon by the *Sunday Times*. This letter is dated 2 November 2019 and purports to be from Mercedes Benz, Garden City Motors, Pietermaritzburg. It is addressed *"To whom it may concern"*. The letter states that the Mercedes Benz (the official vehicle of the MEC) was assessed and that it was found that:

"The vehicle has a defect in the intake capacitor and an attempted repair by a non-approved repairer is noted. The workmanship is not of the acceptable standards of an approved Mercedes Benz workshop.

The vehicle leans towards the right hand side due to the balance brace not being a approved (sic) replacement part for the abovementioned vehicle.

The body damage is minimal. Visible deep scratches are modified on the right side lower fender.

The vehicle does start and can be driven however it is not recommended this be done as the risk of fatality due to the non-approved repair is high.”

- 5.1.44 According to the information provided by Mercedes Benz: Garden City Motors to the PPSA investigation team during the investigation, on 6 March 2020, it was responsible for the maintenance of the Mercedes Benz and it underwent a mechanical service on 30 May 2019 (two days after the MEC took office) with 40233 kilometres on its odometer.
- 5.1.45 On 4 October 2019, Garden City Motors was requested by the Department, represented by Mr Sherwyn Naidoo, the Head of Security, to ascertain the cause for the vehicle not starting whereupon Garden City Motors determined that the battery had discharged. The vehicle’s odometer indicated 40 246 kilometres.
- 5.1.46 The vehicle was towed to Garden City Motors on 22 October 2019 with 40 254 kilometres on its odometer with instructions to attend to the vehicle not starting, leaning to one side and to check and report on body damage. An assessment of the vehicle was undertaken on 25 October 2019 by Garden City Motors and it was determined that:
- 5.1.46.1 The vehicle could not start as the battery was defective and a new battery was fitted;
- 5.1.46.2 A chassis alignment test was conducted and confirmed that the vehicle was not leaning to the one side;
- 5.1.46.3 A 70 point technical test was conducted in respect of the damage to the body and findings duly recorded; and

- 5.1.46.4 In addition, the 70 point technical test carried out confirmed that the vehicle had no technical defects.
- 5.1.47 It was further indicated that on 8 November 2019, Garden City Motors was made aware by Mercedes Benz SA that the *Sunday Times* intended to publish an article relating to a letter allegedly sent from Garden City Motors that the vehicle is unsafe to use by the MEC. Garden City Motors accordingly advised Mercedes-Benz SA that no such letter had been furnished by Garden City Motors to the Department.
- 5.1.48 On 11 November 2019, officials of the Department brought the Mercedes Benz to Garden City Motors advising that the vehicle's instrument panel displayed a warning light of the engine management system and that the vehicle was emitting smoke. An initial assessment was thus conducted by Garden City Motors and it was found that there had been external water ingress to the engine of the vehicle. The initial assessment was reported to Mercedes Benz SA, who, in response appointed an independent investigator to assess the cause and extent of the damage to the vehicle.
- 5.1.49 On 14 November 2019, Garden City Motors advised the Department that the vehicle is still in the process of being assessed and offered a courtesy vehicle to the Department for the MEC to use. The Department accepted the courtesy vehicle.
- 5.1.50 Garden City Motors informed the Department on 19 November 2019 that the independent investigator confirmed the assessment made by Garden City Motors in respect of the vehicle and that the engine had to be replaced.
- 5.1.51 The vehicle remained in the possession of Garden City Motors pending further instructions from the Department in relation to the repair thereof. In January 2020 the Department advised Garden City Motors that the vehicle should not

be repaired and it was collected by the Department on 13 January 2020. It is not clear what happened to it thereafter.

- 5.1.52 In a document titled “*REPORT TO THE MEC: MEDIA REPORT IN RELATION TO THE VEHICLE UTILIZED BY THE MEC FOR EDUCATION IN KWAZULU NATAL*” dated 21 November 2019, the HOD appraised the MEC “*on the recent spate of media reports in relation to the vehicle that was utilised by the MEC for Education in KwaZulu-Natal.*”
- 5.1.53 The HOD indicated that when the MEC took office on 28 May 2019, the official vehicle to be used by the MEC was still being used by his predecessor. Two options had to be considered in respect of the official travelling of the MEC. The first was for him to use his personal vehicle and the second to use a rental vehicle.
- 5.1.54 The HOD indicated that “*the two options mentioned above were considered by the department and a decision to rent a vehicle was based on the hefty costs incurred on subsistence and travel where the previous MECs were utilising their private vehicles. Also, the MEC would not have personally benefitted by renting the vehicle as opposed to him utilising his private vehicle.*” He further provided a calculation of the difference in the costs between a rental vehicle and the MEC using his personal vehicle on the rate as prescribed by the Ministerial Handbook, based on an average of 8000 km travelled per month by the former MEC. This calculation indicated that it would cost the Department R36 718,76 less per month to rent a vehicle, which over a period of six months would amount to a saving of R220 312,56.
- 5.1.55 It was further explained in the Report to the MEC that the HOD was advised by the former Head of Security that the Mercedes Benz used by the former MEC was faulty and needed some attention and hence a hired vehicle was sourced from a service provider for the MEC. He also explained that the response received from the Provincial Treasury in respect of the procuring of

a new vehicle was that it had to be done in terms of the Transversal Contract which was still to be finalised at the time and resulted in a delay. The HOD further stated that:

“It was at this point that the Sunday Times of the 10th November 2019 ran a front page story titled: “Education MEC’s ‘faulty Merc scam cost taxpayer R100k per month”. The Department has already started communicating with Mercedes Benz Garden City Motors to fast track the assessment process. While dealing with the matter, Mercedes Benz Garden City offered a courtesy vehicle to be used by the MEC pending the assessment and the Department surrendered the hired vehicle to Woodford Car Hire.”

