

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



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE
EXECUTIVE ETHICS CODE BY THE FORMER PREMIER OF THE FREE STATE, MR.
ELIAS SEKGOBELO "ACE" MAGASHULE**

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Executive Summary

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] and section 3(3) of the Executive Members` Ethics Act, 1998 [Act No. 12 of 1998] read with section 8 of the Public Protector Act, 1994 [Act No. 23 of 1994].
- (ii) The report relates to an investigation into allegations of a violation of the Executive Ethics Code by Mr. Elias Sekgobelo "Ace" Magashule ("Mr Magashule") in his former capacity as Premier of the Free State Province.
- (iii) On 09 May 2016, Hon Jankielsohn, (the Complainant), lodged a complaint with the office of the Public Protector in terms of section 4(1)(b) of the Executive Members' Ethics Act, 1998.
- (iv) In his complaint, Hon. Jankielsohn refers to two instances in which Mr. Magashule allegedly misled the Provincial Legislature in his written responses to questions from Members of the Free State Provincial Legislature. The first instance being in respect of the involvement of the Premier's office in the funeral arrangements of the late Member of the Executive Council (MEC) of Health, Ms. Fundiswa Ngubentombi ("Ms. Ngubentombi") and the second, concerning a Forensic report in connection with the appointment of Letlaka Communications by the Free State Office of the Premier.
- (v) Hon. Jankielsohn stated that in his reply to the question paper of 20 November 2013 regarding the funeral costs of Ms. Ngubentombi, Mr. Magashule asserted that the extent of involvement of the Office of the Premier was merely to inform relevant Ministries, departments and persons of the details of the official provincial funeral.
- (vi) The Complainant argued that, in a letter from the former Director-General (DG) in the Office of the Premier to the Municipal Manager of the Fezile Dabi District Municipality, the extent of involvement was not merely to inform relevant Ministries, departments and persons of the details of the official provincial funeral, but also to instruct inter alia the municipality to undertake the costs which would

be refunded by the Free State Provincial Government, specifically the Department of Public Works and Infrastructure.

- (vii) It is the Complainant's contention that the Premier was blatantly misleading the Legislature in his reply concerning the involvement of the Premier's Office in the funeral arrangements of the late MEC as well as the commitment by his office to ensure that the Provincial Government refunds the municipality.
- (viii) In the second instance, Hon. Jankielsohn stated that, during a sitting of the Free State Legislature on 21 May 2015, Mr. Magashule was asked questions relating to a National Treasury Report regarding the appointment of Letlaka Communications by the Office of the Premier and in his reply he (Mr. Magashule) ostensibly denied all knowledge of the aforesaid report.
- (ix) The Complainant argued that in two replies from former [unnamed] Ministers of Finance on 15 November 2013 and 14 August 2015, respectively, Mr. Magashule was made aware of the report and refused to act on the recommendations by the Ministers to take criminal action against implicated individuals. Mr Magashule denied knowledge of the report and the recommendations of the Ministers in a reply dated 30 September 2015.
- (x) **Based on the analysis of the complaint, and having taken into account the fact that the Premier was also a Member and Chairperson of the Executive Council, the following issues have been identified to inform and focus the investigation:**
- (a) Whether Mr. Magashule, in his capacity as the former Premier of the Free State, made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the funeral arrangements of the late Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code;

