

CLOSING 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: 36 of 2021/22

ISBN No: 978-1-77634-704-9

**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF VIOLATION
OF THE EXECUTIVE ETHICS CODE BY THE FORMER PREMIER OF THE NORTH
WEST PROVINCIAL GOVERNMENT MR SUPRA MAHUMAPELO**

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1. INTRODUCTION

- 1.1. This is a closing report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act), on an investigation into allegations of violation of the Executive Ethics Code by the former Premier of the North West Provincial Government (NWPG), Mr Supra Mahumapelo in relation to his alleged facilitation of delivery of Bonsmara cattle to the former President, Mr Zuma's homestead through Agridelight Training and Consulting (Pty) Ltd.
- 1.2. The report relates to a complaint lodged with the Public Protector in terms of section 4 of the Executive Members' Ethics Act, 82 of 1998 (EMEA) on 23 April 2018, by Mr. Godrich Gardee (Mr Gardee), the former Secretary-General of the Economic Freedom Fighters (EFF).
- 1.3. A copy of the closing report is provided to the following persons in terms of section 8(3) of the Public Protector Act, 1994:
 - 1.3.1. Mr Godrich Gardee (the Complainant in the matter);
 - 1.3.2. Mr Supra Mahumapelo, the former Premier of the North West Provincial Government;

2. THE COMPLAINT

- 2.1 In essence, the complaint was couched as follows:

- 2.1.1 In his complaint, Mr Gardee made reference to the media report of the Sunday Times newspaper article of 22 April 2018 found on <https://www.timeslive.co.za/sunday-times/news/2018-04-21-exposed-supra-mahumapelos-r15m--gift-to-jacob-zuma/>
- 2.2 The media report referred to by Mr Gardee alleged that the “ *A herd of cattle costing R1.5-million and meant for emerging farmers was instead delivered to Nkandla - as a gift to Jacob Zuma from his political ally, North West premier Supra Mahumapelo*” and that the “*generous gift, paid for with public funds is under investigation*”.
- 2.3 Mr Gardee stated in his complaint that he would like to draw the Public Protector's attention to “*the particular involvement of the then President of the Republic, Mr J.G Zuma on the receipt of stolen goods and the current Premier of the North West, Mr Mahumapelo abuse of public trust and fiscus for private benefit*”.
- 2.4 In his complaint, Mr Gardee did not allege violation of a specific clause of the Executive Ethics Code apart from indicating that the complaint was lodged in terms of section 4(1) of EMEA and requesting the Public Protector to investigate the receipt of cattle by the former President and the involvement of the former Premier in the alleged facilitation of delivery of the said gift of cattle to the former President.
- 2.5 The investigation is conducted in terms of section 3 of the EMEA, which gives the Public Protector the power to investigate any alleged breach of the code of ethics on receipt of a complaint.
- 2.6 **Based on assessment and analysis of the complaint, the following issue was identified to inform and focus the investigation:**

- 2.6.1 Whether the former Premier Mr Supra Mahumapelo violated the Executive Ethics Code in respect of his alleged facilitation of delivery of Bonsmara cattle to the former President's homestead, and if so whether such conduct amounts to improper conduct

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

“The Public Protector has the power as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct ; and*
- (c) to take appropriate remedial action”.*

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

- 3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism

- 3.5 In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows, when confirming the powers of the Public Protector:
- 3.5.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 3.5.2 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 (paragraph 82);
- 3.5.3 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 (paragraph 100 and 101):
- (a) Conduct an investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.5.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
- 3.5.5 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 (Paragraph 105);
- 3.5.6 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 (paragraph 107 and 108); and

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

3.6 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 remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whether 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.”

3.6.1 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

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

3.6.1.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and rights entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);

3.6.1.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

- 3.6.1.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.6.1.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.1.6 The Public Protector's powers to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);
- 3.6.1.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.6.1.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d); and
- 3.6.1.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in particular case (paragraph 71 (e)).
- 3.7 Section 4(1)(a) of EMEA, provides *inter alia* that, the Public Protector "...*must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister...*"

3.8 The complaint was lodged by a Member of the National Assembly against the former Premier of the NWPG, thus subject to the provisions of the EMEA and the Executive Ethics Code and therefore the complaint fell within the purview and jurisdiction of matters that should be investigated by the Public Protector.

