

REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994 AND SECTION 3 OF THE EXECUTIVE MEMBERS' ETHICS ACT, 1998



PUBLIC PROTECTOR
SOUTH AFRICA

“Allegations of breach of the executive Ethics Code by the Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning of the Western Cape Provincial Government, Mr A Bredell”

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF BREACH OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING OF THE WESTERN CAPE PROVINCIAL GOVERNMENT, MR A BREDELL

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Executive Summary

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act) and in terms of section 3 of the Executive Members' Ethics Act, 1998 (EMEA)
- (ii) The report communicates the findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint of a breach of the Executive Ethics Code by the Member of the Western Cape Executive Council responsible for Local Government, Environmental Affairs and Development Planning, Mr A Bredell (MEC).
- (iii) The complaint was lodged by Mr B Herron (Complainant), a member of the Western Cape Provincial Legislature, on 02 July 2020.
- (iv) In the main, the Complainant alleged that:
 - (a) On 11 March 2019, the former Executive Mayor of the Oudtshoorn Local Municipality (Municipality), Mr C Sylvester, alerted the MEC to several allegations of maladministration, fraud, corruption and financial misconduct on the part of the Municipality, and requested his assistance to attend to these matters.
 - (b) Notwithstanding the provisions of section 106 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act), the MEC failed to respond to the former Executive Mayor's letter until 22 January 2020 (10 months later) and only after he had to take action as the Executive Mayor without the MEC's assistance. Further, that from the independent investigation of the allegations that was commissioned by the Municipality, it appeared that

there were valid reasons for concerns brought to the MEC's attention by the former Executive Mayor.

- (c) The MEC addressed Councillors of the Municipality representing the Democratic Alliance (DA) on 12 December 2019, and proposed that they should agree that the Western Cape Provincial Government places the Municipality '*under administration*'. The MEC allegedly said that:

'My suggestion is that we, that you, as Oudtshoorn Council cause you're the majority, you're the council, you ask that we put you under administration'
(sic)

- (d) It is clear from the comments made at this meeting that the MEC's intention was to achieve political advantage for the DA, instead of acting in accordance with the constitutional imperative of assisting the Municipality as the MEC responsible for local government in the Western Cape Province.
- (e) The MEC's proposal to the DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government be placed under administration was improper and constitutes a direct conflict between his official responsibilities as the MEC responsible for local government and his private interests as the Western Cape Provincial Chairperson of the DA, at the time.
- (f) The MEC's failure or actions referred to above were improper and constituted a breach of the Executive Ethics Code

- (v) Based on the analysis of the complaint, the following issues were identified for the investigation:

- (a) Whether the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell failed to take timeous

appropriate action in connection with allegations of improper conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor on 11 March 2019, and if so whether such failure was improper and constitutes a breach of the Executive Ethics Code.

- (b) Whether the MEC for Local Government Environmental Affairs and Development Planning, Mr A Bredell on 12 December 2019, proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government places the Municipality under administration and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act and in terms of sections 3 and 4 of the Executive Members' Ethics Act, 1998 (EMEA) of a breach of the Executive Ethics Code of 2000. It included correspondence with the MEC, the Complainant and the Head of the Western Cape Department of Local Government, and consideration and application of the relevant law and legal prescripts.
- (vii) Having considered the evidence and information obtained during the investigation, the following findings are made:
- (a) Regarding whether the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell failed to take timeous appropriate action in connection with allegations of improper conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor on 11 March 2019 and if so, whether such failure was improper and constitutes a breach of Executive Ethics Code.**

- (aa) The allegation that the MEC failed to take timeous appropriate action in connection with allegations of improper conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor of the Municipality on 11 March 2019, is substantiated.
- (bb) The MEC only formally approached the Speaker of the Municipality and responded to the former Executive Mayor on 22 January 2020, 10 months after the serious allegations of maladministration, fraud, corruption and other malpractices were brought to his attention.
- (cc) His first formal response to the serious allegations of misconduct and impropriety at the Municipality 10 months after having received the letter of 11 March 2019 from a person in the position of the Executive Mayor does not indicate diligence and promptness on his part to attend thereto and at least to obtain more information or the response from the Municipality to the serious allegations, as was required of him by section 106 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) section 136 of the Local Government: Municipal Finance Management Act, 2003 (MFMA) and section 5 of the Western Cape Monitoring and Support of Municipalities Act, 2014.
- (dd) The allegation that the conduct of the MEC was in breach of the Executive Ethics Code is therefore, also substantiated. He did not act in good faith and in the best interest of good governance at the Municipality. His conduct was also inconsistent with his office as MEC responsible for local government.
- (ee) The MEC's conduct was improper and in violation of the provision of section 136 (2)(b) of the Constitution. It also constitutes a breach of paragraphs 2.1(a), 2.1(b), 2.1(c), 2.1(d) and 2.3(c) of the Executive Ethics Code.

(b) Regarding Whether the MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell on 12 December 2019, proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government places the Municipality under administration and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

(aa) The allegation that the MEC on 12 December 2019 proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Administration places the Municipality under administration, is substantiated. The MEC conceded that he attended a DA Caucus meeting with DA Councillors of the Municipality on 12 December 2019. On his own version, the MEC suggested at the DA Caucus meeting that the DA Councillors should agree that the Municipality is placed under administration.

(bb) The suggestion or contention by the MEC that he acted exclusively in furtherance of a matter that concerned his relationship with his political party and that his action fell exclusively within the pursuance of private interests as envisaged in the Executive Ethics Code, and therefore within the private sphere, is misdirected.

(cc) This is also borne from his position as a member of the Western Cape Provincial Legislature, and on account of having been appointed to public office, created by the Constitution, as a representative of a political party. Membership of a political party is thus a requirement to be elected and appointed to public office in terms of the Electoral Act 73 of 1998 and not a default “*capacity*” to which he can revert at will.

(dd) Section 106 of the Municipal Systems Act read with section 139 of the Constitution and section 5 of the Western Cape Monitoring and Support

of Municipalities Act, 2014 stipulate the steps that have to be taken for the provincial government to intervene in the affairs of a municipality and put it under “*administration*”. The role of the MEC responsible for local government in the relevant province is an objective one that focuses on the best interest of good governance and administration. This process has to precede any decision in respect of intervention.

- (ee) In this matter, the MEC had concluded that the intervention by the Western Cape Provincial Government was necessary, even before he had considered the matter as contemplated by the relevant provisions of the Constitution, Municipal Systems Act and the Western Cape Monitoring and Support of Municipalities Act, 2014, to the extent that he even proposed it at a DA Caucus meeting where only Councillors of the ruling party were present.
- (ff) The conduct of the MEC in this regard was therefore not in accordance with the Constitution and the law.
- (gg) The allegation that the conduct of the MEC in that regard was in breach of the Executive Ethics Code, is also substantiated.
- (hh) In making the suggestion to DA Councillors as he did, the MEC did not act diligently and in good faith as he was required to do in terms of paragraph 2.1 of the Executive Ethics Code. His conduct was also not in the best interest of good governance and consistent with his office.
- (ii) The MEC also exposed himself to the risk of a conflict between his official responsibilities as MEC and his private interest as a member of the DA.
- (jj) The MEC’s conduct therefore was improper and in breach of the provisions of section 136(2) of the Constitution. It also constitutes a

breach of paragraph 2.1(a), 2.1(b), 2.1(c), 2.1(d), 2.3(c) and 2.3(f) of the Executive Code.

