

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 a breach of the Executive Ethics Code by the Premier of the Western Cape, Mr Alan Winde”

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REPORT ON AN INVESTIGATION INTO A COMPLAINT OF A BREACH OF THE EXECUTIVE ETHICS CODE BY THE PREMIER OF THE WESTERN CAPE, MR A WINDE

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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, 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 Premier of the Western Cape, Mr A Winde
- (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) The former Executive Mayor of the Oudtshoorn Local Municipality (Municipality) Mr C Sylvester (former Executive Mayor), on 11 March 2019 alerted the Western Cape Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning, Mr A Bredell (MEC) to several allegations of maladministration, fraud, corruption and financial misconduct on the part of the Municipality and requested his assistance to attend to the matter.
 - (b) The Complainant further alleged that notwithstanding the provisions of section 106 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act), the MEC failed to respond to Mr Sylvester'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 the concerns brought to the MEC's attention by Mr Sylvester.

- (c) It was further alleged that on 12 December 2019, the MEC addressed DA Councillors of the Municipality and proposed that they should agree that the Western Cape Provincial Government places the Municipality “*under administration*”. He allegedly *inter alia* stated that:
- “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.”(sic)*
- (d) The Complainant averred that the former Executive Mayor on 06 March 2020, addressed a letter to the Premier of the Western Cape, Mr A Winde (Premier), mainly in connection with the conduct of MEC Bredell referred to above.
- (e) According the Complainant, the Premier was obligated to “*conduct an enquiry in terms of section 2.2 (sic) of the Executive Ethics Code taking into account the promotion of an open, democratic and accountable government*”.
- (f) The Complainant also alleged that the Premier appeared before the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020. During the proceedings, he was referred by a Member of Parliament to the MEC’s proposals to the DA Councillors of the Municipality that they agree that the Municipality is placed under administration. From the Premier’s response, the Complainant contended that the Premier expressed the view that it is perfectly legal to have a political agreement to place a municipality under administration.
- (g) The Complainant contended that the Premier’s response to the Portfolio Committee is indicative of the fact that he was aware of the proposal made by the MEC on 12 December 2019, to the DA Councillors, to agree

that the Municipality is placed administration and that his statements in this regard were improper and in violation of the Executive Ethics Code.

- (v) Based on the analysis of the complaint, the following issues were identified for the investigation:
- (a) Whether the Premier failed to act on the allegations of improper conduct by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell, which were brought to his attention by the former Executive Mayor of the Municipality on 6 March 2020 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.
 - (b) Whether the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative and Traditional Affairs on 23 June 2020 in connection with the proposal made by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, were improper and if so whether his conduct 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 EMEA. It included correspondence with the Premier and the Complainant, 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 Premier failed to act on the allegations of improper conduct by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell, which were brought to his attention by the former Executive Mayor of the Municipality on 6 March 2020 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

(aa) The allegation that the Premier failed to act on the allegations against the MEC contained in the letter addressed to him by the former Executive Mayor of the Municipality is not substantiated. The same allegations became the subject of an investigation by the Public Protector in terms of the EMEA when a complaint of a breach of the Executive Ethics Code was lodged on 2 July 2020.

(bb) The Premier requested and obtained a comprehensive response from the MEC on the allegations and decided that there was no reasonable basis for further action by his office.

(b) Regarding whether the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020 in connection with the proposal made by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Oudtshoorn Local Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, were improper and if so whether his conduct constitutes a breach of the Executive Ethics Code.

(aa) The allegation that the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020 in connection with the proposal made by the Western Cape

MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, were improper, is substantiated.

(bb) The statements made by the Premier to the Portfolio Committee supporting the conduct of the MEC were not in accordance with the Constitution and legislation regulating the intervention by a provincial government in a municipality and even the practice of political negotiation and agreement, as submitted by him. His statements were therefore not in the best interest of good governance and not consistent with what is expected of a person in the position of a Premier. He therefore acted in breach of section 136(2)(b) of the Constitution and paragraphs 2.1(c) 2.1(d), and 2.3(c) of the Executive Ethics Code.

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

(a) The President to:

(aa) In terms of section 3(5)(2)(b) of the EMEA, submit a copy of this report and any comments thereon to the National Council of Provinces within a reasonable time, but not later than 14 days after receiving the report.

REPORT ON AN INVESTIGATION OF A COMPLAINT OF A BREACH OF THE EXECUTIVE ETHICS CODE BY THE PREMIER OF THE WESTERN CAPE, MR A WINDE

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) on an investigation of a complaint of a breach of the Executive Ethics Code by the Premier of the Western Cape, Mr A Winde.
- 1.2 The report is submitted in in terms of sections 8(1) of the Public Protector Act and section 3(2)(a) of the EMEA to the President of the Republic of South Africa, Mr C Ramaphosa.
- 1.3 Copies of the report are also provided to the Premier of the Western Cape, Mr A Winde and Mr Brett Herron MPL, 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 Premier of the Western Cape, Mr A Winde (Premier).

2. THE COMPLAINT

- 2.1 The complaint was lodged by Mr B Herron (the 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 The former Executive Mayor of the Oudtshoorn Local Municipality (Municipality) Mr C Sylvester (former Executive Mayor), on 11 March 2019 alerted the Western Cape

Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning, Mr A Bredell (MEC) to several allegations of maladministration, fraud, corruption and financial misconduct on the part of the Municipality and requested his assistance to attend to the matter.