- (b) Whether Mr Mashinini, in his capacity as the Member of the Executive Council (MEC) responsible for the Free State Department of Public Works and Infrastructure, made a misleading statement to the Free State Provincial Legislature posed in the Provincial Legislature relating to the funeral arrangements of the late MEC of the Free State Provincial Department of Health, Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code; and
- (c) Whether Mr. Magashule made a misleading statement to the Free State Provincial Legislature in his response to question posed in the Provincial Legislature relating to the findings and recommendations made in the JGL Forensics Services' forensic investigation report, as well as recommendations made by the Minister of Finance in respect of allegations of irregularities associated with contracts entered into between the Office of the Premier: Free State Province and Letlaka Communications, and in doing so, violated the provisions of the Executive Ethics Code.
- (xi) The investigation process included the exchange of correspondence and documentation between the Public Protector and the former Premier of the Free State Province, Mr. Elias Magashule, the Complainant, Mr Jankielsohn, the MEC for Police, Roads and Transport in the Free State Provincial Government, Mr Mashinini, Ms Mamashie of the Free State Legislature and the Office of the current Premier of the Free State Province.
- (xii) The approach to the investigation included analysis of the relevant documentation, as well as consideration and application of the relevant laws, regulatory framework and prescripts.
- (xiii) Key laws taken into account to determine whether former the former Premier, Mr Magashule acted in violation of the Executive Ethics Code were principally the following:

- (a) **The Constitution, 1996**, which is the supreme law of the Republic. Section 96(1) thereof provides that that, Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation.
- (aa) Section 132(1) provides that, the Executive Council of a province consists of the Premier, as head of the Council and members appointed by the Premier from among the Members of the Provincial Legislature.
- (bb) Section 133(2) states that Members of the Executive Council of a province are accountable collectively and individually to the Legislature for the exercise of their powers and the performance of their functions.
- (cc) In addition, section 133(3)(a) provides that, Members of the Executive Council of a province must act in accordance with the Constitution. Section 133(3)(b) which provides that, Members of the Executive Council of a province must provide the legislature with full and regular reports concerning matters under their control.
- (dd) Section 136(1) which states that, Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.
- (b) **The Executive Executive Members' Ethics Act, 1998** (the Act), whose primary objective of is to provide for a Code of Ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils.
- (aa) Section 2 of the Act provides that, the President must publish a Code of Ethics prescribing standards and rules aimed at promoting open, democratic and accountable government.
- (bb) Section 3 of the Act provides that, the Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint by *inter alia* a Member of the National Assembly or a permanent delegate to the National Council of Provinces.

- (cc) Sub-sections 3(1) and (2) (a) provides that, the Public Protector must submit a report of the alleged breach of a Code of Ethics within thirty (30) of receipt of the complaint to the President if the complaint is against a Cabinet Member, Premier or Deputy Minister. However, section 3(3) provides that, if the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.
- (dd) Section 3(4) provides that when conducting an investigation in terms of this section, the Public Protector has all the powers vested in her in terms of the Public Protector Act.
- (ee) Section 3(5)(a) of the Act provides that the President must within a reasonable time, but not later than 14 days after receiving a report from the Public Protector on an investigation into allegations of a violation of the Code by a Cabinet member, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- (c) The **Executive Ethics Code** issued in terms of the Executive Members' Ethics Act, 1998, which provides for the Code which Cabinet Ministers must comply in performing their official responsibilities, in particular paragraphs 2.1 (a-d), paragraph 2.2, paragraph 2.3 (b),(c) and (e).
- (d) **The Code of Conduct and Ethics for Members of the Free State Provincial Legislature**, which serves to provide for guidelines on principles, ethical conduct, as well as rules and obligations that the Members of the Free State Provincial Legislature are expected to abide with.
- (aa) In terms of paragraph 3.1 of the Code of Conduct and Ethics, a Member of the Free State Legislature must be loyal to the Republic of South Africa and its people. He or she must uphold the laws of the Republic of South Africa and act with respect towards the institution of the Legislature. A member must ensure that his or her conduct, whether in a personal or official capacity does not bring

the Legislature into disrepute, or damage public confidence in the system of government.