- 5.1.56 The HOD referred to the letter received from Mercedes Benz on 19 November 2019, stating that the vehicle had serious engine damage and was not usable. Further that: *“It is therefore advisable for the MEC to utilise his private vehicle while considering the available options.”* (emphasis added).
- 5.1.57 According to the response from the HOD and the MEC and the documents provided, the Department procured a new BMW X4 vehicle for the official use by the MEC on 20 December 2019, which he has been using since.
- 5.1.58 In his response to the section 7(9) Notice dated 17 November 2021, the MEC advised that Dr Nzama, the HOD, has retired from the public service and is also indisposed due to serious illness. The MEC’s response was accordingly provided without his input.
- 5.1.59 The MEC further stated that the Mercedes Benz was the only official vehicle that he could *“potentially”* have used as the BMW X5 previously used by the former MEC was unreliable and had reached the threshold of 120 000 km and was therefore liable for replacement.

- 5.1.60 He further emphasised his evidence that he was informed by the HOD that the Mercedes Benz was not available as it was not roadworthy.
- 5.1.61 The MEC also disputed the evidence provided by the former MEC Dlungwane and his Personal Assistant, Mr Mbanjwa that the Mercedes Benz was returned to the Department on 7 May 2019, which is denied in the affidavits of Mr Mpungose and Mr Mthetho and not supported by the entries in the vehicle's logbook.
- 5.1.62 With reference to the affidavit of Mr Mngadi, a Transport Officer of the Department, (referred to above), the MEC contended that it is clear that the Mercedes Benz was only returned to the Department by 31 May/1 June 2019. His affidavit also confirms that the Mercedes Benz had a mechanical problem when he was called to collect it on 28 May 2019 and that he had to take to the dealership for repairs and a service.
- 5.1.63 The MEC further disputed that the complaint was lodged in terms of the EMEA and stated that accordingly no finding of a breach of the Executive Ethics Code can be made against him.
- 5.1.64 He further stated that:

“Be that as it may, insofar as there is any abstract duty on my part to act on good faith (and I do not accept there is one), it does not include an obligation to question, doubt or even second guess opinions given to me by the HOD and/or relevant officials, particularly where there was no basis or circumstances which called for or justified any such doubt as to the advice of the HOD.”

There was no breach of any such duty merely because I accepted what I was told by my HOD (that the Mercedes Benz was not drivable when I took office) because I did not question the HOD's expenditure and because I did not

determine why the Mercedes Benz could not be repaired and used (even though the correctness of these facts I do not concede and has already sufficiently been covered in this response and previous submissions to your office.

This is particularly so where the matter on which they had expressed views (the mechanical soundness of a motor vehicle) is outside of my expertise and it would be impossible and impractical for me to personally verify each such detail in any event.

This conclusion seeks in any event to impose a positive duty on me to ascertain and verify departmental assets which does not exist in law.

Application of the relevant law

- 5.1.65 Section 38(1)(b) of the Public Finance Management Act, 1999 (PFMA) stipulates that the accounting officer of a department is responsible for the effective, efficient, economical and transparent use of the resources of the department.
- 5.1.66 The accounting officer is in terms of section 38(1)(d) of the PFMA responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department.
- 5.1.67 In this matter, the HOD stated that he was made aware by the by the former Head of Security that when the Mercedes Benz was returned from use by the former MEC, it was faulty. He further stated that Mr Mr Ngubane continued to report that the issue of the faulty vehicle was being addressed. The HOD's evidence that he was informed by Mr Ngubane that the vehicle was faulty when it was returned to the Department, is supported by the affidavits of Mr Mpungose and Mr Mthetho.

- 5.1.68 The HOD further stated that he did not personally liaise with Mercedes Benz SA as he was under the impression that Mr Ngubane was doing so. However, according to him, the vehicle was only taken to Mercedes Benz by the new Head of Security after his appointment in October 2019 (approximately five months after the MEC was appointed). As Mercedes Benz confirmed in a letter dated 19 November 2019 that the Mercedes Benz was not roadworthy, he regarded the advice by Mr Ngubane to have been accurate.
- 5.1.69 There is no indication in the evidence that the HOD was at any time when the vehicle was returned to the Department, informed by Mr Ngubane or any other official of the Department that the Mercedes Benz is in a drivable condition and could be used by the MEC. The evidence of Mr Dlungwane and Mr Mbanja as to when the Mercedes Benz was returned to the Department and what its condition was, is not supported by the entries made in the logbook of the vehicle and the evidence of Mr Mngadi that he was called to collect it on 28 May 2019 and had to take to the dealership as a warning light was on, which had to be repaired and the vehicle serviced, which is supported by the evidence provided by Mercedes Benz SA.
- 5.1.70 The information obtained from Mercedes Benz SA during the investigation shows that the Mercedes Benz was serviced on 30 May 2019, two days after the MEC took office, and again late in October 2019 when a 70 point technical test was conducted on the vehicle and no defects were found. It was only on 19 November 2019 that Mercedes Benz reported to the Department that the vehicle was brought in on 11 November 2019 with serious mechanical problems and that the engine had to be replaced.
- 5.1.71 It follows from the evidence that the Mercedes Benz was in a good condition from at least 30 May 2019 to 11 November 2019 (a period of five months). Had the HOD attended to the effective use and maintenance of this resource of the Department, as was expected of him by section 38 of the PFMA, the Mercedes Benz could have been used by the MEC, instead of hiring cars at

the expense of the Department. There is no evidence that he did so. It therefore follows that on his version, the MEC was continuously brought under the impression that the Mercedes Benz was not available to be used by the MEC.