- 2.2.2 The Complainant further alleged that notwithstanding the provisions of section 106 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act), the MEC failed to respond to Mr Sylvester'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 the concerns brought to the MEC's attention by Mr Sylvester.
- 2.2.3 It was further alleged that on 12 December 2019, the MEC addressed DA Councillors of the Municipality and proposed that they should agree that the Western Cape Provincial Government places the Municipality "*under administration*". He allegedly *inter alia* stated that:
- "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."*(sic)
- 2.2.4 The Complainant avers that the former Executive Mayor on 06 March 2020, addressed a letter to the Premier, mainly in connection with the conduct of MEC Bredell as referred to above.
- 2.2.5 According the Complainant, the Premier was obligated to "*conduct an enquiry in terms of section 2.2 (sic) of the Executive Ethics Code taking into account the promotion of an open, democratic and accountable government*".
- 2.2.6 The Complainant also alleged that the Premier appeared before the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs (Portfolio

Committee) on 23 June 2020. During the proceedings, he was referred by a Member of Parliament to the MEC's proposals to the DA Councillors of the Municipality that they agree that the Municipality is placed under administration. From the Premier's response, the Complainant contended that the Premier expressed the view that it is perfectly legal to have a political agreement to place a municipality under administration.

2.2.7 In essence, the Complainant asserted that the Premier improperly failed, refused or neglected to take action in response to the former Executive Mayor's letter of 06 March 2020, which alerted him that:

2.2.7.1 The former Executive Mayor had reported allegations of maladministration, fraud, corruption and/or serious malpractice to the MEC who had failed or refused to act as he was obliged to in terms of section 106 of the Municipal Systems Act and had therefore breached the Executive Ethics Code;

2.2.7.2 The Speaker of the Oudtshoorn Municipal Council had prevented the tabling of the Municipality's budget and the tabling of the allegations of misconduct against the Municipal Manager by refusing to call a Council meeting between March 2019 and May 2019 and that the former Executive Mayor had requested the MEC to intervene but he failed to do so;

2.2.7.3 The MEC may have involved himself in colluding with a member of the Directorate for Priority Crime Investigations (HAWKS) in fabricating a false criminal complaint against the former Executive Mayor;

2.2.7.4 On 12 December 2019, the MEC proposed to the DA Caucus of the Municipality that they agree that the Western Cape Provincial Government places the Municipality under administration.

2.2.8 The Complainant contended that there was an obligation on the Premier to conduct an enquiry into the conduct of the MEC, in terms of paragraph 2.2 of the

Executive Ethics Code, taking into account the “*promotion of an open, democratic and accountable government*”, which requires of the Premier:

- 2.2.8.1 To perform his duties diligently and honestly;
- 2.2.8.2 To fulfil the obligations, imposed on him by law;
- 2.2.8.3 To conduct himself in good faith and in the best interest of good governance;
- 2.2.8.4 To act, in all respects, in a manner, consistent with the integrity of his office.

2.3 The Complainant further alleged that the Premier appeared before the Portfolio Committee on 23 June 2020. During the proceedings, he was referred by a Member of Parliament to the MEC’s proposal to the DA Councillors of the Municipality that they agree that the Municipality is placed under administration. In his response, the Premier allegedly indicated that the MEC had two jobs to do. One is his role as the (then) Provincial Chairperson of a political party (DA) and the other as the MEC. From the Premier’s response, the Complainant contended that he expressed the view that is perfectly legal to have a political agreement to place a municipality under administration. The Premier allegedly stated that in his response to the Portfolio Committee *inter alia* that:

“When it comes to talking about recordings and administration obviously what is happening here is very similar to what happened previously in Oudsthoorn where the local government MEC in his role as an MEC has one job to do but also a political job because he is also the Chairperson of a political party.

But what they are doing is looking at an administration at that stage and of course it had happened once before. I remember personally being involved in the one before because it was an agreement between the national Minister, it was then Pravin Gordhan, and myself as well as Minister Bredell and his HOD and of course they can give some more information on that.

That’s how administration work. You’ve got two ways of doing it.

One you can get a political agreement on an administration or you have got to actually follow the rule of law and there are a whole lot of other trigger points but these take a very long time, through lots of court cases etc, and of course if you find a political settlement on getting an administration in place in our experience that is definitely the best way to get it done.” (emphasis added)

- 2.4 The Member of Parliament that put the question to the Premier did not accept his response. The Premier then went on to state that:

“You spoke about corruption. You see there’s two ways of administration. I’ve been in executive for ten years. I remember the first administrative process. You can follow the administrative process, it ends up in court, it doesn’t end up solving the problems for the citizens of that municipality in actual fact it gets worse. It’s all within the law, there’s nothing illegal about it, you can actually any time have an agreement between political parties to engage in an administrative process in a sphere of government.”

- 2.5 The Complainant contended that the Premier’s response to the Portfolio Committee is indicative of the fact that he was aware of the proposal made by the MEC on 12 December 2019, to the DA Councillors, to agree that the Municipality is placed administration and that his statements in this regard were improper and in violation of the Executive Ethics Code.