(viii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

(a) The Premier of the Western Cape to:

(aa) In terms of section 3(6) of the EMEA within a reasonable time, but no later than 14 days after receiving the report on the investigation, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the Western Cape Provincial Legislature.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF BREACH OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING OF THE WESTERN CAPE PROVINCIAL GOVERNMENT, MR A BREDELL

1. INTRODUCTION

- 1.1 This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and in terms of section 3 of the Executive Members' Ethics Act, 1998 (EMEA)
- 1.2 The report is submitted in terms of sections 8(1) of the Public Protector Act and section 3(2)(b) of the EMEA to the Premier of the Western, Cape, Mr A Winde.
- 1.3 Copies of the report are also provided to the Member of the Executive Council of the Western Cape Provincial Government responsible for Local Government, Environmental Affairs and Development Planning, Mr A Bredell (MEC) and to Mr B Herron, who lodged the complaint.
- 1.4 The report relates to an investigation into a complaint of a breach of the Executive Ethics Code by the MEC.

2. THE COMPLAINT

- 2.1 The complaint was lodged by Mr B Herron (Complainant), a Member of the Western Cape Provincial Legislature, on 02 July 2020.

2.2 In the main, the Complainant alleged that:

2.2.1 On 11 March 2019, the former Executive Mayor of the Oudtshoorn Local Municipality (Municipality), Mr C Sylvester, alerted the MEC to several allegations of maladministration, fraud, corruption and financial misconduct on the part of the Municipality, and requested his assistance to attend to these matters.

2.2.2 Notwithstanding the provisions of section 106 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act), the MEC failed to respond to the former Executive Mayor's letter, until 22 January 2020 (10 months later) and only after he had to take action as the Executive Mayor without the MEC's assistance. Further, that from the independent investigation of the allegations that was commissioned by the Municipality, it appeared that there were valid reasons for concerns brought to the MEC's attention by the former Executive Mayor.

2.2.3 The MEC addressed Councillors of the Municipality representing the Democratic Alliance (DA) on 12 December 2019, and proposed that they should agree that the Western Cape Provincial Government places the Municipality "*under administration*". The MEC allegedly said that:

"My suggestion is that we, that you, as Oudtshoorn Council cause you're the majority, you're the council, you ask that we put you under administration" (sic)

2.2.4 It is clear from the comments made at this meeting that the MEC's intention was to achieve political advantage for the DA, instead of acting in accordance with the constitutional imperative of assisting the Municipality as the MEC responsible for local government in the Western Cape Province.

2.2.5 The MEC's proposal to the DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government be placed under administration was improper and constitutes a direct conflict between his official

responsibilities as the MEC responsible for local government and his private interests as the Western Cape Provincial Chairperson of the DA, at the time.

2.2.6 The MEC's failure or actions referred to above were improper and constituted a breach of the Executive Ethics Code that require members of the Executive *inter alia*, to:

- 2.2.6.1 Perform their duties and exercise their powers diligently and honestly.
- 2.2.6.2 Fulfil all the obligations imposed upon them by the Constitution and the law.
- 2.2.6.3 Act in good faith and the best interests of good governance.
- 2.2.6.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.
- 2.2.6.5 Not to use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.
- 2.2.6.6 Not to expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

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 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 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ 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*
- 3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

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

² *Supra* at para [73].

- 3.6.2 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);
- 3.6.3 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);
- 3.6.4 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);
- 3.6.5 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);
- 3.6.6 The Public Protector's power 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);
- 3.6.7 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));

- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.6.9 “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)).
- 3.7 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:
- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.7.2 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);
- 3.7.3 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):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);

- 3.7.5 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);
- 3.7.6 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 (paragraphs 107 and 108); and
- 3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
- 3.7.8 The MEC is a Member of the Executive Council of the Western Cape Provincial Government. 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.

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 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 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 if so, does the deviation amount to a breach of the Executive Ethics Code?

4.2.1.4 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?

4.2.1.5 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, the factual enquiry principally focused on whether or not the MEC acted improperly by not taking timeous appropriate action when he received the letter, dated 11 March 2019 from the former Executive Mayor of the Municipality, whether the MEC addressed DA Councillors of the Municipality on 12 December 2019 and proposed that they should agree that the Municipality be placed under administration by the Western Cape Provincial Government, and if so whether the conduct of the MEC was in violation of the Executive Ethics Code.

4.2.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the MEC to prevent a breach of the Executive Ethics Code.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of violation of the Executive Ethics Code, where possible and appropriate.

4.3. On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell failed to take timeous appropriate action in connection with allegations of improper conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor on 11 March 2019, and if so whether such failure was improper and constitutes a breach of the Executive Ethics Code.

4.3.2 Whether the MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell on 12 December 2019, proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government places the Municipality under administration and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1. Letter of complaint from Mr B Herron dated 2 July 2021 and a copy of an electronic recording and transcript of a meeting held on 12 December 2019 submitted by him.

4.4.1.2 Copy of a letter, dated 11 March 2019 from the former Executive Mayor of the Municipality to the MEC.

4.4.1.3 Copy of a letter from the former Executive Mayor of the Municipality to the MEC dated 12 August 2019

4.4.1.4 Copy of Webber Wentzel Report on an investigation of allegations against the Municipal Manager of the Municipality, dated 16 May 2020.

4.4.1.5 Copy of letter from the MEC to the Speaker of the Municipality, dated 22 January 2020.

4.4.1.6 Copy of a letter from the MEC to the former Executive Mayor of the Municipality, dated 22 January 2020.

4.4.1.7 Copy of a letter from the Speaker of the Municipality to the MEC, dated 29 January 2021.

4.4.1.8 Copy of a letter from the former Executive Mayor of the Municipality to the MEC, dated 29 January 2020.

4.4.1.9 Copy of a letter from the former Executive Mayor of the Municipality to the MEC, dated 06 February 2020

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The MEC, dated 13 August 2020 and 28 August 2020.

4.4.2.2 The Complainant, dated 21 September 2020, 1 October 2020, and 3 February 2021;

4.4.2.3 The former Executive Mayor of the Municipality, Mr C Sylvester, dated 11 August 2021; and

4.4.2.4 The Head of the Western Cape Department of Local Government, Mr G Paulse, dated 14 February 2020 and 17 August 2021

4.4.3 Legislation and other prescripts

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

4.4.3.2 The Public Protector Act 23 of 1994.

4.4.3.3 The Executive Members' Ethics Act, 82 of 1998.

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

4.4.3.5 The Local Government: Municipal Systems Act 32 of 2000. (Municipal Systems Act)

4.4.3.6 The Local Government: Municipal Finance Management Act, 56 of 2003. (MFMA)

4.4.3.7 The Western Cape Monitoring and Support of Municipalities Act, 4 of 2014.

4.4.4 Public Protector Touch Stones

4.4.4.1 *Report on an investigation into allegations of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning of the Western Cape Provincial Government, Mr A Bredell-Report Number 23 of 2020/21.*

4.4.5 Notice issued in terms of section 7(9) of the Public Protector Act.

4.4.5.1 A Notice was issued in terms of section 7(9) of the Public Protector Act to the MEC on 20 May 2021, affording him an opportunity to respond to the evidence obtained during the investigation. He responded on 18 June 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 for Local Government, Environmental Affairs and Development Planning, Mr A Bredell failed to take timeous appropriate action in connection with allegations of improper conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor on 11 March 2019, and if so whether such failure was improper and constitutes a breach of the Executive Ethics Code.