- 5.1.72 According to the evidence of the HOD and the MEC, the latter stopped using hired cars when the article was published in the *Sunday Times* on 10 November 2019, where after he started to use his private vehicle.
- 5.1.73 The conduct of Members of provincial Executive Councils is primarily regulated by section 136 of the Constitution. It provides that:

“(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not-

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.” (emphasis added)

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

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

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

- 5.1.76.1 Perform their duties and exercise their powers diligently and honestly;
 - 5.1.76.2 Fulfil all the obligations imposed on them by the Constitution and the law;
 - 5.1.76.3 Act in good faith and in the best interest of good governance; and
 - 5.1.76.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.
- 5.1.77 Paragraph 2.3 of the Executive Ethics Code provides *inter alia*, that Members of the Executive may not:
- 5.1.77.1 Act in a way that is inconsistent with their position;
 - 5.1.77.2 Expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
 - 5.1.77.3 Make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowance or payments.
- 5.1.78 The *Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers* (approved by Cabinet on 7 February 2007- (the Ministerial Handbook) was a guideline document for the benefits and privileges to which Members of the Executive (Members) and their families are entitled in the execution of their duties.
- 5.1.79 Chapter 5 of the Ministerial Handbook contained the provisions relating to the motor transport of Members. Paragraph 1.1.2 provided that the respective Department would carry the financial implications in terms of procuring and insuring official vehicles.
- 5.1.80 In terms of paragraph 1.2.2, Members at provincial level may be provided with one vehicle for use at their seat of office.

5.1.81 Paragraph 1.4.1 provided that regardless of their usage, official vehicles may be replaced and disposed of by the relevant Department only after completion of 120 000 kilometers. Paragraph 1.4.2 stipulated that:

“If an official vehicle experiences serious mechanical problems and is in poor condition, the respective Department may approve the earlier replacement of such vehicle, subject to obtaining a detailed mechanical report by the vehicle manufacturer or approved dealer.” (emphasis added)

5.1.82 The heading of paragraph 2 of Chapter 5 of the Ministerial Handbook is:

“Government Transport.” It provided that:

“2.1 For the purposes of keeping official engagements, Members and their spouses may make use of any transport, at the expense of the Department, in cases where the vehicle allocated for official purposes is not available.”

2.2 The use of Government Motor Transport for private purposes is not permissible.”

5.1.83 The MEC was accordingly in terms of the Ministerial Handbook entitled to use rental vehicles at the expense of the Department, if the official vehicle allocated to him was not available. In this case he was informed that the Mercedes Benz was not available by the HOD, who also approved the rental of vehicles for the MEC, as the accounting officer of the Department.

5.1.84 With regard to the use of private vehicles by Members, paragraph 6 of Chapter 5 of the Ministerial Handbook stated that:

“In the case of a Member who chooses NOT to make use of a government-owned official vehicle and where the relevant Department 21 does NOT procure an official vehicle for these purposes, all distances travelled for official purposes in private vehicles may be claimed at a tariff equal to 3 times the

standard running and maintenance allowances as published in the Financial Manual from time to time.

A log of all official distances travelled must be kept for distances travelled for official purposes in private vehicles, subject to any guidelines issued by the Department of Transport.”

5.1.85 According to the evidence obtained during the investigation, the MEC did not choose not to make use of a government-owned vehicle. At the time when he took office the Department had 2018 Mercedes Benz with around 40 000 km on its odometer that was serviced by the Mercedes Benz dealership on 30 May 2019... However, the HOD advised the MEC otherwise and approved the expenditure associated with the rental of vehicles. Even so, the MEC was not entitled to use his own car for official purposes under the circumstances.

5.1.86 *The Guide for Members of the Executive (Guide)* effectively replaced the Ministerial Handbook with effect from 20 November 2019

5.1.87 Chapter 4 of the Guide provides for motor vehicle transport of Members. Paragraph 2.2 stipulates that Members shall be provided with one vehicle for official use.

5.1.88 Paragraph 2.3 of Chapter 4 of the Guide provides that:

“Members, on assumption of office, must make use of the official vehicle already purchased by the Department, unless such vehicle is to be replaced in terms of paragraph 2.9 of this Chapter.” (emphasis added)

5.1.89 In terms of paragraph 2.4, Departments must purchase a vehicle for a Member through the transversal contract concluded by the National Treasury for the procurement of bulk motor vehicles for Members directly from manufacturers. Paragraph 2.6 states that the purchase price of official vehicles shall not

exceed R700 000, inclusive of VAT, security upgrades and maintenance plans. The limitation on the cost must be adjusted annually by the Minister of Finance. The cost of purchasing a vehicle for a Member shall, in terms of paragraph 2.8 be borne by the relevant Department.

5.1.90 Paragraph 2.9 provides that Departments may only replace a motor vehicle purchased for a Member if-

(a) *“the vehicle has reached 120 000kms or 5 years, whichever comes first; or*

(b) *the vehicle experiences serious mechanical problems and is in a poor condition, in which event a detailed mechanical report by the vehicle manufacturer or approved dealer is required”.* (emphasis added)

5.1.91 In this case, the MEC was obliged to have used the official vehicle that was purchased for his predecessor. The BMW X5 was unreliable and had already reached the 120 000 km and it was reported to the HOD that the Mercedes Benz had mechanical problems.

5.1.92 Regarding the use of hired vehicles, paragraph 4 of Chapter 4 of the Guide stipulates that:

“4.1. Where the official vehicle is not available, Members may make use of hired vehicles of a similar make and model as may be purchased by a department.

“4.2 The cost of incidental/rented vehicles for official use is borne by the relevant Department and subject to any transversal contract that the National Treasury may conclude.

5.1.93 The MEC was accordingly entitled to use hired vehicles when the official vehicle was not available. It was the responsibility of the Department to ensure

that an official vehicle is purchased and allocated to the MEC for official use and that it is maintained.