3.9 In terms of section 3 of EMEA, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member within 30 days of the receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed. In this regard, the Public Protector has completed her investigation and in line with this legislation, herewith submits her final report to the President and the Premier.

4. THE INVESTIGATION

4.1 Methodology

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

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

4.1.3. A Discretionary Notice dated 4 October 2021 was issued to the Complainant on 5 October 2021, in terms of Rule 42(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018* (the Public Protector Rules) in respect of a preliminary investigation conducted in terms of section 7(1) of the Public Protector Act and sections 3 and 4 of the EMEA.

4.1.4. The Complainant was accordingly advised of the intention to finalise the matter by way of a closing report. The Complainant was further advised that should he however be in possession of evidence which contradicts the findings contained in the Discretionary Notice, he was afforded an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notice. No responses were received from the Complainant in respect of the Discretionary Notice.

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

4.2. Approach to the investigation

4.2.1 The approach to the investigation commenced by analysis of all the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

4.2.2 The investigation was approached using an enquiry process that seeks to find out: -

4.2.2.1 What happened?

4.2.2.2 What should have happened?

4.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration and/or improper conduct?

4.2.3 In the event of a breach of the Executive Ethics Code, what would it take to remedy the wrong and what action should be taken?

- 4.2.3.1 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.
- 4.2.3.2 The Supreme Court of Appeals (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for the parties to provide all of the evidence as judicial officers do. In the case of *The Public Protector v Mail and Guardian*¹ the court stated that, "*The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances.*"
- 4.2.3.3 In this particular case, the factual enquiry principally focused on whether the conduct of the former Premier of North West in his alleged facilitation of delivery of Bonsmara cattle to the former President's homestead, constituted maladministration, improper conduct and thus failure to uphold the Constitution.
- 4.2.3.4 The enquiry regarding what should have happened, focuses on the prescripts regulating the standard that should have been met by the President to prevent maladministration and/or improper conduct and a breach of the Executive Ethics Code?
- 4.2.3.5 The enquiry regarding remedial action seeks to explore options for redressing the consequences of maladministration and/or improper conduct and of violation of the Executive Ethics Code, where possible and appropriate..
- 4.2.3.6 The NWPG and the North West Department of Rural Environmental Agricultural Development (the Department) are both organs of state and their conduct amounts to conduct in state affairs, as a result, the matter falls within

¹ (422/10 [2011] ZASCA 108 (1 June 2011).

the ambit of the Public Protector's mandate. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

4.3. The Key Sources of information

4.3.1. Documents

- 4.3.1.1. Documents received from North West Department of Rural Environmental Agricultural Development;
- 4.3.1.2. Copy of the Memorandum of Agreement (MOA) entered into between it and Agridelight signed on 12 December 2014;
- 4.3.1.3. Notification of Payment from First National Bank indicating that Agridelight had made a payment of an amount of R 500 175.00 to Sizalo Bosnmara for the purchase of the cattle; and
- 4.3.1.4. Delivery notice of the Bonsmara cattle allegedly signed by the parties involved, including the former President.

4.3.2. Correspondence sent and received

- 4.3.2.1. Letter sent to HOD North West Department of Rural Environmental Agricultural Development dated 30 June 2018;
- 4.3.2.2. Response Received from HOD North West Department of Rural Environmental Agricultural Development (the Department);
- 4.3.2.3. Email communication between the investigation team and Mr Montshwe 30 July 2018;
- 4.3.2.4. Letter dated 2 August 2018 sent by the Investigation Team to Mr Montshwe;
- 4.3.2.5. Response dated 02 August 2018 received on 9 September 2018 from Mr Montshwe;
- 4.3.2.6. Request to Cellphone service providers on 15 October 2020;
- 4.3.2.7. Letter to the National Head of the Directorate of Priority Crime Investigations (DPCI) on 14 April 2021;