Common cause or undisputed facts

5.1.1 It is common cause that the former Executive Mayor of the Municipality, Mr C Sylvester, addressed a letter to the MEC on 11 March 2019, under the heading:

“Investigation into allegations of attempted fraud, misrepresentation, irregular, fruitless expenditure, nepotism and corruption”

5.1.2 In his letter, Mr Sylvester stated, inter alia that:

“I am dismayed at writing this letter but compelled to do so. The following serious allegations has come to my attention and require an intervention in terms of section 106 (1)(b) of the MFMA(sic) (should be of the Municipal Systems Act).

In terms of section 106 of the MFMA (sic) the MEC is to investigate allegations of the above mentioned. We applaud the stance by your office, the forensic investigations launched in 2018 and request that these allegations are dealt with the same exigency and importance.

There is good cause to belief that material evidence exists within the administration to support a finding of serious misconduct and contravention of the MFMA' (sic)".

- 5.1.3 Mr Sylvester continued to list the misconduct by officials as including the irregular appointment of staff, non-compliance with the relevant provisions of the MFMA and Supply Chain Management prescripts, irregular and fruitless and wasteful expenditure, fraud and misrepresentation.
- 5.1.4 It is not in dispute that the MEC sent a letter to the Speaker of the Municipality on 22 January 2020 (10 months later), enquiring about the serious allegations of misconduct at the Municipality in relation to the letter that he received from the former Executive Mayor on 11 March 2019, referred to above.

Issues in dispute

- 5.1.5 The Complainant contended that:

"Notwithstanding the provisions of sec 106 (1) of the Municipal Systems Act, which compels the MEC to act [in terms of sec 106 (1) (a) or 106 (1) (b)] where there is a reason to believe there is non-performance or maladministration the MEC failed to respond to that letter until the 22 January 2020, 10 months later and only after the Mayor had himself proceeded to act without the MEC's assistance.....

It is evident, that despite the MEC's failure or refusal, to assist the former Mayor of Oudtshoorn to investigate the numerous allegations of maladministration, fraud, corruption and malpractice that the Mayor, himself secured a council resolution to suspend and investigate the allegations".

- 5.1.6 In his response to the complaint, dated 28 August 2020, the MEC indicated that the letter from the former Executive Mayor did not identify the persons or officials

in respect of which he complained and that the former Executive Mayor did not provide any substantive evidence in respect of the allegations.

- 5.1.7 According to the MEC, the letter of 11 March 2019 was not the first time his office received allegations regarding impropriety, corruption or unlawfulness at the Municipality, during the former Executive Mayor's tenure.
- 5.1.8 In his response to the Notice issued in terms of section 7(9) of the Public Protector Act, dated 18 June 2021, the MEC stated that the threshold for an MEC for Local Government to act in terms of section 106 of the Municipal Systems Act is that he/she must have reason to believe the allegations that are brought to his/her attention. He also referred to section 5 of the Western Cape Monitoring and Support of Municipalities Act, 2014, "*which prescribes what the MEC for local government must do before he or she may take action under section 106 of the MSA*". According to the MEC, he is bound in terms of this provision to consider and assess the veracity of any relevant allegations made to him, before applying the provisions of section 106.
- 5.1.9 He further stated in his response to the Section 7(9) Notice that when he considered the information in the letter of the former Executive Mayor he "*determined to first hold personal meetings with the ex-mayor and various of his officials in order to gain some insight into the matters raised by him in his correspondence to me. I did so because the limited information provided in the ex-Mayor's (sic) was too vague to enable me to meaningfully inform the Municipality of the allegations and (ii) afford the Municipality with an opportunity to respond to the allegations, as envisaged in section 5 of the Western Cape Act.*"
- 5.1.10 The MEC further stated that the process to be followed when such allegations are raised with his office, is to discuss it with the Head of the Department (HOD) to refer it to the relevant officials to attend to as appropriate, whether for further investigation, or a response. According to the MEC, this process was followed in

respect of the letter received from Mr Sylvester. He further stated that:

“It was also patently and immediately clear that the author of the letter, being none other than the Executive Mayor of the Oudtshoorn Municipality appeared to be expecting the Western Cape Provincial Government to take action in circumstances where his office, as Mayor was obligated to do so.”

- 5.1.11 He further indicated that he took up the issues directly with the former Executive Mayor and met with him in person to discuss his allegations extensively, as did the HOD who met with the Municipal Manager during the period between April 2019 to January 2020.
- 5.1.12 In his response to the Public Protector on 28 August 2020, the MEC referred to sections 52(a), (b) and (c) of the MFMA, which provides that the Mayor of a Municipality must provide general guidance over fiscal and financial affairs of the Municipality, which may include monitoring and overseeing the exercise of responsibilities assigned in terms of the MFMA to the municipal manager and chief financial officer.
- 5.1.13 The MEC also indicated that section 171(4)(a) of the MFMA obliges the Municipality to investigate allegations of financial misconduct against an official of the Municipality and if the investigation warrants such steps, to institute disciplinary proceedings against such official of the Municipality.
- 5.1.14 Further that given the lack of specifics provided in the letter and the failure by the former Executive Mayor to mention his office’s or the Council’s own compliance, the view was adopted that his letter was a thinly disguised attempt to seek the MEC’s protection of his own position. This notwithstanding, so he stated, the MEC resolved that the officials of the Department would consider the content of the letter of the former Executive Mayor and take it forward. The first step was to determine what additional information was required in order to meaningfully

consider the allegations made and where such information might best be sourced.

- 5.1.15 According to the MEC, this process took a considerable amount of time, mainly due to what later proved to be an incorrect assumption that the information required to give content and meaning to the letter would become available via other avenues, for example by the institution of criminal, labour or civil proceedings, which did not materialize. The MEC noted that the delay was unfortunate, but was not caused by any ill-intent towards the former Executive Mayor.
- 5.1.16 Further on 09 August 2019, (five months after the letter from the former Executive Mayor dated 11 March 2019), the media confirmed the MEC's intention to investigate misconduct at the Municipality (apparently on a reasonable believe of the veracity thereof).
- 5.1.17 On 12 August 2019, the former Executive Mayor wrote to the MEC again, advising that due to the failure of the MEC to respond to his first letter, the Council of the Municipality elected to appoint an independent investigator to investigate the allegations of misconduct by the Municipal Manager. He also indicated that the decision by Council to appoint an independent investigator " *superseded*" the prior request he made to the MEC.
- 5.1.18 The MEC further stated in his response to the complaint that given the response from the former Executive Mayor that the Council's decision to conduct an investigation superseded his request to the MEC for assistance, he was at a loss to understand why the Complainant asserted that there was any legitimate expectation of a response by the MEC to his letter of 11 March 2019.
- 5.1.19 According to the MEC, the former Executive Mayor appears to have changed his mind as he subsequently lodged a complaint in connection with his letter of 11

March 2019, and the MEC's alleged failure to respond, with the George Regional Office of the Public Protector South Africa.

5.1.20 The George Regional Office of the Public Protector indeed received such complaint from the former Executive Mayor and it was raised by the Regional Manager with the Head of the Western Cape Department of Local Government (Department) on 03 January 2020. In his response, dated 14 February 2020 (11 months after the letter of the former Executive Mayor) the HOD stated, *inter alia*, that:

5.1.20.1 The Department received the letter from the former Executive Mayor, dated 11 March 2019;

5.1.20.2 The relevant officials of the Department were in the process of assessing the allegations against the applicable legislation and that the speed at which it is conducted was dependent of several factors, such as the specificity of the allegations and the availability of resources.