- 5.1.94 Mercedes Benz informed the Department on 19 November 2019 that the Mercedes Benz of the MEC had a serious mechanical failure and that the engine had to be replaced. A courtesy vehicle was provided by Mercedes Benz for the official use by the MEC until 22 November 2019.
- 5.1.95 According to the MEC, he opted to use his own car for official purposes at no cost to the Department after the article was published by the *Sunday Times* on 10 November 2019 for a short period until a new vehicle was purchased by the Department and delivered in December 2019.
- 5.1.96 The Guide does not provide for Members to use their private vehicles for official purposes.
- 5.1.97 From the responses received from the MEC during the investigation, it is clear that he was fully aware of the relevant provisions of the Ministerial Handbook and the Guide in respect of the use by Members of official cars. According to him, on taking office he was informed by the HOD that the Mercedes Benz was not available and it was agreed to hire cars for his official use until the official vehicle was available. This was confirmed by the HOD and other witnesses.
- 5.1.98 There is no evidence that the HOD made regular enquiries to be informed of the reasons why the Mercedes Benz was not available for the MEC's official use, why it was not repaired if it had problems as was expected of him as the HOD and accounting officer of the for the Department that in terms of the Ministerial Handbook and the Guide is responsible for providing the MEC with an official vehicle and is responsible for maintaining the assets of the Department. He only relied on what he was told by the Head of Security, Mr Ngubane.

Conclusion

- 5.1.99 The evidence obtained during the investigation confirmed that the Department had an official car (Mercedes Benz) when the MEC took office at the end of May 2019, which he was obliged to use, in terms of the Ministerial Handbook and the Guide. However, he was advised by the HOD that the Mercedes Benz was not drivable and that vehicles would be rented for him for official use. On the available evidence, the MEC had no reason to doubt the information provided to him by the HOD, who was ultimately, as the HOD and accounting officer of the Department, responsible to ensure that the MEC is provided with an official vehicle.
- 5.1.100 No evidence was found that the MEC requested that a new official vehicle should be procured for him.
- 5.1.101 On his own version provided during the investigation, the HOD did not personally take an interest to determine what the status of the vehicle was. He just approved the hiring of vehicles for the MEC at the expense of the Department. It was only after an article was published by the *Sunday Times* on 10 November 2019 (more than five months after the MEC took office) that the HOD was provided with a technical report by Mercedes Benz SA, indicating that the vehicle has a serious mechanical defect.
- 5.1.102 The evidence shows that the Mercedes Benz was available and drivable from 30 May 2019 to about 11 November 2019, when it was taken to Mercedes Benz for an assessment. However, there is no evidence that the Department informed the MEC accordingly. As the Department is responsible for providing the MEC with an official vehicle, the HOD had a positive duty to ensure that it is done and to prevent fruitless and wasteful expenditure in this regard.

- 5.1.103 No evidence was found that the MEC was involved in any “*elaborate scam*” not to use the official car that was used by his predecessor. There is also no evidence that the MEC or the Department was involved the forging of a letter, ostensibly from Mercedes Benz Garden City Motors, dated 2 November 2019. The origin of this letter could not be determined during the investigation.
- 5.1.104 The Complainant confirmed during the investigation that he lodged to complaint in terms of the EMEA. The investigation was also conducted in terms of section 6 and 7 of the Public Protector Act and section 182(1) of the Constitution.
- 5.1.105 As it is the responsibility of the Department in terms of the Ministerial Handbook and the Guide to provide the MEC with an official vehicle, he had no positive duty in this regard.
- 5.1.106 It therefore cannot be concluded that the MEC acted in any manner inconsistent with his position and therefore in breach of the Executive Ethics Code, acted improperly or that he was involved in maladministration.
- 5.1.107 The evidence indicates that the Mercedes Benz was drivable from at about 30 May 2019 to 11 November 2019. There is no evidence that the HOD was informed thereof. However, as the accounting officer of the Department responsible for its assets, he should have made regular enquiries from the Transport Officers in this regard, which he failed to do. He just relied on what he was told by Mr Ngubane.
- 5.1.108 Under the circumstances, the expenditure incurred for the hiring of vehicles for the MEC for official purposes from 31 May 2019 to 10 November 2019 could have been avoided had reasonable care been taken. The expenditure incurred in this regard can be regarded as fruitless and wasteful as contemplated by section 1 of the PFMA.

5.2. Regarding whether the purchase of a new official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant law and other prescripts regulating the procurement of official cars for Members of the Executive and if yes, whether such conduct was improper and constitutes maladministration.

Common cause or undisputed facts

5.2.1 It is common cause that the MEC took office on 28 May 2019. At the time the Department had an official vehicle for the MEC for Education, (Mercedes Benz) which was purchased by the Department in September 2018. It is not in dispute that the vehicle had around 40 000 on the odometer at the time.

5.2.2 It is also common cause that the Mercedes Benz was assessed by Mercedes Benz SA and an independent assessor in November 2019. On 19 November 2019, Mercedes Benz SA advised that the vehicle had *“suffered damage due to external fluid ingress into the engine, which could cause consequential damage to the engine’s moving parts and/or total engine failure. Therefore, the vehicle requires a complete engine replacement.”* Other than that, the assessment found the vehicle in good condition.

5.2.3 Mercedes Benz SA further stated in a letter addressed to the Department on 19 November 2019 that:

“We accordingly refer you to the terms and conditions of the Mercedes Benz Warranty and Premium Drive Maintenance plan, and specifically draw your attention to the list of exclusions which will not be covered by MBSA and will be for the customer’s own account:

‘The repair of any damage of whatever nature caused as a result of or arising from but not limited to: Any external influence causing damage to the vehicle.’

On this premise, the Warranty & Maintenance contract will be cancelled until such time that the vehicle has been brought back to Mercedes Benz Standards as per our recommendations to replace the engine at an approved Mercedes-Benz Dealership/Repair Center.”