- 4.3.2.8. Subpoena dated 26 May 2021 was issued to the former Premier;
- 4.3.2.9. Affidavit dated 15 June 2021 the former Premier responding to subpoena; and
- 4.3.2.10. Discretionary Notice dated 4 October 2021 sent to Complainant on 5 October 2021;

4.3.3. **Meetings Held**

- 4.3.3.1. Meeting held between the Investigation Team and Mr Mleki Msiza on 10 July 2018;
- 4.3.3.2. Meeting held between the Investigation Team and Mr Montshwe on 31 July 2018;
- 4.3.3.3. Meeting held between the Investigation Team and DPCI North West Province on 11 May 2021; and
- 4.3.3.4. Meeting held between the Investigation Team and Ms Lourraine L. Eayrs of the AFU on 12 July 2021.

4.3.4. **Legislation and other prescripts**

- 4.3.4.1. The Constitution of the Republic of South Africa, 1996.
- 4.3.4.2. The Public Protector Act 23 of 1994.
- 4.3.4.3. The Executive Members' Ethics Act, 82 of 1998.
- 4.3.4.4. The Executive Ethics Code published in terms of section 2(1) of the EMEA on 28 July 2000.
- 4.3.4.5. Etc.

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 former Premier, Mr Supra Mahumapelo violated the Executive Ethics Code in respect of his alleged facilitation of delivery of**

Bonsmara cattle to the former President, and if so, whether such conduct amounts to improper conduct.

Common cause issues

- 5.1.1 In October 2016, twenty five (25) heifers and one (1) bull Bonsmara cattle were delivered to the former President, Mr Jacob Zuma's (the former President) homestead at Nkandla by Mr Mleki Msiza (Mr Msiza), through a company named Sizalo Bonsmara.

Issues in dispute

- 5.1.2 Mr Gardee stated in his complaint that he would like to draw the Public Protector's attention to:

“the particular involvement of the then President of the Republic, Mr J.G Zuma on the receipt of stolen goods and the current Premier of the North West, Mr Mahumapelo abuse of public trust and fiscus for private benefit.

- 5.1.3 The media report referred to by Mr Gardee alleged that the “ *A herd of cattle costing R1.5-million and meant for emerging farmers was instead delivered to Nkandla - as a gift to Jacob Zuma from his political ally, North West premier Supra Mahumapelo*” and that the “*generous gift, paid for with public funds is under investigation*”.

- 5.1.4 In a response to the Public Protector's letter dated 30 June 2018, Dr Poncho Mokaila (Dr Mokaila) the then Head of Department (HOD) North West Department of Rural Environmental Agricultural Development (the Department), refuted the allegations that public funds were used by it in the provision of the gift of cattle to the former President. Dr Mokaila further indicated that on 23 April 2018 a Special Departmental Executive Management Committee meeting was held to ascertain and discuss the matter.

- 5.1.5 Dr Mokaila stated that as a finding and outcome of the meeting, all members of the Departmental Executive Management Committee, including the Accounting Officer, had no knowledge with regards to any transactions on the payment of R1, 5 million for purchasing of Bonsmara cattle allegedly delivered to Nkandla, former President's homestead during October 2016.
- 5.1.6 Dr Mokaila submitted to the Public Protector a copy of the Memorandum of Agreement (MOA) entered into between it and Agridelight signed on 12 December 2014.
- 5.1.7 In terms of the MOA Agridelight had been appointed for the provision of on and off farm infrastructure, input supply, agro processing and capacity building programmes in the North West Province for the amount of R650 million. According to paragraph 13 of the MOA Agridelight would charge the Department the management fee of 10%, including VAT and disbursement, of the Programme Funds.
- 5.1.8 In an effort to establish more information about the cattle's delivery, the investigation team held a meeting with Mr Mleki Msiza on 10 July 2018, who according to the complaint, allegedly through a company named Sizalo Bonsmara, transported from his farm and delivered cattle to the former President's homestead in Nkandla.
- 5.1.9 During the said meeting with the investigation team, Mr Msiza confirmed that 25 heifers and one bull were delivered to Nkandla in October 2016. He stated that Agridelight had ordered the cattle from him. He further indicated that Sizalo Bonsmara specialises in breeding Bonsmara cattle and that he also had received a request from Agridelight to deliver cattle to the Chiefs in some villages of the North West Province.
- 5.1.10 He stated that the Chiefs were each to receive 25 heifers and one bull at a cost of about R442 000.00 per delivery. In total he delivered 175 cattle at a cost of R1, 7 million. This was done as a service to Agridelight. He stated that the