- (ee) Paragraph 3.7 states that a Member of the Free State Legislature is accountable for his or her decisions and actions to the public and must submit himself or herself to whatever scrutiny is appropriate to his or her office.
- (e) **The Prevention and Combating of Corrupt Activities Act, 2004**, which provides, *inter alia*, for the strengthening of measures to prevent and combat corruption and corrupt activities as well as to provide for the offence of corruption and offences relating to corrupt activities.
- (aa) Section 34(1) of the Prevention and Combating of Corrupt Activities Act, 2004 which states that, any person who holds a position of authority must report knowledge or suspicion of an offence to any police official.
- (xiv) Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the response to a section 7(9)(a) notice issued to the former Premier of the Free State Province, as well as a letter issued to the former MEC responsible for the Free State Department of Public Works and Infrastructure, I now make the following findings:
 - (aa) The allegation that Mr. Magashule blatantly misled the Free State Provincial Legislature in his response to the question of the Hon. Jankielsohn regarding both his Department's involvement in the funeral arrangements as well as the commitment by his office to ensure that the Provincial Government refunds the municipality, could not be substantiated.
 - (bb) The allegation that Mr. Mashinini misled the Free State Provincial Legislature in response to the question of the Hon. Jankielsohn relating to the funeral arrangements of the late MEC for Health, Ms. Ngubentombi, was substantiated.

- (cc) The allegation that Mr. Magashule deliberately misled the Free State Provincial Legislature in his response to the question of the Hon. Jankielsohn by denying any knowledge of the report by JGL Forensic Services as well as the recommendations of the Minister of Finance, are also unsubstantiated.
- (xv) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying maladministration and improper conduct referred to in this report is the following:
- (a) **The Premier of the Free State Province, Ms Sisi Ntombela, to;**
- (aa) To take cognisance of the findings of a violation of the Constitution and the Executive Ethics Code by a Member of the Executive Council, to ensure that such conduct is not repeated and to take appropriate corrective action to prevent a recurrence of such conduct referred to in this report;
- (bb) In terms of section 3(6) of the Executive Members' Ethics Act, the Premier must within a reasonable time, but not later than 14 days after receiving a report, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE ETHICS CODE BY THE FORMER PREMIER OF THE FREE STATE, MR. ELIAS SEKGOBELO "ACE" MAGASHULE

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 3(3) of the Executive Members` Ethics Act, 1998 (the Executive Members` Ethics Act) read with section 8 of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 3(2)(a) of the Executive Members` Ethics Act to the Premier of the Free State Provincial Government , Ms Sisi Ntombela and the Speaker of the Free State Provincial Legislature, Ms Zanele Sifuba.
- 1.3 Copies of the report are also provided to the former Premier of the Free State province (currently ANC Secretary-General), Mr. Elias Sekgobelo "Ace" Magashule ("Mr. Magashule") and the Honourable Mr. Roy Jankielsohn ("Hon. Jankielsohn"), MPL, Leader of the Democratic Alliance (DA) in the Free State in terms of section 8(3) of the Public Protector Act, 1994.
- 1.4 The report relates to an investigation into allegations of a violation of the Executive Ethics Code by Mr. Magashule in his former capacity as Premier of the Free State Province.

2. THE COMPLAINT

- 2.1 On 09 May 2016, Hon Jankielsohn, (the Complainant), lodged a complaint with the office of the Public Protector in terms of section 4(1)(b) of the Executive Members` Ethics Act, 1998.
- 2.2 In his complaint, Hon Jankielsohn indicated that he initially submitted a complaint to the Speaker of the Free State Legislature on 14 October 2015.

- 2.3 In the aforesaid complaint, he alleged that Mr. Magashule, in his official capacity as the former Premier of the Free State, violated the Code of Conduct and Ethics for Members of the Free State Provincial Legislature as prescribed by the Standing Rules and Orders of 2014.
- 2.4 Further, that the Speaker responded to the complaint on 11 November 2015, indicating that the allegations against Mr. Magashule were not sufficiently substantiated and therefore the Speaker was unable to proceed with a referral against Mr. Magashule.
- 2.5 As a corollary to this, Hon. Jankielsohn, approached the Public Protector and requested that an investigation be commissioned with a view to determining whether the Mr Magashule, in his capacity as the Premier of the Free State at the time, breached the Code of Ethics for Members of the Free State Provincial Legislature.
- 2.6 In his complaint, Hon. Jankielsohn refers to two instances in which Mr. Magashule allegedly misled the Provincial Legislature in his written responses to questions from Members of the Free State Provincial Legislature. The first instance being in respect of the involvement of the Premier's office in the funeral arrangements of the late Member of the Executive Council (MEC) of Health, Ms. F Ngubentombi ("Ms. Ngubentombi") and the second, concerning a Forensic report in connection with the appointment of Letlaka Communications by the Free State Office of the Premier.
- 2.7 Hon. Jankielsohn stated that in his reply to the question paper of 20 November 2013 regarding the funeral costs of Ms. Ngubentombi, Mr. Magashule stated that all payments relating to the funeral were the responsibility of the Department of Public Works.
- 2.8 Further to his reply, Mr. Magashule asserted that the extent of involvement of the Office of the Premier was merely to inform relevant Ministries, departments and persons of the details of the official provincial funeral.