- 5.2.4 It was further indicated that a courtesy vehicle was provided to the MEC until 22 November 2019.
- 5.2.5 The Mercedes Benz remained in the possession of Garden City Motors pending further instructions from the Department in relation to the repair of the vehicle. In January 2020 the Department advised Garden City Motors that the vehicle should not be repaired and it was collected by the Department on 13 January 2020. It is not clear what happened to it thereafter.
- 5.2.6 It is also not in dispute that the Department purchased a new BMW X4 for the MEC’s official use on 20 December 2019 on the National Treasury RT 57 contract in the amount of approximately R770 000-00.

Issues in dispute

- 5.2.7 In his response to the complaint (referred to above), the HOD stated that at the time the MEC took office, he was advised that the Mercedes Benz official car of the MEC was still being used by the former MEC. On its return, he was informed by the former Head of Security, Mr J Ngubane, who was responsible for the security of the MEC’s transport that the vehicle was not safe for use by the MEC as *“it had serious mechanical problems that had to be fixed before it could be used again.”*
- 5.2.8 The HOD further stated in this regard that: *“The Department could not doubt his judgment on issues of security, including this one. Mr Ngubane, however, as the Head of Security did not send the vehicle to Mercedes Benz immediately so that it could be attended to by the recognised dealership. The*

vehicle was only taken to Mercedes Benz by the new Head of Security after his appointment. That contributed to the longer hiring of utilisation of hired vehicles by the new MEC.” (emphasis added) He further stated that when the allegations of improper conduct and the misappropriation of public funds by the MEC surfaced in November 2019, Mr Ngubane was no longer the Head of Security as his appointment was linked to the term of office of the former MEC and that he left the Department before any investigation could be conducted on his role in the management of vehicles allocated to the former MEC.

- 5.2.9 It was established from a Memorandum obtained during the investigation, submitted to the HOD by Mr S F Phakati of the Office of the MEC, on 8 July 2019 that it was recommended to the HOD that a new official vehicle is purchased for the MEC. The motivation for the request was that although the official vehicle that was used by the former MEC was purchased in October 2018 and had only done around 40 000 km, *“the drivers have advised that this vehicle has some limitations with road handling in the terrain where MEC travels. This may have an adverse on (sic) on the daily activities of the MEC. It is the considered view of the Dr Zama (sic) that to proceed with this vehicle despite of the concerns raised, may cause the Department to spend a lot of costs on repairs that could otherwise be avoided.”*
- 5.2.10 The HOD approached the KwaZulu-Natal Provincial Treasury on 8 July 2019, on the basis of Mr Phakati’s Memorandum and the reasons provided therein, requesting approval to purchase a BMW X5 for the MEC at a cost of approximately R1 338 396,00.
- 5.2.11 Mr S Moodley, the Provincial Accountant General and Mr L S Magagula, the HOD of the KZN Provincial Treasury responded on 16 and 19 July 2019 respectively, stating that the request for a deviation from normal procedure when purchasing a new vehicle for the MEC, could not be supported, as important information was omitted from the submission which:

- “1. *Did not explain the root course (sic) of the vehicle limitations:*
 - 1.1 *Did not provide clarity as to whether or not the vehicle was damaged;*
 - 1.2 *Did not indicate if the decision to buy is influenced by inferior technical specifications of the vehicle, explanation was also not provided as to why the vehicle was purchased if it did not meet the needs of the Department;*
2. *Did not provide any information regarding planned future use of the current vehicle and the impact of the early retirement of the vehicle to the department’s budget.*

5.2.12 The Provincial Treasury referred the HOD to the provisions of paragraph 2.7(b) of the Guide for Members of the Executive (Guide) in terms of which a new vehicle can be purchased if the current vehicle *experiences serious mechanical problems and is in poor condition, in which event a detailed mechanical report by the vehicle manufacturer or approved dealer is required.*” It was further indicated that the National Treasury had advised that the appointing of suppliers of vehicles on the RT 57 Transversal Contract had not been finalised.

5.2.13 The HOD approached the Provincial Treasury again on 12 August 2019 requesting approval to purchase a BMW X5 vehicle for the MEC. In the Memorandum, the HOD indicated that the current vehicle of the MEC (Mercedes Benz) *“has just travelled over 40 000 km. This can still be utilised until 100 000 km.”* (emphasis added). He further stated that the vehicle used by the former MEC (Mercedes Benz) would be *“redeployed”* to provide transport for national delegates while monitoring schools at districts across the province and for the transportation of the MEC whenever there is a breakdown of his allocated vehicle.

5.2.14 This evidence shows that on 12 Augustus 2019, the HOD was of the view that the Mercedes Benz could still be used and could be redeployed. However, there is no evidence that he informed the MEC accordingly and took steps for the MEC to utilise the vehicle.

5.2.15 In its response, dated 16 August 2019, the Provincial Treasury indicated that the process of the Transversal Contract had been finalised and that purchasing a vehicle in terms of it was not regarded as a deviation that had to be approved by the Provincial Treasury. The accounting officer of the Department has the authority to approve the purchase. It was stated that:

“The Department is advised that purchasing vehicles from the Transversal RT57 contract is not considered as a deviation from SCM processes, therefore approval by Provincial Treasury as prescribed by National Treasury Instruction Note 3 of 2016/2017 is not a requirement.”

5.2.16 On 29 November 2019, Mr S B Ndlovu, the Director: Facilities Management & Auxiliary Services of the Department submitted a Memorandum to the HOD, requesting that an official vehicle is purchased for the MEC by the Department through the RT57 Transversal Contract. According to the Memorandum, the vehicle chosen by the MEC was a Mercedes Benz GLC at a cost of R687 697,36. It was stated that the purchase price was within the prescribed threshold. The Memorandum was approved by the HOD on the same day (29 November 2019).

5.2.17 Subsequent correspondence between the Department and the KwaZulu-Natal Department of Transport obtained during the investigation indicates that the threshold for the purchasing of vehicles for Members of the Executive had been increased to R800 000, but that the Mercedes Benz that the MEC preferred was no longer available.