delivery to Nkandla was the only one outside the North West Province at a cost of R504 000.00 which was paid for by Agridelight. He provided the Investigation Team with the mobile number and name of a person whom he stated represented Agridelight (Agridelight representative).

- 5.1.11 The Investigation Team telephonically contacted the Agridelight representative, who stated that he did not work for Agridelight anymore, and that he was being threatened by unknown people. He requested that the Investigation Team discuss the matter with Mr Bolokang Derrick Montshwe (Mr Montshwe).
- 5.1.12 On 30 July 2018 the Investigation Team communicated with Mr Montshwe, the Managing Director of Agridelight, informing him of the allegations under investigation and requested a meeting with him.
- 5.1.13 On 31 July 2018 the Investigation Team interviewed Mr Montshwe, who confirmed delivery of the cattle to Nkandla. He stated that the cattle were donated by Agridelight to the former President. The Investigation Team encouraged Mr Montshwe to provide supporting documents and any other information he might have to assist the investigation.
- 5.1.14 On 2 August 2018 the Investigation Team sent a letter to Mr Montshwe confirming the issues that were discussed between him and the Investigation Team on 31 July 2018 and again requested Mr Montshwe to provide supporting documents and any other information he might have to assist the investigation.
- 5.1.15 On 9 September 2018, Mr Montshwe responded through a letter dated 02 August 2018 stating *inter alia* the following :
- 5.1.15.1 That Agridelight has handled various business opportunities with various clients in the past and these include Small Enterprise Development Agency (SEDA), Department of Rural Development and Land Reform (DRDLR) (Limpopo, Gauteng, Mpumalanga, North West, Free State and Northern Cape), Department of Agriculture (North West, Limpopo and

Mpumalanga), National Agriculture Marketing Council (NAMC), Municipalities and Private clients;

- 5.1.15.2 That Agridelight has offices in North West (Klerksdorp), Gauteng (Pretoria), and Limpopo (Polokwane);
- 5.1.15.3 That the company has always been bidding through open tenders;
- 5.1.15.4 That, with relevance to the enquiry, the Department appointed Agridelight as an Implementing Agent in October 2014. On 12 December 2014, the Department entered into a MOA with Agridelight. In terms of MOA, Agridelight would implement on and off farm infrastructure, input supply, agro processing and capacity building programmes.
- 5.1.15.5 That Agridelight attached the delivery notice dated 29 October 2016 as signed by parties involved, including the former President and that he confirms the telephonic communication with the former Premier on the day of delivery during which he was also in Nkandla on that morning.
- 5.1.15.6 That Agridelight searched its files and records for signed resolution and could not find anything, this could be due to a theft incident it experienced wherein documents and computers were stolen from Agridelight's office in Klerksdorp which was reported to the police.
- 5.1.16 Mr Montshwe provided a Notification of Payment from First National Bank indicating that Agridelight had made a payment of an amount of five hundred thousand and one hundred and seventy five rand only (R500 175.00) to Sizalo Bosmara for the purchase of these cattle. He also provided the delivery notice of the Bosmara cattle allegedly signed by the parties involved including the former President.