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:

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

² *Supra* at para [73].

- 3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.6.2 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 Section 4 of the of the EMEA provides, *inter alia* that the Public Protector must investigate an alleged breach of the Executive Ethics Code on receipt of a complaint by a member of the provincial legislature if the complaint is against a Member of the Executive Council of the province.
- 3.7.9 The Premier 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, 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, improper conduct and maladministration?

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

4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Premier improperly failed to investigate the conduct of the MEC relating to matters of impropriety that were brought to his attention by the former Executive Mayor of the Municipality and whether the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020 in connection with the proposal made by the MEC to DA Councillors of the Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, were improper and if so whether his conduct constitutes a breach of the Executive Ethics Code.

4.2.1.6 The enquiry regarding what should have happened, focuses on the EMEA, the Executive Ethics Code and the law or rules that regulate the standard that should have been met by the Premier, 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 Premier failed to act on the allegations of improper conduct by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell, which were brought to his attention by the former Executive Mayor of the Municipality on 6 March 2020 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

4.3.2 Whether the statements made by the Premier to the Portfolio Committee on 23 June 2020 in connection with the proposal made by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, were improper and if so whether his conduct constitutes a breach of the Executive Ethics Code.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1. Compliant lodged by Mr B Herron MPL on 02 July 2020.

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

4.4.1.3 Letter dated 06 March 2020, from the former Executive Mayor of the Municipality to the Premier.

4.4.1.4 Letter dated 25 August 2020 from the MEC to the Premier.

4.4.1.5 Letter dated 1 October 2020 from the Premier to the Executive Mayor of the Municipality.

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 Premier Winde, dated 06 November 2020;

4.4.2.2 The Complainant dated 13 November 2020 and 21 January 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 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 Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (Immunities Act).

4.4.3.7 Rules of the National Assembly, 9th Edition.

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

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

4.4.4.1 A Notice was issued in terms of section 7(9) of the Public Protector Act to the Premier on 11 June 2021, affording him an opportunity to respond to the evidence obtained during the investigation. He responded on 29 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 Premier failed to act on the allegations improper conduct by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell, which were brought to his attention by the former Executive Mayor of the Municipality on 6 March 2020 and if so, whether such conduct 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 addressed a letter to the Premier on 6 March 2020, referring to what he regarded as improper conduct of the MEC, as set out in his complaint, referred to above.

Issues in dispute

5.1.2 The Complainant contended that:

“The letter requested the Premier to suspend the MEC and investigate these allegations.

The allegations contained in the letter, the attached evidence, and the recording that was offered to the Premier, required the Premier to act in terms of Section 2.2 of the Executive Ethics Code and to consider whether the MEC for Local Government had complied with the provisions of Sec 2.1 of the Executive Ethics Code (sic).

There was an obligation on the Premier to conduct an enquiry in terms of section 2.2 of the Executive Ethics Code, taking into account the “promotion of an open democratic and accountable government”.

No such enquiry took place and the Premier could not have considered the need to promote an “open, democratic and accountable government”

In failing to conduct an enquiry, and to respond to the allegations and request for an investigation, taking into account the need to promote open, democratic and accountable government the Premier breached Section 2.2 of the Executive Ethics Code and himself failed:

- a) To perform his duties diligently and honestly;*
- b) To fulfil the obligations imposed on him by the law;*
- c) To conduct himself in good faith in the best interest of good governance;*
- d) Act, in all respects, in a manner, consistent with the integrity of his office and the government”*

5.1.3 The Premier responded to this complaint during the investigation on 06 November 2020. He indicated that there was a duplication of the complaints lodged by the former Executive Mayor of the Municipality in connection with the alleged failure by the MEC to respond to a letter that he addressed to him on 11 March 2019 and the suggestion that the MEC made to DA Councillors of the Municipality that they should agree that the Municipality is placed under administration by the Western Cape Provincial Government on 12 December 2019.

5.1.4 The same complaint of a breach of the Executive Ethics Code by the MEC was also lodged with the Public Protector by the Complainant on 2 July 2020 and is the subject of a separate investigation in terms of the EMEA.

5.1.5 In his response, the Premier stated that the only request made by the former Executive Mayor of the Municipality in his letter addressed to him on 6 March 2020 was contained in the last paragraph thereof as follows:

“As a humble citizen of Oudtshoorn I am asking you to place the MEC on suspension pending an investigation into his conduct”.

5.1.6 The Premier further stated that he was not requested in the letter to conduct an investigation into the MEC’s alleged conduct and there was rather a bald assertion that the Municipality *“would like to register a breach of the Executive Ethics Code against the MEC”*. Further, that the former Executive Mayor had stated in the letter that in his view the MEC had allegedly breached paragraphs 2.1 and 2.3 of the Executive Ethics Code because he had failed to institute a forensic investigation into allegations of misconduct by the Municipal Manager of the Municipality in August 2019.

5.1.7 The Premier further indicated that paragraph 2.2 of the Executive Ethics Code places no obligation on his office, nor does it provide his office with the powers to investigate members of the executive thereunder.

5.1.8 He stated that the letter of the former Executive Mayor made wide ranging, unsubstantiated and vague allegations against the MEC, based on *inter alia* conversations with a local business man as well as suggestions which are contrary to the law.