5.2.18 On 13 December 2019, Mr S B Ndlovu, the Director: Facilities Management

and Auxiliary Services of the Department informed the KZN Department of Transport to proceed to purchase a BMW X4 at an amount of R770 711,20 and an order was placed with BMW South Africa accordingly.

5.2.19 In his further response to the complaint, dated 15 June 2021, the MEC stated that it is his understanding from the explanation provided by the HOD that the BMW X 4 was procured as the official vehicle for the MEC by the Department, through the Department of Transport, utilizing the RT-57 contract, in December 2019.

5.2.20 The MEC further stated that:

“Quite evidently, the BMW X4 was procured as a replacement for the Mercedes Benz GLE 350. Replacement of the Mercedes Benz GLE was approved by Treasury as far back as 16 August 2019. The basis for the replacement of the Mercedes Benz GLE 350, as again explained by the HOD in his responses, was that the Mercedes Benz GLE 350 had mechanical failures.”

5.2.21 Attached to the MEC’s response was a copy of the Delivery Note by BMW South Africa of a BMW X4 to the KZN Department of Transport, dated 20 December 2019. Also attached was a copy of the authority to the Department to collect the BMW X4 from the KZN Department of Transport on 20 December

5.2.22 According to the information provided by Mercedes Benz: Garden City Motors, to the PPSA investigation team during the investigation on 6 March 2020, it was responsible for the maintenance of the Mercedes Benz and it underwent a mechanical service on 30 May 2019 (two days after the MEC took office) with 40233 kilometres on its odometer.

5.2.23 On 4 October 2019, Garden City Motors was requested by the Department,

represented by Mr Sherwyn Naidoo: the new Head of Security, to ascertain the cause for the vehicle not starting wherein Garden City Motors determined that the battery had discharged. The vehicle's odometer indicated 40 246 kilometres.

5.2.24 The vehicle was towed to Garden City Motors on 22 October 2019 with 40 254 kilometres on its odometer with instructions to attend to the vehicle not starting, leaning to one side and to check and report on body damage. An assessment of the vehicle was undertaken on 25 October 2019 by Garden City Motors and it was determined that:

5.2.24.1 The vehicle could not start as the battery was defective and a new battery was fitted;

5.2.24.2 A chassis alignment test was conducted and confirmed that the vehicle was not leaning to the one side;

5.2.24.3 A 70 point technical test was conducted in respect of the damage to the body and findings duly recorded; and

5.2.24.4 In addition the 70 point technical test carried out confirmed that the vehicle had no technical defects.

5.2.25 It was further indicated that on 8 November 2019, Garden City Motors was made aware by Mercedes Benz SA that the *Sunday Times* intended to publish an article relating to a letter allegedly sent from Garden City Motors stating that the vehicle is unsafe to use by the MEC. Garden City Motors advised Mercedes-Benz SA that no such letter had been furnished by Garden City Motors to the Department.

5.2.26 On 11 November 2019 the Department took the Mercedes Benz to Garden

City Motors, advising that the vehicle's instrument panel displayed a warning light of the engine management system and that the vehicle is emitting smoke. An initial assessment was thus conducted by Garden City Motors and it was found that there had been external water ingress to the engine of the vehicle. The initial assessment was reported to Mercedes Benz SA and in response, Mercedes-Benz SA appointed an independent investigator to assess the cause and extent of the damage to the vehicle.

- 5.2.27 On 14 November 2019, Garden City Motors advised the Department that the vehicle is still in the process of being assessed and offered a courtesy vehicle to the Department for the MEC to use. The Department accepted the courtesy vehicle.
- 5.2.28 Garden City Motors informed the Department on 19 November 2019 that the independent investigator confirmed the assessment made by Garden City Motors in respect of the vehicle and that the engine had to be replaced.
- 5.2.29 The vehicle remained in the possession of Garden City Motors pending further instructions from the Department in relation to the repairs of the vehicle. In January 2020 the Department advised Garden City Motors that the vehicle should not be repaired and it was collected by the Department on 13 January 2020.

Application of the relevant law

- 5.2.30 Section 36 of the Public Finance Management Act, 1999 (PFMA) provides that the head of a department must be the accounting officer.
- 5.2.31 The general responsibilities of accounting officers are set out in section 38 of the PFMA. It provides, *inter alia*, that the accounting officer of a department must ensure an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

- 5.2.32 Section 38(1)(c) of the PFMA provides that the accounting officer must take effective and appropriate steps to, *inter alia*, prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct. In terms of section 38() (d) the accounting officer “*is responsible for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department*” (emphasis added)
- 5.2.33 Section 1 of the PFMA defines “*irregular expenditure*” as expenditure, other than unauthorised expenditure, incurred in contravention or that is not in accordance with a requirement of any applicable legislation.”
- 5.2.34 “*Fruitless and wasteful expenditure*” means, in terms of section 1 “*expenditure which was made in vain and would have been avoided had reasonable care been exercised.*”
- 5.2.35 Regulation 16A6.5 of the Treasury Regulations made in terms of the PFMA, provides that the accounting officer of a department may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.
- 5.2.36 The *Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers* (approved by Cabinet on 7 February 2007- (the Ministerial Handbook) was a guideline document for the benefits and privileges to which Members of the Executive (Members) and their families are entitled in the execution of their duties.
- 5.2.37 Chapter 5 of the Ministerial Handbook contained the provisions relating to the

motor transport of Members. Paragraph 1.1.2 provided that the respective Department would carry the financial implications in terms of procuring and insuring official vehicles.

5.2.38 In terms of paragraph 1.2.2, Members at provincial level may be provided with one vehicle for use at their seat of office.