- 5.1.17 According to Mr Montshwe, the 25 Bonsmara cattle which were delivered to the former President's home were a donation from him personally to the former President.
- 5.1.18 On 15 October 2020, the Investigation Team requested cell-phone records from cell phone service providers for the former Premier and Mr Montshwe for the period October 2016. However, at the time, the cell phone records could not be provided for the said period because according to the service providers, data or cell phone records are kept for a period of 36 months.
- 5.1.19 As part of further effort by the investigation team to establish the involvement and link of Agridelight with the matter under investigation, a letter was submitted by the Investigation Team to the National Head of the Directorate of Priority Crime Investigations (DPCI) on 14 April 2021 requesting that the Investigation Team meet with the team from DPCI conducting the criminal investigation, in order to engage on the issues being investigated, as well as to establish progress of the investigation by the DPCI.
- 5.1.20 On 11 May 2021 the investigation team held a meeting with the Investigation Team from DPCI North West Province. During the meeting it was established that the DPCI is still currently seized with the investigation into Agridelight and alleged gratifications made to various individuals. The Provincial Head of the DPCI North West referred the Public Protector Investigation Team to the Asset Forfeiture Unit (AFU) as the latter had been involved in tracking and tracing the flow of funds within Agridelight.
- 5.1.21 Consequently, On 12 July 2021 a meeting was held between the Investigation Team and officials of the AFU subsequent to the engagement of 11 May 2021 with the DPCI. During the said meeting it was established that the AFU was still currently seized with the financial analysis as part of their investigation into Agridelight as well as alleged gratifications made to various individuals, and that there is still a lot of groundwork that needs to be done in respect of the matter.

- 5.1.22 A subpoena dated 26 May 2021 was issued to the former Premier to provide information regarding his alleged role and knowledge in respect of the allegation that the former President received 25 Bonsmara cattle and one bull on 29 October 2016 from Agridelight at the amount of R 525 000.00 (Five hundred and twenty five thousand rand only) delivered at Nkandla.
- 5.1.23 In an affidavit dated 15 June 2021, the former Premier responded to the allegation as depicted in the Public Protector’s subpoena by stating in one line as follows *“Kindly direct this question to Agridelight”*.

Application of relevant legal prescripts

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*

- 5.1.24 The Executive Members Ethics Act, 1998 is the national legislation referenced in section 96(1) of the Constitution and the bedrock of the Executive Ethics Code. It provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils; and to provide for matters connected therewith.

- 5.1.25 Section 2(1) of EMEA read thus:

“The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECS must comply in performing their official responsibilities.”

5.1.26 In terms of clause 1 of the Executive Ethics Code, 2000 *“a member of the Executive means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee.”*

5.1.27 The general standards which the members of the Executives² must comply with are contained in clause 2.1 of the Executive Ethics Code which provides that:

2.1 *“Members of the Executive must to the satisfaction of the President or the Premier, as the case may be-*

- (a) perform their duties and exercise their powers diligently and honestly;*
- (b) fulfill all the obligations imposed upon them by the Constitution and law;*
- (c) act in good faith and in the best interest of good governance;*
- (d) act in all respects in a manner that is consistent with the integrity of their office or the government.”*

5.1.28 Clause 2.2 provides that *“In deciding whether members of the Executive complied with the provisions of clause 2. 1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.*”

5.1.29 Clause 2.3 of the Executive Ethics Code provides that:

² Member of the Executives means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and ‘member’ and ‘Executive’ have corresponding meanings.

2.3 “Members of the Executive may not-

...

- (c) *act in a way that is inconsistent with their position;*
- (d) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;*
- (e) *use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;*
- (f) *expose themselves to any situation involving the risk of a conflict between their official responsibilities and their financial and/or personal interests;*
- (g) *receive remuneration for any work or service other than for the performance of their functions as Members; or*
- (h) *make improper use of any allowance or payment properly made to them, or disregard the administrative rules, which apply to such allowances or payments.”*

5.1.30 In the case of **Public Protector and Others v President of the Republic of South Africa and Others (CCT 62/20) [2021] ZACC 19 (1 July 2021)** (*the President case*). In par 11, the court indicated that:

*“Section 3 empowers the Public Protector to investigate any breach of the code. The scheme that emerges from the reading of this provision is that the Public Protector’s power to investigate is subject to a formal complaint. **This suggests that the scope of an investigation is determined by the breach of the code contained in the complaint.** It is important to note that section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code.”*

5.1.31 In his complaint to the Public Protector’s office, the Complainant did not allege violation of a specific clause of the Executive Ethics Code apart from indicating that the complaint was lodged in terms of section 4(1) of EMEA and requesting the Public Protector to investigate the receipt of cattle by the former President.