5.1.20.3 The MEC informed the Speaker of the Municipality of the allegations submitted by the former Executive Mayor in writing on 22 January 2020, and afforded the Municipality an opportunity to respond. The Speaker responded on 29 January 2020, the contents of which were being considered by the officials of the Department to determine further steps that had to be taken to investigate the allegations.

5.1.20.4 The MEC also requested further information relating to his allegations from the former Executive Mayor on 22 January 2020, to determine the way forward with the matter.

- 5.1.20.5 The former Executive Mayor's letter of 11 March 2019, was not responded to directly as the Department was still in the process of assessing the allegations and there was no decision at the time to investigate the allegations.
- 5.1.21 The investigation of the complaint lodged at the Regional Office of the PPSA was incorporated in the investigation of the Complaint raised by Mr Herron, which is the subject of this report.
- 5.1.22 The MEC also referred in his response to the complaint to the letter that he addressed to the Speaker of the Municipality on 22 January 2020, in connection with the allegations made by the former Executive Mayor and the letter he addressed to the latter on 22 January 2020, requesting more information, despite according to him, the indication by the former Executive Mayor that the Council had resolved to conduct an investigation into the allegations.
- 5.1.23 It appears from the letter addressed to the Speaker, a copy of which was submitted by the MEC, that it included the allegations raised by the former Executive Mayor in his letter of 11 March 2019 (10 months earlier). The MEC stated in the letter that he was of the opinion that the allegations required further assessment and that he therefore required the Speaker's response thereto and further information and supporting documents relating thereto, within 14 days.
- 5.1.24 The MEC also submitted a copy of the response of the Speaker of the Municipality dated 29 January 2020, detailing the investigation that was conducted by the Municipality into the allegations and the action that was taken.
- 5.1.25 The MEC further submitted a copy of a letter that he addressed to the former Executive Mayor on 22 January 2020, acknowledging receipt of his letter of 11 March 2019 (10 months earlier), requesting more information in respect of the allegations and to determine to what extent further steps needed to be taken to investigate. The MEC also emphasized that the former Executive Mayor, together

with the Council were obligated to take action in relation to the allegations that were reported to him, including investigating the allegations and taking remedial action in terms of the applicable legislation.

5.1.26 In his response to the MEC, dated 06 February 2020, the former Executive Mayor advised that the MEC's letter was submitted to the Council that resolved on 31 January 2020, *inter alia*, to place the Municipal Manager on special leave pending the outcome of an investigation of the allegations against him to be conducted by an independent investigator to be appointed by the Council.

5.1.27 The former Executive Mayor stated in his response of 06 February 2020, that:

" It has been noted that you have decided to only investigate four (4) of the allegations against the Municipal Manager that I have submitted to Council. The balance of the charges as well as others that will be investigated will be subjected to an investigation by independent investigators appointed by the Municipal Council.

The resolution was taken against the background that my request for assistance with forensic investigation was sent to your office in March 2019 and your response only came with the offer to assist on 22 January 2020. Your response to assist came after your testimony under cross-examination at the hearing the party (DA) is conducting against me."(emphasis added)

5.1.28 It was established from the investigation that the Council appointed Webber Wentzel Attorneys to investigate the allegations of misconduct against the Municipal Manager, as per the resolution taken on 31 January 2020. Webber Wentzel Attorneys issued their report on the investigation on 16 May 2020, in which several findings of financial misconduct were made and disciplinary and other remedial action were recommended.

5.1.29 The MEC stated that his office received a copy of the report of the independent investigation conducted by the Municipality on 08 June 2020, which was being attended to by officials of the Department.

5.1.30 He further stated that:

"It is my firm view that this complaint is nothing more than a political ploy by Mr Sylvester to do whatever he can to cast aspersions on my office, not only for vindictive personal purposes now that he is no longer a member of the Democratic Alliance or in office, but also crucially to enable him to try and discredit any findings of unlawfulness (and potential recovery) against him that may result in due course. Mr Sylvester faced a disciplinary process initiated by the Democratic Alliance recently, and after having been found guilty on numerous of the charges against him.

Finally, in so far as there is any concern in relation to my office initiating section 106 of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) investigations at Municipalities in the Western Cape, it should be noted that I have in recent years initiated such investigations at the Bitou Municipality, George Municipalities and Central Karoo District. These Municipalities are controlled by different political parties in some instances coalitions in which my party has a stake, but in respect of which I have acted fairly, impartially and in accordance with the law."

5.1.31 The MEC in his response to the Public Protector's notice in terms of section 7(9), dated 18 June 2021, he advised that there were several direct engagements with the former Executive Mayor in connection with his letter of 11 March 2019, the dates and events of which he provided. He referred the investigation team to the HOD to confirm this.

5.1.32 A letter was sent to the former Executive Mayor as well as the Head of Department, Mr G Pause, on 10 and 11 August 2021, respectively to verify the personal engagements referred to by the MEC.

5.1.33 The former Executive Mayor did not respond to the letter sent to him or to telephone messages.

5.1.34 Mr G Pause responded on 17 August 2021, and provided the investigation team with, agendas as well minutes of meetings held between 11 June and September 2019. None of these documents recorded any discussion between the MEC and the former Executive Mayor.

5.1.35 Mr G Pause indicated in his letter dated 17 August 2021, that:

“Please note further that whilst the attached attendance registers and/ or minutes will confirm the agenda or attendance at the meetings of the relevant parties, evidence of the actual content of any personal engagements (referred to by Minister Bredell in his response to your office i.e. on the issues raised with him by the Mayor of Oudtshoorn), will not be found therein, as that item would not have been included on the agenda and minutes at these meetings, for obvious reasons”

5.1.36 Mr Pause further advised that:

“It is my experience that Ministers, provincial officials, executive mayors, as well as municipal managers and other officials utilise the opportunities which these meetings provide them, to raise and discuss any range of concerns, viewpoints, or queries with our colleagues in government in a face to face manner. This takes place over tea, lunch, or other adjournments, and often in the time before and after the formal meetings take place. It is during these discussions that institutional relationships are strengthened and issues of mutual concern raised and ventilated, much of which does not relate to the agenda items

in question but rather to any other urgent, or pressing items which responsible officials or members of the executive feel the need to raise with their colleagues when the opportunity to do so in person presents itself.”

5.1.37 The MEC also averred that during the course of various telephonic and face to face engagements the former Executive Mayor confirmed to him, *inter alia* that he had elected to also lay criminal charges against his Municipal Manager, but was not satisfied with the resultant delay that the investigation by the HAWKS would take was urging the MEC’s office to assist him in removing the Oudtshoorn Municipal Manager.

5.1.38 The MEC indicated that the HAWKS declined to prosecute the person against whom the former Executive Mayor had laid charges against of corruption on 07 December 2020, and informed the HOD that this decision was made on the basis of there being no reasonable prospects of success in any of the matters. On those basis alone there was no reasonable basis for his office to believe that an investigation into the allegations of attempted fraud or corruption was warranted.

5.1.39 The Public Protector was in respect of the application of section 106 of the Municipal Systems Act referred by the MEC to the case of *Democratic Alliance Western Cape & Others v Minister of Local Government Western Cape and Others 2005(3) SA 576* In which the court found *inter alia* that:

“It is accepted that the test as to whether there is “reason to believe” is objectively determined and must be constituted by facts giving rise to such belief. The belief in itself must be rational or reasonable and whilst it has been recognised that the phrase reason to believe places a much higher burden of proof on an applicant than the phrase ‘the court is satisfied’ a blind belief based on such information or hearsay evidence as a reasonable man could not give credence to, does not suffice.”