5.2.39 The vehicle was accordingly to be procured in terms of the relevant supply chain management prescripts and policies that regulate the procurement of goods and services, as contemplated by section 217 of the Constitution, the PFMA and the Treasury Regulations.

5.2.40 Paragraph 1.4.1 of the Ministerial Handbook provided that regardless of their usage, official vehicles may be replaced and disposed of by the relevant Department only after completion of 120 000 kilometers. Paragraph 1.4.2 stipulated that:

“If an official vehicle experiences serious mechanical problems and is in poor condition, the respective Department may approve the earlier replacement of such vehicle, subject to obtaining a detailed mechanical report by the vehicle manufacturer or approved dealer.” (emphasis added)

5.2.41 The official vehicle therefore had to experience serious mechanical problems and had to be in a poor condition as confirmed by a detailed mechanical report by the vehicle manufacturer or an approved dealer.

5.2.42 In this case, the information provided by Mercedes Benz SA during the investigation indicates that the Mercedes Benz was in a good condition shortly after the MEC took office. It was serviced on 30 May 2019 and the battery was replaced on 22 October 2019 when a 70 point technical test was conducted on the vehicle and no defects were found. It was taken to the dealer, Garden

City Motors, on 11 November 2019 for an assessment as a warning light was on.

- 5.2.43 The report provided by Mercedes Benz to the Department on 19 November 2019 indicated that the Mercedes Benz had a serious mechanical problem that could be resolved by replacing the engine. It did not indicate that the vehicle was also in a poor condition. At that stage it only had around 40 254 km on the odometer.
- 5.2.44 *The Guide for Members of the Executive (the Guide)* effectively replaced the Ministerial Handbook with effect from 20 November 2019.
- 5.2.45 Chapter 4 of the Guide provides for motor vehicle transport of Members. Paragraph 2.2 stipulates that Members shall be provided with one vehicle for official use.
- 5.2.46 Paragraph 2.3 of Chapter 4 of the Guide provides that:
- “Members, on assumption of office, must make use of the official vehicle already purchased by the Department, unless such vehicle is to be replaced in terms of paragraph 2.9 of this Chapter.”*
- 5.2.47 In terms of paragraph 2.4, Departments must purchase a vehicle for a Member through the transversal contract concluded by the National Treasury for the procurement of bulk motor vehicles for Members directly from manufacturers. Paragraph 2.6 states that the purchase price of official vehicles shall not exceed R700 000, inclusive of VAT, security upgrades and maintenance plans. The limitation on the cost must be adjusted annually by the Minister of Finance. The cost of purchasing a vehicle for a Member shall, in terms of paragraph 2.8 be borne by the relevant Department.

5.2.48 Paragraph 2.9 provides that Departments may only replace a motor vehicle purchased for a Member if-

(c) “the vehicle has reached 120 000kms or 5 years, whichever comes first; or

(d) the vehicle experiences serious mechanical problems and is in a poor condition, in which event a detailed mechanical report by the vehicle manufacturer or approved dealer is required”. (emphasis added)

5.2.49 The evidence in this matter shows that the HOD already endeavoured to purchase a new vehicle for the MEC in July 2019. However, at the time he had to obtain the approval of the Provincial Treasury for a deviation of the normal supply chain management prescripts, which was not granted as there was insufficient information submitted to show that the provisions of paragraph 2.9 of the Guide had been complied with.

5.2.50 Subsequently, the HOD indicated to the Provincial Treasury that the Mercedes Benz would be redeployed for the transportation of delegates and the MEC when his new official vehicle was not available and could still be used up to 100 000 km. It therefore clearly was his intention at the time, in August 2019, to have the Mercedes Benz repaired so that it was drivable. It is not clear why then it was felt necessary to procure a new official vehicle for the MEC.

5.2.51 However, after receiving the report from Mercedes Benz SA on 19 November 2019, indicating that the engine had to be replaced and, when the RT57 transversal contract was concluded by the National Treasury, the HOD could approve the purchase of a new vehicle without the involvement of the Provincial Treasury. His decision was however still subject to the provisions of the PFMA and the stipulations of the Guide.

5.2.52 The condition of the Mercedes Benz had not changed since the report was

issued on 19 November 2019 by Mercedes Benz SA. It had a serious mechanical problem, but was otherwise still in a good condition. There is no indication in the evidence obtained during the investigation that Mercedes Benz SA was requested to provide a quotation on the cost of the engine replacement. Instead, Mercedes Benz was advised not to repair the vehicle and it was collected from them In January 2020, i.e. after a new vehicle was already purchased for official use by the MEC in December 2019 at a cost of approximately R770 000-00. It is not clear what happened to it thereafter.

- 5.2.53 A new vehicle was therefore purchased for the official use by the MEC by the Department, despite the fact that the Mercedes Benz had to have its engine replaced, but was otherwise still in good condition and had only done approximately 40 000 km.
- 5.2.54 The MEC was provided with a report in response to the allegations by the media by the HOD on 21 November 2019, indicating the findings the history of the Mercedes Benz, that the Provincial Treasury had declined a request for a deviation as the Mercedes Benz had not exceeded 120 000 km, the report by Mercedes Benz on its mechanical failure and the reasons for the delay in purchasing a new vehicle for the MEC.
- 5.2.55 The HOD did not respond to the Notice issued to him in terms of section 7(9) of the Public Protector Act.

Conclusion

- 5.2.56 The evidence obtained during the investigation shows that the Department had a vehicle for the official use of the MEC when he took office. According to the information provided by Mercedes Benz SA, the Mercedes Benz was in a good condition around the time when the MEC took office in May 2019. It was serviced on 30 May 2019. It was only in November 2019 that it experienced

serious mechanical problems, but no attempt was made by the Department to have it repaired.

