

09 July 2019

To: KwaZulu-Natal Department of Cooperative Governance
and Traditional Affairs (KZN COGTA)

c/o: Member of the Executive Council
Mr Sipho Hlomuka

Per: E-mail (dadda.mngomezulu@kzncogta.gov.za)
Ms Mngomezulu – Executive Assistant to the MEC

And to: The Head of Department
KZN COGTA

Mr Tando Tubane
Per: E-mail (thando.tubane@kzncogta.gov.za)

And to: The Acting Director: Office of the HOD
KZN COGTA
Ms Buhle Ally

Per: E-mail (buhle.ally@kzncogta.gov.za)

Dear Sir,

**ALLEGED IMPROPER CONDUCT AND BREACH OF THE CODE OF CONDUCT BY MAYOR GUMEDE
AND CLLR MONDLI MTHEMBU
OUR REF: L4/DA/03
YOUR REF: UNKNOWN**

1. As you are aware, the Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA envisions a prosperous country with an organised, engaged and empowered civil society that ensures responsible use of tax revenues throughout all levels of Government.
2. The abovementioned matter as well as previous correspondence exchanged on the topic refers. The previous correspondence with eThekweni Municipality is attached for ease of reference.
3. In a letter sent by OUTA to eThekweni Municipality Members of the Executive Council on 1 July 2019, we stated, amongst other, that –
 - 3.1 There are various examples, where Mayor Zandile Gumede and Councillor Mondli Mthembu may be in breach of the Code of Conduct for Councillors¹.
 - 3.2 That the Council must take steps as its legislative duty, to begin an investigation into the allegations against Gumede and Mthembu as stipulated by the Municipal Systems Act.
 - 3.3 Failure to take any action in the above matter would be a dereliction of duty.
 - 3.4 OUTA reserves the right to approach and exercise our rights in all legal forums for the community's best interests to prevail.
4. We alerted the Executive Council that there is enough material available, both public and confidential, to undertake its oversight function, with regards to Gumede and her co-accused, Mr Mondli Mthembu, an Executive Committee Councillor and Chairperson of the Human Settlements and Infrastructure Committee. This material includes:

¹ Municipal Systems Act, 2000, Schedule 1, Paragraph 11

- 4.1 A charge sheet implicating Gumede, Mthembu and the remaining 10 co-accused in their alleged illegal role in the awarding of a R208-million waste management tender. The charge sheet has *been presented to the Durban Specialised Commercial Crime Court.*
 - 4.2 A supporting affidavit by the HAWKS investigating officer Lt-Col Ngoako Mphaki handed to the same court during Gumede and Mthembu's bail application on 14 May 2019.
 - 4.3 An internal report compiled by the city's Head of the City Integrity and Investigations Unit. The report was compiled by forensic accountancy firm Integrity Forensic Solutions (IFS) on behalf of the integrity unit. This report, which in the possession of the City, underpins the criminal investigation.
5. The affidavit (see 4.2), which gives a summary of the evidence at hand, points to certain allegations which could be in breach of the Code of Conduct for Councillors² such as:
- 5.1 Members of the Bid Specifications Committee (BSC), the Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC) would be instructed by Gumede and Mthembu on which companies to award tenders to while sitting in on these committees, leaving the SCM committees dysfunctional;
 - 5.2 Gumede and Mthembu consistently interfered in the operational functions and duties of the employees at "all levels of the administration...by inducing said employees to committing various unlawful acts".
 - 5.3 Mthembu called the four implicated suppliers into City Hall and ordered them to sub-contract "the illegal portion of the contract to other suppliers identified" by Mthembu, thus directly interfering and ignoring SCM protocol.
 - 5.4 Gumede incited a march on 16 April 2019 to Durban City Hall requesting the removal of the City Manager from office "on the grounds he refuses to take orders from the mayor to make irregular payments" in respect of the questionable tender.
6. We went further as to state it is our submission that –
- 6.1 The taking of disciplinary steps against a councillor does not automatically amount to an interference in a criminal investigation.
 - 6.2 That the law makes provision for civil and criminal proceedings to run concurrently without causing a conflict or intrusion on each other.
 - 6.3 Although the processes may be similar, the burden of proof in civil and criminal proceedings are vastly different as well as the subsequent consequences.
 - 6.4 A criminal conviction in itself does not amount to breach of a civil code and *vice versa* – thus two independent enquiries are required.
 - 6.5 There is at least a warranted reasonable suspicion of the breach of the Code of Conduct for councillors.
7. The 1 July 2019 letter was sent only after OUTA had unsuccessfully raised the same issues with the City Speaker William Mapena on 21 May 2019.
8. In correspondence received from the Speaker, dated 23 May 2019, we were advised, amongst other, that –
- 8.1 The Municipal Council did not in any way contribute or cause the investigation which led to the charges and arrest of the Mayor, Ms Z Gumede (Gumede).

² Municipal Systems Act, 2000, Schedule 1, Paragraph 11.

- 8.2 The HAWKS are currently investigating the matter and that the Council has been instructed not to “*interfere or do anything which might jeopardise the investigation.*”
- 8.3 Save for being arrested, the Office of the Speaker does not possess any information “*upon which a reasonable suspicion can be formed that there has been a breach of the Code of Conduct... or otherwise any legal duty or standard.*”
- 8.4 The Office of the Speaker cannot engage on the topic.
- 8.5 Caution should be exercised against the temptation to interfere with the criminal investigations and the law enforcement authority should be allowed to conduct their investigations without perceived pressure.
9. OUTA believes the Speaker’s rationale is completely misplaced.
10. We would like to remind the KwaZulu-Natal Department of Cooperative Governance and Traditional Affairs too that it has a legislative duty to intervene in matters of improper conduct as set by the Code of Conduct³ which states:
- 10.1 “*The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office.*”
- 10.2 “*The Commissions Act, 1947 (Act No.8 of 1947), may be applied to an investigation in terms of subitem (3).*”
- 10.3 “*If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may-*
- a) *suspend the councillor for a period and on conditions determined by the MEC; or*
- b) *remove the councillor from office.*”
- 10.4 “*Any investigation in terms of this item must be in accordance with the rules of natural justice.*”
11. Based on the evidence at hand, the statutory duty of your office and the responsibility of your office to the community of eThekweni and eThekweni’s Council failure to institute any form of investigation into this matter, we strongly urge your office to take the legislative steps to investigate possible breaches of the Code of Conduct, as a matter of urgency.
12. The failure to act will amount to a dereliction of duty by both the Council and the Department and we reserve the right to approach and exercise our rights in all legal forums for the community’s best interests to prevail.
13. We trust you find above in order and eagerly await your response on or before the **16 July 2019**.

Yours Faithfully,



Tim Tyrrell
Provincial Manager
OUTA KZN
E-mail: tim.tyrrell@outa.co.za

³ Municipal Systems Act, 2000, Schedule 1, Paragraph 14.4 – 14.7