- 2.9 The Complainant argued that, in a letter from the former Director-General (DG) in the Office of the Premier to the Municipal Manager of the Fezile Dabi District Municipality, the extent of involvement was not merely to inform relevant Ministries, departments and persons of the details of the official provincial funeral, but also to instruct *inter alia* the municipality to undertake the costs which would be refunded by the Free State Provincial Government, specifically the Department of Public Works and Infrastructure.
- 2.10 Furthermore, that the former Free State MEC for Public Works and Infrastructure, Mr Malambulele Samuel Mashinini (“Mr. Mashinini”) stated in a written reply to a Parliamentary Question dated 22 August 2014, that ‘his’ department did not commit to refund the cost incurred for the funeral for the late MEC of Health to the Fezile Dabi District Municipality.
- 2.11 It is the Complainant’s contention that the Premier was blatantly misleading the Legislature in his reply concerning the involvement of the Premier’s Office in the funeral arrangements of the late MEC as well as the commitment by his office to ensure that the Provincial Government refunds the municipality.
- 2.12 In the second instance, Hon. Jankielsohn stated that, during a sitting of the Free State Legislature on 21 May 2015, Mr. Magashule was asked questions relating to a National Treasury Report regarding the appointment of Letlaka Communications by the Office of the Premier and in his reply he (Mr. Magashule) ostensibly denied all knowledge of the aforesaid report.
- 2.13 The Complainant argued that in two replies from former [unnamed] Ministers of Finance on 15 November 2013 and 14 August 2015, respectively, Mr. Magashule was made aware of the report and refused to act on the recommendations by the Ministers to take criminal action against implicated individuals.
- 2.14 Further, that he continued denying knowledge of the report and the recommendations of the Ministers in another reply dated 30 September 2015.

2.15 Section 3(1) read with section 4(1)(b) of the Executive Members' Ethics Act provides that the Public Protector must investigate any alleged violation of the code of ethics, by a Member of the Executive Council (including the Premier) on receipt of a complaint by a member of the provincial legislature of a province.

3. **Based on the analysis of the complaint, and having taken into account the fact that the Premier was also a Member and Chairperson of the Executive Council, the following issues have been identified to inform and focus the investigation:**

3.1 Whether Mr. Magashule in his capacity as the former Premier of the Free State, made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the funeral arrangements of the late Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code;

3.2 Whether Mr Mashinini, in his capacity as the MEC previously responsible for the Provincial Department of Public Works and Infrastructure (currently MEC responsible for Police, Roads & Transport) of the Free State, made a misleading statement to the Free State Provincial Legislature in his response to a question relating to the funeral arrangements of the late MEC previously responsible the Free State Provincial Department of Health, Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code; and

3.3 Whether Mr Magashule, the former Premier of the Free State made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the report by JGL Forensics Services into the contracts between the Office of the Premier and Letlaka Communications as well as recommendations made by the Minister of Finance to take criminal action against implicated individuals, and in doing so, violated the provisions of the Executive Ethics Code.

4. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 4.1 The Public Protector is an independent constitutional institution, established under section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.:
- 4.2 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.*
- 4.3 Section 182(2) of the Constitution, states that the Public Protector has the additional powers and functions prescribed by national legislation.
- 4.4 Section 4(1)(b) of the Executive Members’ Ethics Act, 1998, (EMEA) provides that *“The Public Protector must investigate, in accordance with section 3, any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4”.*
- 4.5 Section 4 of the EMEA provides that *“The Public Protector must investigate, in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.*
- 4.6 In terms of section 3 of the Executive Members’ Ethics Act, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member within 30 days of the receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed.

- 4.7 The Public Protector accordingly reported to the President on 30 January 2017 that her investigation of the complaint had not been completed and that she would submit the report when it is finalised.
- 4.8 In ***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 Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:-
- 4.8.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 4.8.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);
- 4.8.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
- 4.8.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);
- 4.8.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
- 4.8.6 The Public Protector's power to take appropriate remedial action is wide, but certainly not unfettered. What remedial action to take in a particular case, will be

informed by the subject-matter of the investigation and the type of findings made (para 71);

- 4.8.7 Implicit in the words “*take action*” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “*action*” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(a));
- 4.8.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d)); and
- 4.8.9 “*Appropriate*” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e)).
- 4.8.10 The remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: “*When the remedial action is binding, compliance is not optional, and 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.*”
- 4.8.11 In ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows, when confirming the powers of the Public Protector:-
- 4.8.11.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (para 71);
- 4.8.11.2 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);

4.8.11.3 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;-

- (a) Conduct an investigation;
- (b) To take remedial action; and
- (c) To take remedial action

4.8.11.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (para 104);

4.8.11.5 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);

4.8.11.6 The fact that there is 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 (para 107 and 108);

4.8.11.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112);

4.8.12 The conduct of Mr Magashule falls within the mandate of the Public Protector as provided for by section 4(1)(b) of the Executive Members' Ethics Act.

4.9 THE INVESTIGATION

4.9.1. Methodology

4.9.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act read with sections 3 and 4 of the Executive Members' Ethics Act.

4.9.2. Approach to the investigation

4.9.2.1. The approach to the investigation included analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

4.9.2.2. The investigation was approached using an enquiry process that seeks to find out:

4.9.2.2.1. What happened?

4.9.2.2.2. What should have happened?

4.9.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?

4.9.2.2.4. In the event of a violation, what action should be taken?

4.9.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the Complainant and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the alleged conduct of the former Premier of the Free State, Mr. Magashule constitutes a violation of the Executive Ethics Code.

4.9.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Mr. Magashule to prevent the alleged violation of the Executive Ethics Code.

4.9.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the alleged impropriety.

4.9.6. **Key sources of information**

4.9.7. **Documents**

The relevant documents obtained and analyzed were primarily:

- 4.9.7.1. Letter to the Hon M Qabathe MPL, Speaker: Free State Legislature Re: Request for an Ethics Committee investigation into misleading replies by the Premier, from Mr Roy Jankielsohn Free State Leader of the Democratic Alliance, dated 14 October 2015;
- 4.9.7.2. Letter to the Hon M Qabathe MPL, Speaker: Free State Legislature Re: Request for an Ethics Committee investigation into misleading replies by the Premier, from Mr Roy Jankielsohn Free State Leader of the Democratic Alliance, dated 19 November 2015;
- 4.9.7.3. Premier of the Free State Province, Draft Response on Questions for Written reply to Mr. BF Mothupi, Table Assistant Free State Provincial Legislature, dated 30 September 2015;
- 4.9.7.4. National Council of Provinces Questions for Written Reply, Question No: 448 [CW658E], dated 15 November 2013;
- 4.9.7.5. National Council of Provinces Questions for Written Reply, Question No: 388 [CW479E], dated 14 August 2015;
- 4.9.7.6. Transcriptions of Proceedings in the Free State Legislature on 21 May 2015;
- 4.9.7.7. Mr. Mashinini, Draft Response on Questions for Written reply to Mr. BF Mothupi, Table Assistant Free State Provincial Legislature, dated 22 August 2014;
- 4.9.7.8. Letter from the former Director-General, Ms. Elzabe Rockman, Office of the Premier to Ms. Lindi Molibeli, Municipal Manager, Fezile Dabi District Municipality Re: *Provincial Official Funeral of the Late MEC of Health, Ms. F Ngubentombi*, dated 5 December 2012;
- 4.9.7.9. Free State Legislature Question for Written Reply, Question Paper 23-2013, Fifth Session, Fourth Legislature, dated 20 November 2013;