- 5.1.32 The Complainant instead drew attention to the involvement of the former President in the receipt of goods allegedly purchased through public funds and the former Premier's alleged abuse of public trust and fiscus for private interest and benefit, in the acceptance thereof.
- 5.1.33 Notwithstanding the above, it was noted that the Constitution and the Executive Ethics Code require members of Cabinet and Provincial Legislature to conform to the prescribed ethical standards when performing their official functions.
- 5.1.34 The complaint lodged by Mr Gardee was in April 2018 and the former President ceased to be a member of Cabinet in February 2018 and therefore no longer subject to the Code of Ethical Conduct and Disclosure of Members' Interest for Assembly and Permanent Council Members when the complaint was lodged. However, the former Premier at the time of the complaint was still the Premier of the NWPG and was thus still subject to the Executive Ethics Code.

6. CONCLUSION

- 6.1. The evidence indicates that the Department did not use funds for the provision of the gift of cattle to the former President because the cattle which were delivered to the former President's homestead was paid for by Agridelight to the company Sizalo Bonsmara. However, Mr Montshwe's explanation seems to suggest that he used the Agridelight's account funds to pay for the personal gift to the former President.
- 6.2. Although Mr Montshwe contends that he personally donated the cattle to the former President, however his use of the Agridelight's FNB account and not his personal account to pay for the transaction does not support his version. Nonetheless, the matter pertaining to the Agridelight's flow of funds under his management is receiving the attention of the law enforcement agencies.

- 6.3. There is therefore no evidence to confirm that the former Premier, abused public trust and the fiscus for his private benefit. Even though Mr Montshwe stated that he confirms the telephonic communication with the former Premier on the day of delivery during which he was also in Nkandla that morning, unfortunately this could not be confirmed or corroborated by evidence.
- 6.4. The former Premier's response through his lawyer, except to just deny and refer the Public Protector to Agridelight, he did not make further submission in response to the subpoena.

7. REASONS FOR CLOSURE

- 7.1 The allegation that the former Premier violated the Executive Ethics Code through his involvement in the facilitation of delivery of the Bonsmara cattle to the former President, **is not substantiated**.
- 7.2 From the evidence sourced independently and also provided to the Public Protector, it is apparent that the former President did receive cattle from Agridelight, as confirmed by the payments made for the cattle by Agridelight, the delivery of the cattle and Mr Montshwe's submission.
- 7.3 Although Mr Montshwe contends that he personally donated the cattle to the former President, his use of the Agridelight's FNB account and not his personal account to pay for the transaction does not support his version. However, the matter pertaining to the Agridelight's flow of funds under Mr Montshwe's management is receiving the attention of the law enforcement agencies.
- 7.4 It is also clear from the evidence relating to the payments made for the delivery of cattle that the Department itself did not fund the payments for the said donation and delivery of cattle to the former President.

- 7.5 Therefore no state funds were utilised for the payment and delivery of cattle to the former President which would have indicted the Public Protector to investigate and pronounce on that in line with her mandate and jurisdiction.
- 7.6 There is also no evidence to indicate that the former Premier, abused public trust and fiscus for his private benefit, thereby violating clauses 2.1 and 2.3 of the Executive Ethics Code.
- 7.7 In light of the afore-going, the Public Protector has therefore decided not to pursue the matter any further and thus finalise it by means of a closing report.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 30/11/2021

Assisted by: Ms Vanessa Mundree: Provincial Representative FS