5.1.9 The Premier stated that the power by which Premiers are entitled to investigate allegations regarding misconduct of Members of the Executive Council is to be found in section 132(2) of the Constitution, as well as section 42(2) of the Constitution of the Western Cape, which reads as follows:

“The Premier (of a Province) appoints the (members of the Executive Council) Provincial Ministers, assigns their powers and functions and may dismiss them”.

- 5.1.10 In this regard, the Premier indicated that any exercise of the power to dismiss a member of the Provincial Cabinet, which is exclusive to the Premier, must obviously be lawful and rational. To ensure this outcome, Premiers have an inherent obligation to provide the member of their Cabinet an opportunity to be heard in respect of any allegation before embarking on a process, which may lead to a dismissal.
- 5.1.11 Accordingly, so the Premier stated, he had no hesitation to send the letter from the former Executive Mayor of the Municipality to the office of the MEC for his comment, specifically in relation to the allegation that he failed to respond to the request for a forensic investigation to be conducted at the Municipality, in March 2019.
- 5.1.12 After following up with the MEC’s office on his response to this matter, once the emergency situation of dealing with the impact of the Covid-pandemic and the hard lockdown had passed, the Premier received a substantive written response to the content of the former Executive Mayor’s letter from the MEC, on 25 August 2020. A copy of this response was provided during the investigation.
- 5.1.13 Having considered the contents of the response that was provided by the MEC, the Premier forwarded a copy thereof to the new Executive Mayor of the Municipality on 1 October 2020, explaining the delay caused by the impact of the Covid-19 pandemic and indicating that he was satisfied that there was no reasonable basis for his office to consider suspending the MEC or to lodge an investigation into the alleged breach of the Executive Ethics Code, as asserted. A copy of this letter was also provided during the investigation.
- 5.1.14 A copy of the Premier’s response was also sent to the Complainant for his comments, which were received on 21 January 2021. The Complainant maintained

his view that there was a duty on the Premier to have investigated the allegations that the MEC acted in breach of the Executive Ethics Code, which also arises out of the Premier's obligation to ensure to ensure ethical good governance independently of any request for an investigation. He further stated that in as much as the allegations were wide ranging, vague or unsubstantiated, they were nonetheless of a serious nature and emanated from an Executive Mayor. He also contended that the Premier could have requested more information or further particulars.

Application of the relevant law

- 5.1.15 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.
- 5.1.16 Section 132(1) of the Constitution provides that the Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature. In terms of section 132(2), 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.
- 5.1.17 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. Members are, in terms of section 133(2) accountable to the legislature for the exercise of their powers and the performance of their functions. Section 133(3) provides that Members of the Executive Council of a province *inter alia*, must act in accordance with the Constitution.
- 5.1.18 The conduct of Members of provincial Executive Councils (including the Premiers) 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.”* (emphases added).

5.1.19 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.*”

5.1.20 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 a MEC by a member of the Provincial Legislature. If the complaint is against a Premier, the Public Protector must submit her report to the President.

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

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

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

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

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

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

5.1.23 Paragraphs 2.3 (a)-(c) of the Executive Ethics Code provides that Members of the Executive may not:

5.1.23.1 Wilfully mislead the legislature to which they are accountable;

5.1.23.2 Wilfully mislead the President or Premier, as the case may be;

5.1.23.3 Act in a way that is inconsistent with their position.

5.1.24 Section 2.2 of the Executive Ethics Code states that *“In deciding whether members of the Executive complied with the provisions of clause 2.1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government”*.

5.1.25 The Premier indicated that he was aware of the similar complaint lodged against the MEC with the Public Protector, in terms of the EMEA and that the matter was under investigation. He was accordingly of the view that an investigation by his office would amount to a duplication of the same investigation. However, the Premier afforded the MEC an opportunity to respond to the letter that was addressed to him by the Executive Mayor on 6 March 2020 and received a comprehensive response on 24 August 2020. The Premier then forwarded the MEC’s response to the new Executive Mayor of the Municipality on 1 October 2020, informing him that having considered the matter, the Premier was of the view that there was no reasonable basis for his office to suspend the MEC and/or launching an investigation into his alleged breach of the Executive Ethics Code.

5.1.26 The Premier conceded that ideally his response to the Executive Mayor should have been provided sooner, but the impact of the Covid-19 pandemic at the time and the extensive responses that had to be obtained from officials of his office in this regard, caused some delay.

Conclusion

- 5.1.27 The complaint lodged with the Premier against the MEC was also lodged on 2 July 2020 with the Public Protector and was investigated in terms of the EMEA.
- 5.1.28 The Premier obtained a response to the letter addressed to him by the former Executive Mayor on 6 March 2020 from the MEC and after having considered the matter, decided that there was no reasonable basis to suspend the MEC and/or to launch another investigation against him. He informed the new Executive Mayor accordingly.
- 5.1.29 The allegation that the Premier failed to act on the allegations against the MEC contained in the letter addressed to him by the former Executive Mayor of the Municipality is not substantiated. The same allegations became the subject of an investigation by the Public Protector in terms of the EMEA when a complaint of a breach of the Executive Ethics Code was lodged on 2 July 2020.
- 5.2 Regarding whether the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020 in connection with the proposal made by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Oudtshoorn Local Municipality is placed under administration, were improper and if so whether his conduct constitutes a breach of the Executive Ethics Code.**

Common cause or undisputed facts

- 5.2.1 It is common cause that the Premier appeared before the Portfolio Committee on 23 June 2020.