- 4.9.7.10. Letter from the Office of the Speaker to Hon. Jankielsohn MPL Re: *Request for an Ethics Committee Investigation into Misleading Replies by the Premier*, dated 11 November 2015;
- 4.9.7.11. Free State Legislature Standing Rules and Orders, Sixth Edition:2009;
- 4.9.7.12. Free State Legislature Standing Rules and Orders, Eighth Edition:2014;
- 4.9.7.13. Undated Final Report by Mchunu Attorneys Re: *Investigation into the Appointment of Letlaka Media CC by the Office of the Free State Premier and the Appointment of the Department of the Free State Premier as the Implementing Agent for the Free State Provincial Departments*;
- 4.9.7.14. Recommendations on the Final Investigation Report, Department National Treasury, Re: *Appointment of Letlaka Media CC as Service Provider to the Office of the Free State Premier and other Provincial Departments*, dated 14 December 2012;
- 4.9.7.15. Undated letter from the Director-General, Department of the Premier of the Free State Province, Ms Elzabe Rockman to Mr Freeman Nomvulo, Accountant-General, National Treasury Re: *Appointment of Letlaka Media CC as Service Provider to the Office of the Premier and other Provincial Departments*.
- 4.9.7.16. Letter from the Director-General, Department of the Premier of the Free State Province, Mr Kopung Ralikontsane to Mr S. Human, Acting Accountant-General SA, National Treasury Re: *Forensic Report: Appointment; Letlaka Media CC*, dated 3 March 2014;
- 4.9.7.17. Memorandum, Re: *Request for approval to incur expenditure towards the burial of the former MEC of the Department of Health, Ms. Fundiswa 'Fezi' Ngubentombi and the late VIP Protector Seargent Motaung*, dated 7 February 2013;
- 4.9.7.18. Free State Legislature Question for Written Reply, Question Paper 3-2014, Fifth Session, Fourth Legislature, dated 10 September 2014;

4.9.7.19. State official and Provincial official funeral Policy Manual, the Presidency of the Republic of South Africa, July 2016;

4.9.7.20. Forensic Report: *Appointment of Letlaka Media CC as a service provider to the Office of the Free State Premier and other Provincial Departments*, by National Treasury from the Office of the Accountant-General, dated 25 February 2014;

4.9.7.21. Letter to the Minister of Finance, Mr NM Nene, MP Re: *Appointment of Letlaka Media CC as a service provider to the Office of the Free State Premier and other Provincial Departments*, from the Premier of the Free State Province, Mr Magashule, dated 13 October 2015

4.9.8. **Correspondence sent and received**

4.9.8.1. Letter to Mr. Magashule from the Public Protector informing him of the allegations dated 23 January 2017;

4.9.8.2. Response received from Mr. Magashule on 24 May 2017;

4.9.8.3. Letter to Mr. Magashule from the Public Protector requesting outstanding documentation and information, dated 28 August 2017;

4.9.8.4. Acknowledgement of receipt from Mr. Magashule, dated 29 August 2017;

4.9.8.5. Response from Mr. Magashule on 19 September 2017;

4.9.8.6. A Discretionary Notice sent to the Complainant on 30 July 2019;

4.9.8.7. A response to the Discretionary Notice from the Complainant on 12 August 2019;

4.9.8.8. An email from the office of the Premier Mr AJ Venter, Corporate Administration & Co-ordination, 9 April 2019;

4.9.8.9. A notice was sent to Mr Magashule in terms of section 7(9) of the Public Protector Act, 1994 on 17 January 2020 for response by 7 February 2020;