Application of the relevant legal prescripts

- 5.1.40 Section 125 of the Constitution provides that the executive authority of a province is vested in the Premier, who exercises it together with the other members of the Executive Council.
- 5.1.41 The Premier of a province appoints, in terms of section 132(2) of the Constitution, the members of the Executive Council, assigns their powers and functions, and may dismiss them.
- 5.1.42 Members of the Executive Council are, in terms of section 133(2) of the Constitution, collectively and individually accountable to the Provincial Legislature for the exercise of their powers and the performance of their functions.
- 5.1.43 Section 139 of the Constitution provides that when a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure the fulfillment of that obligation. Section 139(8) provides that national legislation may regulate the implementation of this section of the Constitution, including the process established.
- 5.1.44 Section 105(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) provides that the MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155(6) of the Constitution to monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions.
- 5.1.45 Section 106 of the Municipal Systems Act provides that:
- “(1) If an MEC has reason to believe that a municipality in the province cannot or does fulfil a statutory obligation binding on that a municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must-*

- (a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or*
- (b) if the MEC considers it necessary, designate a person or persons to investigate the matter”. (emphasis added)*

5.1.46 Section 237 of the Constitution provides that all Constitutional obligations must be performed diligently and without delay.

5.1.47 Section 136(1) of the Local Government Municipal Finance Management Act, 2003 (MFMA) provides that:

*“If the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must **promptly***

- (a) Consult the mayor of the municipality to determine the facts;*
- (b) Assess the seriousness of the situation and the municipality’s response to the situation; and*
- (c) determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.” (emphasis added)*

5.1.48 Section 5 of the Western Cape Monitoring and Support of Municipalities Act, 2014 provides that:

“The Provincial Minister must, before taking action under section 106(1) of the Municipal Systems Act—

- (a) inform the municipality concerned in writing of relevant information received by the Provincial Minister and invite the municipality to furnish the Provincial Minister with written comment by a date determined by the Provincial Minister; and*
- (b) objectively assess all relevant information at the Provincial Minister’s disposal, taking into account, among other matters—*

- (i) the manner in which the information was received;*
- (ii) the comments, if any, received from the municipality;*
- (iii) whether the information indicates that the municipality cannot or does not fulfil a statutory obligation binding on the municipality, and if so, whether or not it is due to incapacity;*
- (iv) whether the information indicates that maladministration, fraud, Corruption or any other serious malpractice has occurred or is occurring in the municipality;*
- (v) the areas of performance of the municipality that may be affected if action is not taken in accordance with section 106(1) of the Municipal Systems Act;*
- (vi) whether the municipality previously requested assistance from the Provincial Minister, or the head of any provincial department, to deal with the matter concerned or a related matter;*
- (vii) whether the Provincial Minister, the Department or another provincial department has previously provided assistance to the municipality; and*
- (viii) if applicable, the extent to which the municipality implements relevant practice notes and complies with the essential national standards and minimum standards established in terms of section 108(1) of the Municipal Systems Act.”*

5.1.49 The letter of the former Executive Mayor that was addressed to the MEC on 6 March 2019 contained serious allegations of impropriety at the Municipality, which at least required of the MEC to make further enquiries promptly and without delay and to do so formally a written response to the letter. The submission by the MEC that the Executive Mayor was personally engaged in connection with the matters that he had raised in his letter could not be verified during the investigation. It appears from the response of the HOD in this regard that no such discussion was minuted at the occasions referred to by the MEC and that if it happened, the discussions were informal.

5.1.50 The MEC only responded in writing to the letter of the former Executive Mayor on 22 January 2020 (10 months later) when he wrote to the Speaker of the Municipality enquiring about the seriousness of the allegations of misconduct at the Municipality and to Mr Sylvester, requesting further information from him. At this stage therefore the MEC apparently had “*reason to believe*” as contemplated by section 106(1) of the Municipal Systems Act, hence the letter to the Speaker. There is no evidence that the MEC had more information than what was provided to him by the former Executive Mayor in his letter 10 months earlier. On the contrary, he was only then asking for more information

5.1.51 On 31 January 2020, the Council of the Municipality (according to Mr Sylvester not having received any assistance from the MEC) resolved to appoint an independent investigator whose report on the allegations found several instances of financial misconduct and recommended disciplinary and other action to be taken.

5.1.52 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)*

5.1.53 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.

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

5.1.55 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-

5.1.55.1 Perform their duties and exercise their powers diligently and honestly;

5.1.55.2 Fulfil all the obligations imposed on them by the Constitution and the law;

5.1.55.3 Act in good faith and in the best interest of good governance; and

5.1.55.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.

5.1.56 Paragraph 2.3 of the Executive Ethics Code provides *inter alia*, that Members of the Executive may not:

5.1.56.1 Act in a way that is inconsistent with their position; and

5.1.56.2 Expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

Conclusion

5.1.57 Section 106 of the Municipal Systems Act, read with section 136 of the MFMA place a statutory obligation on MEC responsible for local government to take prompt action if he or she has reason to believe that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality or that there is a serious financial problem in a municipality. This obligation stems from the constitutional imperative as stipulated in section 139 of

the Constitution, requiring the consideration by the MEC of intervention in the affairs of a municipality when it does not or cannot fulfil its executive functions.

- 5.1.58 It follows that the “*jurisdictional fact*” referred to by the MEC that has to exist for the MEC to take action, is the awareness (reasonable belief) that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality.
- 5.1.59 In this case, the letter addressed to the MEC by the former Executive Mayor of the Municipality on 11 March 2019 clearly indicated that there were serious allegations of improper conduct and maladministration by officials of the Municipality, which impacted on the its ability to properly perform its statutory obligation and on regularity of expenditure and the finances of the Municipality.
- 5.1.60 It was expected of the MEC in terms of section 237 of the Constitution and section 136(1) of the MFMA to have responded to the letter diligently and without delay.
- 5.1.61 In terms of section 5 of the Western Cape Monitoring and Support of Municipalities Act, 2014 it was expected of the MEC inform the Municipality in writing before taking action under section 106(1) of the Municipal Systems Act of the relevant information received by the MEC and to invite the Municipality to comment thereon.
- 5.1.62 However, the MEC only replied to the former Executive Mayor 10 months later, requesting him to provide more information within 14 days. He also only requested the response from the Speaker of the Municipality on the serious allegations 10 months after receiving the letter from the former Executive Mayor, on 22 January 2020.
- 5.1.63 A few days later, the Council appointed Webber Wentzel to investigate the allegations. The investigation found serious incidences of misconduct and

recommended disciplinary and other action to be taken. This investigation obviously came at a cost to the Municipality, and fruitless and wasteful expenditure might have been avoided had the MEC taken prompt action in terms of section 106 of the Municipal Systems Act and section 136 of the MFMA, and therefore in compliance with section 237 of the Constitution.

5.1.64 Paragraph 2.1 of the Executive Ethics Code requires of Members of the Executive to perform their duties diligently and honestly, to fulfill all the obligations imposed upon them by the Constitution and the law, to act in good faith and in the best interest of good governance and to act in all respects in a manner that is consistent with their office or the government.

5.1.65 The response by the MEC to the effect that there was actually a duty on the former Executive Mayor and the Council to have acted on the allegations of serious misconduct does not absolve him from the duties imposed upon the MEC responsible for local government by the Constitution, the Municipal Systems Act and the MFMA. His first formal response to the serious allegations of misconduct and impropriety at the Municipality 10 months after having received the letter of 11 March 2019 from a person in the position of the Executive Mayor, does not indicate diligence and promptness on his part to attend thereto and at least to obtain more information or the response from the Municipality to the allegations.