5.2.2 During the proceedings, the Premier was asked about a recording that was made of a meeting of the MEC with DA Councillors of the Municipality, held on 12 December 2019, where he allegedly proposed to them that they should agree that the Municipality is placed under administration by the Western Cape Provincial Government.

5.2.3 It is not in dispute that the Premier stated in his response to the Committee that:

“When it comes to talking about recordings and administration etc. obviously what is happening here is very similar to what happened previously in Oudtshoorn where the local government MEC in his role as an MEC has one job to do but also a political job because he also is the Chairman of a political party.

But what they are doing is looking at an administration at that stage and of course it happened once before. I remember personally being involved in the one before because it was an agreement between the national Minister, it was then Pravin Gordhan, and myself as well as Minister Bredell and his HOD and of course they can give some more information on that.

That’s how administration works. You’ve got two ways of doing it.

One you can get political agreement on an administration or you have got to actually follow the rule of law and there are a whole lot of other trigger points but these take a very long time, through lots of cases etc., and of course if you can find a political settlement on getting an administration in place in our experience that is definitely the best way to get it done.”

5.2.4 In response to a question that was asked by a Member of Parliament in relation to the above, the Premier replied as follows:

“You spoke about corruption. You see there’s two ways of administration. I’ve been in executive for ten years. I remember the first administrative process...

you can follow the administrative process, it ends up in court, it doesn't really end up solving the problems for the citizens of that municipality in actual fact it gets worse. Its all within the law, there's nothing illegal about it, you can actually any time have an agreement between political parties to engage in an administrative process in a sphere of government."

Issues in dispute

- 5.2.5 The Complainant contended that the Premier clearly indicated to the Portfolio Committee that there is an alternative to having to "*follow the rule of law*" and that the alternative was "*the best way to get it done.*"
- 5.2.6 He further asserted that it goes without saying that there is no lawful process outside section 139 of the Constitution and section 106 of the Municipal Systems Act in terms of which a Member of a Provincial Executive Council may intervene in the administration of a municipality.
- 5.2.7 The Premier responded to the complaint on 06 November 2020. He indicated that his engagement with the Portfolio Committee in connection with a recording of a meeting between the MEC and DA Councillors of the Municipality where the MEC suggested that a means of resolving the Municipality's internal problems was for the DA Councillors to agree that the Municipality is placed under administration, appears to be regarded as incorrect, as asserted by the Complainant in that "*the MEC can only intervene in the administration of a municipality in terms of his obligation provided for by the Constitution and the Municipality Systems Act, and not by political agreement.*" (sic)
- 5.2.8 The Premier denied having suggested to the Portfolio Committee that an agreement reached between politicians in the same, or different parties with respect to a proposed intervention in local government is a means by which to bypass, avoid or in any way undermine the application of the law as it applies to

an intervention in a municipality, in terms of section 139 of the Constitution. According to the Premier, he only advised the Portfolio Committee that if political consensus on the need for intervention at a municipality in terms of section 139 of the Constitution can be reached, that is definitely the best way to get it done.

- 5.2.9 The Premier further stated that given the increase in failing municipalities and the resultant interventions being approved by the National Council of Provinces, such political discussions over the means by which municipalities can be assisted or helped, so he believes, are becoming a common place, and in his view this should be welcomed and encouraged.
- 5.2.10 According to the Premier, all or any decisions to place a municipality under administration should be discussed and communicated via internal political structures, in the hope that such process curtails costly, expensive litigation by parties who may be affected in that process and who have not been forewarned or engaged. This is the message he conveyed to the Portfolio Committee in this matter and to suggest, as the Complainant does, that the MEC was not entitled to suggest to his own caucus (DA) that an intervention in Municipality, delinquent as it was it is in his view simply disingenuous.
- 5.2.11 In his response to the Notice issued in terms of section 7(90) of the Public Protector Act, the Premier confirmed that he was aware of the meeting between the MEC and the DA Councillors of the Municipality where the MEC suggested that they should consider requesting the Provincial Government to place the Municipality under administration, as a means to resolve its problems.
- 5.2.12 The Premier maintained that voicing his support for the MEC's suggestion to the Portfolio Committee was proper and lawful as prior negotiations at political level are crucial in facilitating answers seeking solutions to problems that arise in administrations from time to time.
- 5.2.13 He further indicated that one method by which municipalities can be assisted is *"for a municipality to volunteer itself for a section 139 intervention by a provincial*

government” and an assertion that just because the Constitution and the Municipal Systems Act do not expressly make provision for a council to request this, or resolve to so agree, means that it cannot be done, would be incorrect

- 5.2.14 The Premier also stated in essence that his experience of trying to remedy issues that arise in problematic municipalities, both at service and executive level has resulted in provincial institutional belief that voluntary requests for provincial interventions from municipalities in distress are both desirable and encouraged. This encouragement derives in part from a knowledge of the complexity of the legislation that surrounds this area of law, as well as strict adherence to the doctrine of separation of powers.
- 5.2.15 The Premier averred that section 3 of the “*Provincial Monitoring Support Act, 2014*”, specifically enables a municipal council to request the assistance of the Provincial Government in performing its functions. Further, that should the DA caucus have followed the suggestion by the MEC and brought the issue before the Municipal Council, which then resolved to request the assistance of the Provincial Government this could have been regarded as a request under section 3 of the Provincial Act.
- 5.2.16 The Premier in his response also averred 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 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.
- 5.2.17 The Premier indicated that section 139 of the Constitution and section 136 of the MFMA authorize the provincial executive to intervene in a municipality. It is only in circumstances where a provincial executive cannot or does not adequately intervene in circumstances that warrant a mandatory intervention that the national executive must intervene.