4.9.8.10. Response received on behalf of Mr Magashule from Victor Nkwashu Attorneys Inc. on 16 June 2020

4.9.8.11. Letter to the MEC previously responsible for the Provincial Department of Public Works and Infrastructure, Mr Mashinini, dated 12 June 2020; and

4.9.8.12. Response from MEC Mashinini, dated 15 July 2020.

4.9.9. **Legislation and other prescripts**

4.9.9.1. The Constitution of the Republic of South Africa, 108 of 1996;

4.9.9.2. The Public Protector Act, 23 of 1994;

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

4.9.9.4. The Executive Ethics Code.

4.9.9.5. The Ministerial Handbook: State Official and Provincial Official Funeral Policy, 2007;

4.9.9.6. The Code of Conduct and Ethics for Members of the Free State Provincial Legislature.

4.9.10. **Case Law**

4.9.10.1. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11;

4.9.10.2. *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);

4.9.10.3. *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108(1 JUNE 2011)

4.9.11. Public Protector's Touchstones

4.9.11.1. Report of the Public Protector: Report No. 33 of 2017/18, issued on 21 February 2018, following an investigation into allegations of a violation of the Executive Ethics Code by the Minister of Public Enterprises, Ms Lynne Brown lodged by the Democratic Alliance Member of Parliament, Ms Natasha Mazzone (Ms Mazzone) in terms section 4(1)(a) of the Executive Members' Ethics Act, 82 of 1998.

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

5.1. **Whether Mr Magashule, in his capacity as the former Premier of the Free State, made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the funeral arrangements of the late MS. F Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code;**

Issues that are Common Cause

5.1.1. A pronouncement was made of the passing of MEC F Ngubentombi on 1 December 2012 and Mr Magashule, in his former capacity as Premier of the Free State requested approval from the Presidency to declare the funeral of the late MEC a Provincial Official Funeral.

5.1.2. The funeral was declared a Provincial Official Funeral, Category One (with prescribed police ceremonial honours) by the Executive Council on 3 December 2012 and scheduled to take place on 8 December 2012 in Sasolburg.

Issues that are in dispute

5.1.3. The issue for my determination is whether Mr Magashule misled the Free State Legislature regarding the involvement of the Office of the Premier in the arrangements of the Provincial Official Funeral of the late MEC, Ms. F Ngubentombi.

5.1.4. In the replies received to the questions for oral reply as published on the question paper of 12 June 2013 [Question Paper No. 32-2013, dated 20 November 2013], the following question was presented by Hon Jankielsohn to Mr Magashule, in his former capacity as Premier of the Free State Province for a written reply:

“

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In view of the fact that Fezile Dabi District Municipality spent R 6, 5 million on the funeral of the former MEC for Health, Ms. F Ngubentombi, under conditions that it would be repaid by the Provincial Government;

1.1. Which Department will be responsible for this payment?

1.2. Whether the full amount will be refunded to the Municipality, if not (a) how much will be refunded and (b) how much will they have to pay themselves, if so, what is the exact amount that will be paid, and

1.3. When will this payment take place?”

5.1.5. In this regard, Mr Magashule replied as follows:

“

The Department of Public Works was responsible for the payment. The extent to which the Office of the Premier was involved in the arrangements extended to informing relevant Ministries, Departments and persons of the details of the official provincial funeral as declared by the presidency. Further questions should be directed to the relevant department.”

5.1.6. The Complainant stated in his complaint that, “...the reply by the Premier was blatantly misleading regarding both his Department’s involvement in the arrangements as well as the commitment by his office to ensure that the Provincial Government refunds the municipality in this regard”

5.1.7. In a letter to the Municipal Manager of the Fezile Dabi District Municipality, dated 05 December 2012, Ms. Elzabe Rockman, former Director General (DG) in the Office of the Premier, stated that, “The Fezile Dabi District Municipality is required to play the leading coordinating role with regard to the hosting of the district

memorial services in the Fezile Dabi District. This will include all reasonable and necessary expenditure to be incurred with regard to the district memorial service.”