5.1.66 The conduct of the MEC was accordingly not in in good faith and in the best interest of good governance at the Municipality. It was also inconsistent with his office as MEC responsible for local government and therefore in breach of the Executive Ethics Code.

5.2 **Regarding Whether the MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell on 12 December 2019, proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government places the Municipality under**

administration and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

Common cause issues or undisputed facts

5.2.1 It is not in dispute that the MEC attended a DA Caucus meeting with DA Councillors of the Municipality on 12 December 2019.

Issues in dispute

5.2.2 According to the Complainant, the MEC addressed DA Councillors of the Municipality on 12 December 2019 and proposed that they should request the Western Cape Provincial Government to place the Municipality “*under administration*”. The Complainant submitted, what he indicated is a copy of an electronic recording of this meeting. The electronic copy was provided to the MEC during the investigation. The Complainant also submitted a transcript of the electronic recording of the statements purportedly made by the MEC at the meeting, as follows:

“Now I know some of you are going to be shocked, so I’m going to put a proposal on the table.

Just listen to what I want to suggest, please. My suggestion is that we, that you, as Oudtshoorn’s Council, cause you’re the majority, you’re the Council, you ask that we put you under administration.

What does that mean? That means that Administration will take over the Council’s functions, the Executive. You will still maintain your legislative functions. The Mayor will still stay Mayor. The MAYCO members (Mayoral Committee) will stay the MAYCO members. Your salaries will remain the

same.

The benefit for that, I think, is that we will show voters that, as leaders, you realise there is a problem, and that you step up to the plate, and you're willing to address it, with the support of the province, with support of the party, that we get an Administrator, and that we get a team, an engineer, a CFO, a team of people in Oudtshoorn to come and support us.

Secondly, I think that its very important that the benefit of this will be to make your hands a bit loose, to go back to your communities, because what we pick up in the research is that there's a gap between the Councillors and the communities. So my suggestion will be that the Mayor sit, sit and give us a list of institutions within the Municipality, we draw up a schedule, and once a quarter we will meet with that, with the Administrator etc. etc. So that can help us, I think can help us, rebuild our brand, so that we can get votes, 2021, to govern for the next 5 years" (emphasis added)

- 5.2.3 The Complainant asserted that it is clear from the comments made at this meeting that the MEC's intention was to achieve political advantage for the DA, instead of acting in accordance with the constitutional imperative of assisting the Municipality as the MEC responsible for local government in the Western Cape Province.
- 5.2.4 He further contended that the MEC's proposal to the DA Councillors of the Municipality that they should request the Western Cape Provincial Government to place the Municipality under administration, was improper and constitutes a direct conflict between his official responsibilities as the MEC responsible for Local Government and his private interests as the Western Cape Provincial Chairperson of the DA, at the time, and that the MEC therefore acted in breach of the Executive Ethics Code.

5.2.5 In his response to the allegations, dated 28 August 2020, the MEC stated that the transcript of the recording as provided by the Complainant and that “*Mr Sylvester has circulated publicly*” is not true and complete “*record of the conversation that took place within the DA caucus meeting which I attended on 12 December 2019*”

5.2.6 He further confirmed that:

“The meeting was one of Democratic Alliance members only, which is why it was termed a caucus meeting and was not one in which I addressed my colleagues in my capacity as anything other than provincial leader of the Democratic Alliance and I certainly was not attending nor addressing this meeting in my capacity as a member of the executive.

All the DA members who attended this caucus meeting, including Mr Sylvester, agreed that the problems being experienced at the Oudtshoorn Municipality at the time had been attended to. The fact that there was complete breakdown between the executive and the administration was of great concern, as was the fact that the CFO and the Chief Engineer had both resigned as a result of that conflict. The proposal put forward by me, as a possible solution, was for the caucus to agree to the Municipality being put under administration in terms of section 139, as had been done previously, with the agreement of the ANC members of the Municipality in (sic) after Minister Gordhan and myself had engaged on means by which to resolve the problems faced by this same municipality in 2015. My solution was rejected by the DA caucus at that meeting after Mayor Sylvester informed me that the caucus members who were part of the municipal executive wanted to think about it some more and would put forward another solution to the problems facing this municipality” (emphasis added)

5.2.7 According to the MEC, his discussion of potential solutions to the problems that the Municipality faced was neither unlawful, nor unethical. His suggestion to the DA Caucus was made solely in his capacity as a member of the Democratic Alliance “*and as such neither the EMEA, nor indeed the mandate which your office has to investigate alleged breaches of that Act has any application*”

5.2.8 The MEC did not deny in his response to the complaint that he made the statements at the DA Caucus meeting, as indicated in the complaint and the transcript that was provided by the Complainant. His only response was that the transcript was not a true and complete reflection of the entire meeting that was held.

5.2.9 In his response dated 18 June 2021 to the Notice issued to him in terms of section 7(9) of the Public Protector Act, affording him an opportunity to respond to the evidence obtained during the investigation, the MEC stated, *inter alia* that:

“I place on record that had I been asked, in my capacity as Minister, by any member of the council, or public at that time, as to what options were open to remedy the dire circumstances that Oudtshoorn Municipality found itself in once again, I would have proffered exactly the same advice.

I say this because as an elected public representative, I am obligated to always make suggestions as to the methods by which a dysfunctional municipal administration can be assisted. One method by which to do so is to suggest that a municipality volunteer itself for a section 139 intervention by a provincial government and you are incorrect in your assertion that just because the Constitution and the MSA (Municipal Systems Act) do not make provision for a council to request this, or agree to it, that it cannot be done”. (emphasis added)

- 5.2.10 The MEC further indicated that provincial interventions in municipalities that have requested or expressed their support for such interventions, typically to provide the provincial government with easy and timeous access to evidence required to establish the jurisdictional facts on which provincial interventions, must still be predicated.
- 5.2.11 The MEC also averred that section 3 of the Western Cape Monitoring and Support of Municipalities Act, 2014 specifically enables a Municipal Council to request the assistance of the Provincial Government in performing its functions.
- 5.2.12 The MEC indicated that, notwithstanding any request for an intervention that is made by a municipal council, in order to result in a valid intervention, the jurisdictional facts necessary for any intervention still need to exist and hence an investigation into any facts asserted in such a request, both in terms of section 106 of the Municipal Systems Act and/or section 136 of the MFMA is not done away with simply because a request for an intervention derives from a municipality.
- 5.2.13 Further, that before any provincial government intervention takes place there must be sufficient credible evidence put before the provincial cabinet, supporting any decision to so act. That evidence will be neither sufficient nor objective, if derived from a request by the relevant council alone.
- 5.2.14 He also referred to the conclusions made in a study conducted by the Dullah Ohmar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape, which found (*inter alia*) as follows in relation to requests for an intervention by a municipal council:

“Sometimes an intervention takes at (sic) at the invitation of the council. This is, of course, the best possible scenario as the requesting municipality would then fully cooperate with the intervention measures and the administrator should one

be appointed. This scenario is most likely to happen within the context where both the municipal council and the provincial government is from the same political stable. The more difficult scenario arises where there is a difference in political alignment; in such cases a clear set of rules, principles and procedures should be agreed upon by all parties concerned before any prospect of intervention is entertained. (emphases added)

5.2.15 From this study, the MEC concluded that a cooperative approach (by the Municipal Council) can have a huge benefit to the state and the residents of the Municipality. It avoids months of investigative and diagnostic work by officials tasked with considering whether a requested section 139 intervention can and should be recommended for approval

Application of the relevant legal prescripts

5.2.16 In terms of section 125 of the Constitution, the executive authority of a province is vested in the Premier of that province. The Premier exercises the executive authority, together with the other members of the Executive Council. It further provides that the provincial executive must act in accordance with the Constitution.