5.2.18 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.”

5.2.19 The Premier concluded in this regard that his expression of support at the Portfolio Committee of the MEC’s suggestion to a DA Caucus of the Council of the Municipality was neither misdirected, nor contrary to the Constitution or the Executive Ethics Code.

5.2.20 The Premier further indicated that any finding made against him in as far the utterances he made before the Portfolio Committee would be a breach of the doctrine of freedom of speech, as enshrined in the concept of parliamentary privileges and immunity in the Constitution and legislation which precludes the Public Protector from making any findings herein.

5.2.21 He asserted that this doctrine cloaks both members and witnesses called to committees with immunity in respect of any damages or adverse finding and gives cognisance to the need for Parliament to protect its integrity and regulate its own affairs.

- 5.2.22 The Premier stated that the scope of the privilege and immunity extends to anything said in, produced before, or submitted to Parliament or its committees and, which involves the business of Parliament. He further indicated that protection is not limited to members of parliament and the national legislation referred to above extends the privilege to witnesses who are linked to the business of Parliament i.e. to him in the circumstances of the comments made by him to the Portfolio Committee in question.
- 5.2.23 According to the Premier, he was invited to the Portfolio Committee to address it on the Western Cape Province's state of readiness. The meeting was held virtually. Subsequent to his presentation, follow up questions were asked by Members of the Committee. The particular issue in question i.e. the suggestion which Mr A Bredell had proffered to the DA caucus had nothing at all to do with either the agenda or the address which he provided, and the question was clearly aimed at political gain, more than information. That notwithstanding, he offered his opinion on the question raised by the Committee member comprehensively and honestly.
- 5.2.24 The Premier referred to various provisions of legislation, which in his view confirm the rights of privilege and free speech in Parliament. He referenced section 58 and 117 of the Constitution. He also made reference sections 14, 16, 17, 18 and 22 of the Immunities Act. He also referred to jurisprudence confirming the right of free speech in Parliament, as afforded by section 58(1) of the Constitution and the protection of members and witnesses against criminal and civil liability.

Application of the relevant legal prescripts

- 5.2.25 Section 125(1) of the Constitution states that "*The executive authority of a province is vested in the Premier of that Province.*"
- 5.2.26 Section 132(1) of the Constitution provides that "*The Executive Council of a province consists of the Premier as head of the Council and no fewer than five*

and no more than ten members appointed by the Premier from among the members of the provincial legislature.”

5.2.27 Section 132 (2) provides that *“The Premier of a province appoints the members of the Executive Council, assigns their powers and functions and may dismiss them.”*

5.2.28 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. Members are, in terms of section 133(2) accountable to the legislature for the exercise of their powers and the performance of their functions. Section 133(3) provides that Members of the Executive Council of a province *inter alia*, must act in accordance with the Constitution.

5.2.29 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 or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.”

(In the case of an oath: So help me God.)

5.2.30 The conduct of Members of provincial Executive Councils (including the Premiers) 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).

5.2.31 It is thus clearly expected by section 136 of the Constitution of 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.

5.2.32 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.”

5.2.33 Sections 3(1) and 4 of the EMEA provide that the Public Protector must investigate any alleged breach of the Executive Ethics Code by an MEC on receipt of a complaint from a member of the Provincial Legislature. If the complaint is against a Premier, the Public Protector must submit her report to the President.

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

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

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

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

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

- 5.2.35.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.
- 5.2.36 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.
- 5.2.37 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.
- 5.2.38 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 Council 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.
- 5.2.39 It follows therefore that Members 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 (including the Premiers), 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 again.
- 5.2.40 The constitutional imperative of ethical conduct as also provided for in paragraphs 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 the Councillors representing that party should agree 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 Members of the Executive Council to be objective and diligent and to act in the best interests of his or her office and government as a whole, and not only of one political party.

5.2.41 Section 139 (1) of the Constitution provides that:

“When a municipality cannot or does not 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 obligations and stating any steps required to meet its obligations

(b) assuming responsibility for the relevant obligation....

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.”.

5.2.42 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 not fulfil a statutory obligation of that 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.”