- 5.2.57 The vehicle was left at Garden City Motors until after a new vehicle was purchased by the Department for official use by the MEC in December 2019. No information was provided by the Department during the investigation that a quotation was obtained for the replacement of the Mercedes Benz's engine before a new car was purchased for the MEC and as to why it was decided not to repair it.
- 5.2.58 There is no indication in the evidence that the HOD made any attempt to obtain a *“detailed mechanical report by the vehicle manufacturer or approved dealer”* in order to take an informed decision on the replacement of the Mercedes Benz as the official vehicle, as stipulated by paragraph 2.9 of the Guide, when he commenced the process in July 2019. It was only after the article was published by the *Sunday Times* on 10 November 2019, that the HOD obtained a technical report from Mercedes Benz SA. This report indicated that the engine of the vehicle had to be replaced. However, there was no indication that it was otherwise in a poor condition. The purchasing of a new vehicle was for the official use of the MEC, was therefore not justified in terms of paragraph 2.9 the Guide.
- 5.2.59 Under the circumstances, it is concluded that the approval by the HOD of the purchasing of the BMW X4 for the official use of the MEC was not in line with the provisions of the Guide and his responsibilities as the accounting officer of the Department in terms of section 38 of the PFMA. It was therefore improper and amounts to maladministration.

6. Findings

- 6.1 **Regarding whether the MEC used hired vehicles in his official capacity at state expense instead of an official car, and if so, whether his conduct**

in this regard was improper and constitutes a breach of the Executive Ethics Code

- 6.1.1 It is not in dispute that vehicles were hired for the MEC to use in his official capacity at state expense instead of an official car from the time he took office in May 2019 to November 2019.
- 6.1.2 No evidence was found that the MEC was involved in any “*elaborate scam*” not to use the official car that was used by his predecessor. There is also no evidence that the MEC or the Department was involved the forging of a letter, ostensibly from Mercedes Benz Garden City Motors, dated 2 November 2019. The origin of this letter could not be determined during the investigation.
- 6.1.3 The Complainant confirmed during the investigation that he lodged the complaint in terms of the EMEA. The investigation was also conducted in terms of section 6 and 7 of the Public Protector Act and section 182(1) of the Constitution.
- 6.1.4 The evidence shows that the MEC relied on the information provided to him by the HOD in respect of the non availability of the official car and that he had no reason not to accept it. It was also at the insistence of the HOD that the MEC accepted that vehicles would be hired for him for official purposes.
- 6.1.5 As it is the responsibility of the Department in terms of the Ministerial Handbook and the Guide to provide the MEC with an official vehicle, he had no positive duty in this regard.
- 6.1.6 It therefore cannot be concluded that the MEC acted in a manner that is inconsistent with his position and therefore in breach of the Executive Ethics Code, acted improperly or that he was involved in maladministration.

6.2. Regarding whether the purchase of a new official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant law and other prescripts regulating the procurement of official cars for Members of the Executive and if yes, whether such conduct was improper and constitutes maladministration.

6.2.1 The purchase of a new the official vehicle for the MEC by the KwaZulu-Natal Department of Education in December 2019 was not in accordance with the relevant laws and other prescripts regulating the procurement of official cars for Members of the Executive.

6.2.2 There is no indication in the evidence that the HOD made any attempt to obtain a “*detailed mechanical report by the vehicle manufacturer or approved dealer*” in order to take an informed decision on the replacement of the Mercedes Benz as the official vehicle, as stipulated by paragraph 2.9 of the Guide, when he commenced the process in July 2019. It was only after the article was published by the *Sunday Times* on 10 November 2019, that the HOD obtained a technical report from Mercedes Benz SA. This report indicated that the engine of the vehicle had to be replaced. However, there was no indication that it was otherwise in a poor condition.

6.2.3 The purchasing of a new vehicle for the official use of the MEC, was therefore not justified in terms of paragraph 2.9 the Guide.

6.2.4 Under the circumstances, it is concluded that the approval by the HOD of the purchasing of the BMW X4 for the official use of the MEC was not in line with the provisions of the Guide and his responsibilities as the accounting officer of the Department in terms of section 38 of the PFMA. It was therefore improper and amounts to maladministration. It also resulted in irregular and fruitless and wasteful expenditure, as contemplated by section 1 of the PFMA.

6.2.5. The conduct of the HOD accordingly constitutes improper conduct as

envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 Regulation 4 of the Treasury Regulations made in terms of the PFMA deals with financial misconduct.

7.2 Regulations 4.1.3 and 4.1.4 provides that:

“4.1.3 If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with applicable and agreements applicable in the public service.

4.1.4 A relevant treasury may-

- (a) direct that an official other than an employee of the institution conducts the investigation; or*
- (b) issue any reasonable requirement regarding the way in which the investigation should be performed.”*

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

7.3.1 The Premier of KwaZulu-Natal to:

7.3.1.1 In terms of section 3(6) of the EMEA within a reasonable time, but not later than 14 days after receiving this report on the investigation, submit a copy thereof and any comments thereon, to the KwaZulu-Natal Provincial Legislature.

7.3.2 The KwaZulu-Natal Provincial Treasury to:

7.3.2.1 Take the appropriate steps in terms of Regulations 4.1.3 and 4.1.4 of the Treasury Regulations to ensure that an investigation is conducted into the conduct of the HOD in respect of and that of the other officials of the Department involved in the purchasing of a new vehicle for the official use of the MEC, as referred to in this report, within 60 days from the date of this report, and that action appropriate to the findings of the investigation is taken.

8. MONITORING

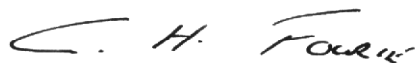
8.1 The KZN MEC for Finance submit an implementation plan to the Public Protector on the remedial action taken in paragraph 7.1.2.1 above within 30 days from the date of this report.

8.2. The submission of the implementation plan and the implementation of the remedial action taken shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 13/12/2021

Assisted by:



**ADV C H FOURIE
EXECUTIVE MANAGER:
PII COASTAL**