5.2.17 Section 132 of the Constitution provides that the Premier of a province appoints the members of the Executive Council from among the members of the provincial legislature, assigns their powers and functions, and may dismiss them.

5.2.18 Members of the Executive Council are in terms of section 133 of the Constitution, responsible for the functions of the executive assigned to them by the Premier, Section 133(3) provides that Members of the Executive Council of a province *inter alia*, must act in accordance with the Constitution.

5.2.19 Before Members of the Executive Council of province begin to perform their functions, they must, in terms of section 135 of the Constitution swear or affirm faithfulness to the Republic and obedience to the Constitution in accordance with Schedule 2, as follows:

“I, A,B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic, and I undertake to hold my office as Premier/Acting Premier/ member of the Executive Council of the province of C.D with honour and dignity, to be a true and faithful counsellor; not to divulge directly indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and the best of my ability”

5.2.20 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 entrusted to them, to enrich themselves or improperly benefit any other person.” (emphases added)

5.2.21 It is thus clearly expected by section 136 of the Constitution of the Members of the Executive Council of a province not to 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.

5.2.22 Section 2(1) of the EMEA enjoins the President “*to 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*”

5.2.23 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 a complaint against an MEC by a Member of the Provincial Legislature and must report on the investigation to the Premier of the Province.

5.2.24 The Executive Ethics Code was published on 28 July 2000.

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

- 5.2.25.1 Perform their duties and exercise their powers diligently and honestly;
- 5.2.25.2 Fulfil all obligations imposed on them by the Constitution and the law;
- 5.2.25.3 Act in good faith and in the best interest of good governance; and
- 5.2.25.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.

5.2.26 Paragraph 2.3(a)-(c) of the Executive Ethics Code provides that Members of the Executive may not;

- 5.2.26.1 Wilfully mislead the legislature to which they are accountable;
- 5.2.26.2 Wilfully mislead the President or Premier, as the case may be;
- 5.2.26.3 Act in a way that is inconsistent with their position.

- 5.2.27 In terms of paragraph 2.3(f) of the Executive Ethics Code, Members of the Executive may not expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.
- 5.2.28 The Executive Ethics Code therefore clearly distinguishes between the “*official responsibilities*” and “*private interests*” (such as political interests) of a member based on the nature of the activity in which the member is engaged.
- 5.2.29 The Guide for Members of the Executive approved by the President and which became effective of 20 November 2019, covers Ministers, Deputy Ministers, Premiers and Members of the Executive Councils of Provincial Governments (referred to as members). It provides *inter alia* that Members are required at all times to ensure compliance with the Executive Ethics Code while they continue to hold office as a Member.
- 5.2.30 It follows therefore that Members of the Executive of the Executive Council are appointed by the Premier, and for the duration of their tenure do not cease to be Members at any time. Moreover, there is no provision in the Constitution or any other legislation regulating the powers and functions of Members of the Provincial Executive Council, that provides for a temporary relinquishing of membership of the Executive Council, whereby a Member may address a meeting of municipal councillors of a political party only as a member thereof and representing the political party, and that once this role has ended, taking on the position as Member of the Executive Council and its responsibilities again.
- 5.2.31 The constitutional imperative of ethical conduct as also provided for in paragraph 2.1 and 2.3 of the Executive Ethics Code therefore also applies when a Member of the Executive Council makes a suggestion to a political party meeting on how Councillors representing that party should agree to in order to get the Provincial Government to intervene in the affairs of the Municipality. The standard of ethics imposed on him or her by the Constitution and the Executive Ethics Code, not to

act in any way that is inconsistent with their office, still stands. It is expected of the MEC to be objective and diligent and to act in the interests of his office and government as a whole, and not only of one political party.

5.2.32 Section 139(1)(a) of the Constitution provides that:

“When a municipality cannot or does fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

(a) Issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligation and stating any steps required to meet its obligation”.

5.2.33 Section 106(1) of the Municipal Systems Act provides that:

“If an MEC has reason to believe that a Municipality in the province cannot or does fulfil a statutory obligation on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or occurring in a municipality in the province, the MEC the must–

(a) By written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

(b) If the MEC considers it necessary, designate a person or persons to investigate the matter”.

5.2.34 The intervention of the Provincial Government in the affairs of a Municipality by, *inter alia* placing it under administration involves an objective executive decision based on information obtained regarding the status of the municipality in performing its functions and obligations. No provision is made in the Constitution or the Municipal Systems Act for a municipality to request the provincial

government to place it under administration and take over the running of its business.

- 5.2.35 Neither the Constitution nor the Municipal Systems Act provides for a process in terms of which the Council can request the intervention of the MEC or can prevent it from happening. In as much as it might happen in practice that a Municipal Council would approach the Provincial Government requesting that it be placed under administration, such request should be based on a resolution of the Council involving all the political parties, without any prior interference or influence by the Provincial Government or a specific political party.
- 5.2.36 In this matter, the MEC appealed to Councillors of the Municipality representing the DA political party, of which he was the Provincial Chairperson, to agree that the Municipality is placed under administration by the Western Cape Provincial Government, to resolve its internal problems. On his own version of the events, the MEC believes that he made the suggestion, not in his capacity as the MEC for Local Government, but as a member of the DA, the majority in the Council.
- 5.2.37 However, the evidence shows that the MEC at the time had already made up his mind that that the Western Cape Provincial Government should intervene in the affairs of the Municipality, despite not having followed the processes contemplated by the relevant provisions of the Constitution the Municipal Systems Act and the Western Cape Monitoring and Support of Municipalities Act, 2014.
- 5.2.38 It is not clear from the explanation provided by the MEC, how the Provincial Government, especially the MEC responsible for local government, would objectively and without fear or favour consider intervening in the affairs of a municipality, when it was required to do so in terms of section 139 of the Constitution, if the decision in respect of intervention that affects all political parties and especially the communities that the municipality serves, had already

been taken by the political party that the MEC represents, and more so at his/her suggestion to a meeting where only members of that political party were present.

5.2.39 Section 41 of the Constitution regulates co-operative government and intergovernmental relations. Section 41(1)(h) provides that:

“All spheres of government and all organs of state within each sphere must cooperate with one another in mutual trust and good faith by-

- (i) fostering friendly relations;*
- (ii) assisting and supporting one another;*
- (iii) informing one another of, and consulting one another on matters of common interest;*
- (iv) co-ordinating their actions and legislation with one another;*
- (v) adhering to agreed procedures; and*
- (vi) avoiding legal proceedings against one another.*

5.2.40 In an article titled *“Contemporary trends in provincial government supervision of local government in South Africa”* in the publication: *Law Democracy & Development*, Volume 18(2014)³, Mbuseni Matherjwa stated *inter alia*, the following in this regard:

“In order to achieve coherent government in the Republic, the Constitution makes provision for principles of co-operative government. The said principles of co-operative government instruct all spheres of government and organs of State to commit themselves to the Republic of South Africa, first, by securing the wellbeing of the people of the Republic, and by providing ‘effective, transparent, accountable and coherent government for the Republic as a whole.’ Thus, the spheres of government are required to commit themselves to the course of government in the Republic. The commitment of the spheres of government to

³ <http://dx.doi.org/10.4314/idd.v18i1.9>

the Republic and the provision of coherent government entails that the upper spheres should supervise the lower spheres in order to prevent the decline of government in the Republic. Accordingly, provincial government as the sphere of government closest to local government supervises local government to ensure harmony in the functioning of government in the Republic.”

and

“In this regard the scope of supervision of local government is broader than intervention in local government in the amended section 139 of the Constitution. It includes the monitoring of local government of, intervention in, and support of local government. The monitoring of local government informs local government on the proper action for remedying any deficiency in the functioning of local government. The remedial action may take the form of intervention by assuming certain powers of local government or by rendering support by redistributing resources to local government, if it needs such support.”