- 5.2.43 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.
- 5.2.44 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.
- 5.2.45 The Provincial Government has to take an objective executive decision on whether or not steps should be taken by it intervene in the administration of the Municipality. The MEC responsible for Local Government clearly plays a crucial role in this process.
- 5.2.46 In this matter, the Premier was requested by the Portfolio Committee to respond to the MEC urging Councillors of the Municipality representing the DA political party to agree that the Municipality is placed under administration by the Western Cape Provincial Government, to resolve its internal problems. His response was that the MEC has two roles to play. First as MEC and second as the Chairperson of a political party (DA).
- 5.2.47 In his response to the Portfolio Committee, the Premier further suggested that intervention in a municipality by the Provincial Government can be done through applying the rule of law or by means of a political agreement placing the municipality under administration, which in his view was definitely the best way to get it done.

- 5.2.48 In his response during the investigation, the Premier reiterated that all or any decisions to place a municipality under administration should be so discussed and communicated via internal political structures, in the hope that such process curtails costly, expensive litigation by parties who may be affected in that process and who have not been forewarned or engaged.
- 5.2.49 The suggestion or contention by the Premier that one way to approach placing a municipality that cannot or does not fulfil its executive obligations is to have a political agreement by all the parties before the decision is taken as prescribed by law, which may result in costly litigation, might not be without merit. However in this case the Premier was aware that what he was asked about in the Portfolio Committee was not about a political agreement, but a suggestion made by the MEC to the DA Councillors that they, as the majority in the Council, should agree that it is placed under administration. It was not a suggestion made to a sitting of the Council where all parties are represented, but a suggestion clearly based on political expediency for one party only. It is this suggestion of the MEC that the Premier supported at the Portfolio Committee
- 5.2.50 It is not clear from the explanation provided by the Premier, 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.
- 5.2.51 Neither section 139 of the Constitution nor the Municipal Systems Act provide for political interference or expediency in the process of placing a municipality under administration.

5.2.52 Section 3 of the Western Cape Monitoring and Support of Municipalities Act, 2014 provides that:

- “(1) A municipality may request the Provincial Minister or the head of any provincial department to assist the municipality in performing its functions generally or to deal with a specific matter.
- (2) When such a request is made—
- (a) the Department or the other relevant provincial department must cooperate with the municipality and, as far as is reasonably possible, provide the assistance requested; and
- (b) the Department, or the other relevant provincial department, and the municipality must coordinate their actions.
- (3) The municipality is not absolved from its responsibility to manage its own affairs and perform its functions when it makes a request for assistance.”

5.2.53 The Premier contended that should the DA caucus have followed the suggestion by the MEC and brought the issue before the Municipal Council, which then resolved to request the assistance of the Provincial Government to be placed under administration, this could have been regarded as a request under section 3 of the Provincial Act. However, as indicated above, provincial intervention in a municipality is regulated by section 139 of the Constitution. It does not entail mere assistance by the provincial government in the performance of its functions or to deal with a specific matter, as contemplated by section 3 of the Western Cape Monitoring and Support of Municipalities Act, 2014. The intervention referred to in section 139 of the Constitution includes the issuing of a directive to the Municipal Council, describing the extent of the failure to fulfill its obligations, assuming the responsibility for certain obligations of the municipality and dissolving the Municipal Council and appointing an administrator.

5.2.54 Section 58 (1) of the Constitution provides that: “Cabinet Members, Deputy Ministers and members of the National Assembly-

- (a) *have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and;*
 - (b) *are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-*
 - (i) *anything that they have said in, produced before or submitted to the Assembly or any of its committees; or*
 - (ii) *anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its Committees.”*
- (emphases added)

5.2.55 Section 117(1) of the Constitution provides that “*Members of a provincial legislature and the province’s permanent delegates to the National Council of Provinces-*

- (a) *have freedom of speech in the legislature and in its committees, subject to its rules and orders, and*
- (b) *are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-*
 - (i) *anything that they have said in, produced before or submitted to the legislature or any of its committees; or*
 - (ii) *anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees.*

5.2.56 In this case, it was a member of a provincial legislature that appeared before a Portfolio Committee of the National Assembly. The Premier is not a “*Cabinet Member, Deputy Minister or a Member of the National Assembly*”. Accordingly, the provisions of section 58(1) did not apply to him during his appearance in Parliament.

5.2.57 Section 14(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (Immunities Act) provides that:

“(1) *A joint committee may-*

- (a) *summons any person to appear before it to give evidence on oath or affirmation, or to produce documents; or*
- (b) *require any person or institution to report to it.”*

5.2.58 In terms of section 16 of the Immunities Act the law regarding privilege as applicable to witnesses summonsed to give evidence or to produce a document before the High Court of South Africa applies to the examination of a person in terms of section 15.

5.2.59 A person who is being examined under oath or affirmation in terms of section 15 of the Immunities Act may be required to answer any question put to him or her in connection with the subject of the enquiry, and to produce any document that he or she is requested to produce under that section, despite the fact that the answer or the document would incriminate him or her or would tend to expose him or her to criminal or civil proceedings, or damages. Evidence given under oath or affirmation by a person before a House or committee may not be used against that person in any court or place outside Parliament, except in criminal proceedings where the person concerned stands trial on a charge of perjury or a charge contemplated in section 17(1)(c) or (2)(d) or (e).

5.2.60 Section 17 of the Immunities Act provides:

“(1) A person who

- (a) has been duly summonsed in terms of section 14 and who fails, without sufficient cause-
 - (i) to attend at the time and place specified in the summons; or
 - (ii) to remain in attendance until excused from further attendance by the person presiding at the enquiry;
- (b) when called upon under section 15(a), refuses to be sworn in or to make an affirmation as a witness; or

(c) fails, without sufficient cause—

(i) to answer fully and satisfactorily all questions lawfully put to him or her under section 15(b); or

(ii) to produce any document in his or her possession or custody or under his or her control which he or she has been required to produce under section 15(b),

commits an offence and is liable to a fine or to imprisonment for a period not exceeding 12 months or to both the fine and the imprisonment.

5.2.61 Section 18 of the Immunities Act provides that:

“(1) No person is liable to civil or criminal proceedings in respect of the publication of any report, paper or minutes of Parliament or a House or committee by order or under the authority of the Houses, or the House or committee concerned.

(2) No member or staff member is liable to civil or criminal proceedings in respect of the publication to a member of a document that has been submitted to or is before Parliament or a House or committee.”

5.2.62 Section 22 of the Immunities Act provides that:

“No person is liable in damages or otherwise for any act done in good faith in terms of this Act, or under the authority of a House or committee and within the legal powers of the House or committee, or under any order or summons issued by virtue of those powers.” (emphasis added)

5.2.63 According to the Premier, he was invited to make a presentation to the Portfolio Committee on the state of Covid-19 readiness of the Western Cape Province, when the questions relating to MEC Bredell’s meeting with the DA Councillors

were raised. He was therefore not a witness and did not testify under oath or affirmations, as contemplated by section 16 of the Immunities Act.

- 5.2.64 An investigation by the Public Protector of a complaint of the Executive Ethics Code is also not civil or criminal proceedings, as referred to by the Immunities Act.
- 5.2.65 It has to be considered whether section 22 of the Immunities Act applied to the Premier when he made the utterances to the Parliamentary Portfolio Committee in support of the MEC. In terms of this provision, he would only qualify for immunity if he acted in good faith when doing so.
- 5.2.66 As the MEC's conduct when he attempted to convince the DA Councillors of the Municipality to agree that it is placed under administration was not in line with the relevant provisions of the Constitution, the Municipal Systems Act and even the practice of political negotiation and agreement as submitted by the Premier during the investigation, of which the Premier was fully aware, it cannot be concluded that he acted in good faith when he responded to questions of the Parliamentary Portfolio Committee in relation thereto and in support of the MEC's conduct

Conclusion

- 5.2.67 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 critical one that has to focus objectively on the best interest of good governance and administration. This process has to precede any decision in respect of intervention and 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.

- 5.2.68 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.
- 5.2.69 The statements made by the Premier to the Portfolio Committee supporting the conduct of the MEC were not in accordance with the Constitution and legislation regulating the intervention by a Provincial Government in a municipality and even the practice of political negotiation and agreement, as submitted by him. His statements were therefore not in the best interest of good governance and not consistent with what is expected of a person in the position of a Premier. He therefore acted in breach of section 136(2)(b) of the Constitution and paragraphs 2.1(c) 2.1(d), and 2.3(c) of the Executive Ethics Code.
- 5.2.70 As the Premier did not act in good faith, it cannot be found that he escaped liability for his statements made in support of the conduct of the MEC, in terms of the Immunities Act.

6 FINDINGS

- 6.1 Regarding whether the Premier failed to act on the allegations of improper conduct by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell, which were brought to his attention by the former Executive Mayor of the Municipality on 6 March 2020 and if so, whether such conduct was improper and constitutes a breach of the Executive Ethics Code.**
- 6.1.1 The allegation that the Premier failed to act on the allegations against the MEC contained in the letter addressed to him by the former Executive Mayor of the Municipality is not substantiated. The same allegations became the subject of an

investigation by the Public Protector in terms of the EMEA when a complaint of a breach of the Executive Ethics Code was lodged on 2 July 2020.

6.1.2 The Premier requested and obtained a comprehensive response from the MEC on the allegations and decided that there was no reasonable basis for further action by his office.

6.2 Regarding whether the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020 in connection with the proposal made by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Oudtshoorn Local Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, was improper and if so whether his conduct constitutes a breach of the Executive Ethics Code.

6.2.1 The allegation that the statements made by the Premier to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs on 23 June 2020 in connection with the proposal made by the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell to DA Councillors of the Municipality on 12 December 2019 that they should agree that the Municipality is placed under administration, were improper, is substantiated.

6.2.2 The statements made by the Premier to the Portfolio Committee supporting the conduct of the MEC were not in accordance with the Constitution and legislation regulating the intervention by a provincial government in a municipality and even the practice of political negotiation and agreement, as submitted by him. His statements were therefore not in the best interest of good governance and not consistent with what is expected of a person in the position of a Premier. He

therefore acted in breach of section 136(2)(b) of the Constitution and paragraphs 2.1(c) 2.1(d), and 2.3(c) of the Executive Ethics Code.

7. REMEDIAL ACTION

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

7.1.1. The President to:

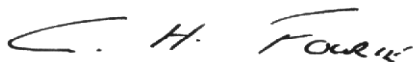
7.1.1.1. In terms of section 3(5)(2)(b) of the EMEA, submit a copy of this report and any comments thereon to the National Council of Provinces within a reasonable time, but not later than 14 days after receiving the report.

8 MONITORING

8.1.1 The President 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
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