Conclusion

- 5.2.41 Section 106 of the Municipal Systems Act read with section 139 of the Constitution stipulate the steps that have to be taken for a provincial government to intervene in the affairs of a municipality and to put it under “*administration*”. The role of the MEC responsible for local government in the relevant province is a crucial one that has to focus objectively on the best interest of good governance and administration. The provincial government has a critical role to play in monitoring and cooperating with local governments to ensure that they perform effectively and efficiently. This has to precede any decision in respect of intervention and an intervention should not be triggered or influenced by an MEC at a political level by suggesting to Councillors of the political party that he

represents that they as the majority should agree that the municipality is placed under administration, as it will be to their advantage as a party.

5.2.42 To do so is improper, as it is by law expected of the MEC and the provincial government to act without fear or favour and with an open mind when the decision to intervene in the affairs of a municipality has to be taken, whether at the request of the municipal council or otherwise.

5.2.43 In this matter, the MEC had clearly concluded that the intervention by the Western Cape Provincial Government was necessary, even before he had considered the matter as contemplated by the relevant provisions of the Constitution and the Municipal Systems Act, to the extent that he even proposed it at a DA Caucus meeting where only Councillors of the ruling political party were present.

5.2.44 The conduct of the MEC in this regard was therefore not in accordance with the Constitution and the law. In making the suggestion to DA Councillors as he did, the MEC did not act diligently and in good faith as he was required to do in terms of paragraph 2.1 of the Executive Ethics Code. His conduct was also not in the best interest of good governance and inconsistent with his office as MEC.

5.2.45 By making the suggestion that the DA Councillors should agree that the Municipality is placed under administration, the MEC also exposed himself to the risk of a conflict between his official responsibilities as MEC and his private interest as a member of the DA. He therefore acted in breach of paragraph 2.3(f) of the Executive Ethics Code and in violation of section 136 of the Constitution.

6. FINDINGS

6.1. Regarding whether the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell failed to take timeous appropriate action in connection with allegations of improper

conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor on 11 March 2019 and if so, whether such failure was improper and constitutes a breach of Executive Ethics Code.

- 6.1.1 The allegation that the MEC failed to take timeous appropriate action in connection with allegations of improper conduct against officials of the Municipality when he was requested to do so by the former Executive Mayor of the Municipality on 11 March 2019, is substantiated.
- 6.1.2 The MEC only formally approached the Speaker of the Municipality and responded to the former Executive Mayor on 22 January 2020, 10 months after the serious allegations of maladministration, fraud, corruption and other malpractices were brought to his attention.
- 6.1.3 His first formal response to the serious allegations of misconduct and impropriety at the Municipality 10 months after having received the letter of 11 March 2019 from a person in the position of the Executive Mayor does not indicate diligence and promptness on his part to attend thereto and at least to obtain more information or the response from the Municipality to the serious allegations, as was required of him by section 106 of the Municipal Systems Act, section 136 of the MFMA and section 5 of the Western Cape Monitoring and Support of Municipalities Act, 2014.
- 6.1.4 The allegation that the conduct of the MEC was in breach of the Executive Ethics Code is therefore, also substantiated. He did not act in good faith and in the best interest of good governance at the Municipality. His conduct was also inconsistent with his office as MEC responsible for local government.
- 6.1.5 The MEC's conduct was improper and in violation of the provision of section 136 (2)(b) of the Constitution. It also constitutes a breach of paragraphs 2.1(a), 2.1(b), 2.1(c), 2.1(d) and 2.3(c) of the Executive Ethics Code.

6.2 Regarding Whether the MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell on 12 December 2019, proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Government places the Municipality under administration and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

6.2.1 The allegation that the MEC on 12 December 2019 proposed to DA Councillors of the Municipality that they should agree that the Western Cape Provincial Administration places the Municipality under administration, is substantiated. The MEC conceded that he attended a DA Caucus meeting with DA Councillors of the Municipality on 12 December 2019. On his own version, the MEC suggested at the DA Caucus meeting that the DA Councillors should agree that the Municipality is placed under administration.

6.2.2 The suggestion or contention by the MEC that he acted exclusively in furtherance of a matter that concerned his relationship with his political party and that his action fell exclusively within the pursuance of private interests as envisaged in the Executive Ethics Code, and therefore within the private sphere, is misdirected.

6.2.3 This is also borne from his position as a member of the Western Cape Provincial Legislature, and on account of having been appointed to public office, created by the Constitution, as a representative of a political party. Membership of a political party is thus a requirement to be elected and appointed to public office in terms of the Electoral Act 73 of 1998 and not a default “capacity” to which he can revert at will.

6.2.4 Section 106 of the Municipal Systems Act read with section 139 of the Constitution and section 5 of the Western Cape Monitoring and Support of

Municipalities Act, 2014 stipulate the steps that have to be taken for the provincial government to intervene in the affairs of a municipality and put it under “*administration*”. The role of the MEC responsible for local government in the relevant province is an objective one that focuses on the best interest of good governance and administration. This process has to precede any decision in respect of intervention.

- 6.2.5 In this matter, the MEC had concluded that the intervention by the Western Cape Provincial Government was necessary, even before he had considered the matter as contemplated by the relevant provisions of the Constitution, Municipal Systems Act and the Western Cape Monitoring and Support of Municipalities Act, 2014, to the extent that he even proposed it at a DA Caucus meeting where only Councillors of the ruling party were present.
- 6.2.6 The conduct of the MEC in this regard was therefore not in accordance with the Constitution and the law.
- 6.2.7 The allegation that the conduct of the MEC in that regard was in breach of the Executive Ethics Code, is also substantiated.
- 6.2.8 In making the suggestion to DA Councillors as he did, the MEC did not act diligently and in good faith as he was required to do in terms of paragraph 2.1 of the Executive Ethics Code. His conduct was also not in the best interest of good governance and consistent with his office.
- 6.2.9 The MEC also exposed himself to the risk of a conflict between his official responsibilities as MEC and his private interest as a member of the DA.

6.2.10 The MEC's conduct therefore was improper and in breach of the provisions of section 136(2) of the Constitution. It also constitutes a breach of paragraph 2.1(a), 2.1(b), 2.1(c), 2.1(d), 2.3(c) and 2.3(f) of the Executive Code.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution with view to remedying the maladministration and improper conduct referred to in this report:

7.1.1. The Premier of the Western Cape to:

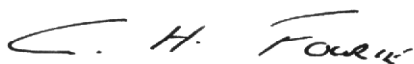
7.1.1.1. In terms of section 3(6) of the EMEA within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the Western Cape Provincial Legislature.

8 MONITORING

8.1.1 The Premier to inform the Public Protector within 60 days from the date of this report of the implementation of the remedial action taken in paragraph 7.1.1 above.



ADV BUSISIWE MKHWEBANE
THE PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 22 / 10 /2021



Assisted by:
Adv C H Fourie
Executive Manager:
PII Coastal, Public Protector South Africa