- 5.1.8. Further, that the Fezile Dabi District Municipality was required to assist the Free State Provincial Government with all logistical arrangements, including the contracting of services and incurring all reasonable and necessary expenditure with regard to the funeral preparations.
- 5.1.9. The Fezile Dabi District Municipality was further instructed to liaise with the Funeral Planning Committee and with regard to expenditure, specifically with the Chief Financial Officer of the Free State Department of Public Works.
- 5.1.10. In the aforesaid letter of 05 December 2012, it was stated that all reasonable and necessary expenditure in respect of the funeral will be refunded by the Free State Provincial Government to the Fezile Dabi District Municipality except in respect of such specific instances where the Municipality resolves to incur the expenditure themselves.
- 5.1.11. The Complainant argued that the level of involvement of the Office of the Premier extended beyond merely informing relevant departments, but also instructing various role players, including the Fezile Dabi District Municipality to undertake the costs which would be refunded by the Free State Provincial Government.
- 5.1.12. I informed Mr Magashule of the allegations raised in a letter dated 23 January 2017, and he replied on 19 September 2017, stating that he still maintains that his oral response to the question of Hon Jankielsohn, noted in paragraph 17.1.5 above, was factually correct as it was abundantly clear what his department’s role was during the planning of and during the actual funeral.
- 5.1.13. In this regard, Mr Magashule referred to a letter sent by Ms Elzabe Rockman, former Director-General in the office of the Premier, to all Municipal Managers of Metropolitan, Local and District Municipalities within the Free State Province, informing them of the Provincial Official funeral (Category One) of the late Free

State MEC responsible for Health, Ms Ngubentombi, which was scheduled to take place on 8 December 2012 in Sasolburg

- 5.1.14. Mr Magashule also referred to a letter addressed to the Municipal Manager of the Fezile Dabi District Municipality, Ms. Lindi Molibeli, dated 5 December 2012, in which she was informed of her appointment as an official member of the Funeral Planning Committee, who would play the leading coordinating role in hosting the district memorial services in the Fezile Dabi District, which will include all reasonable and necessary expenditure to be incurred for such services.
- 5.1.15. Further, that the Fezile Dabi District Municipality would assist the Free State Provincial Government with all logistical arrangements, including the contracting of services and all expenses incurred pertaining to such services.
- 5.1.16. The letter also stated that such reasonable and necessary expenses would be refunded by the Free State Provincial government to the Fezile Dabi District Municipality and that the Fezile District Municipality must liaise with the Chief Financial Officer of the Free State Department of Public Works with regard thereto.

Discretionary notice

- 5.1.17. On 31 July 2019, a Discretionary notice was sent to the Complainant, Mr Jankielsohn, to inform him of my intended conclusion on the issue relating to the investigation into whether the former Premier made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the funeral arrangements of the late Member of the Executive Council (MEC) of Health, Ms F Ngubentombi.
- 5.1.18. I informed the Complainant that it appears from the information and documentation obtained during the investigation that, the allegation against the former Premier of the Free State, Mr. Elias Magashule of blatantly misleading the Free State Provincial Legislature regarding both his Department's involvement in the funeral arrangements, as well as the commitment by his office to ensure that

the Provincial Government refunds the municipality, could not be substantiated for the following reasons:

- 5.1.18.1. In terms of the Provincial Official Funeral Policy contained in the Ministerial Handbook of 2007, *informing* Ministries and departments entails issuing of a notice to all spheres of Government, State Organs and the public at large, announcing the demise and instructing those concerned to commence the immediate implementation of the procedures in the policy;
- 5.1.18.2. In the letter of the Director-General of the Department of the Premier, dated 5 December 2012, *informing* relevant Ministries, Departments and persons of the details of the Official Provincial Funeral of the late MEC as declared by the presidency, included announcing that the Fezile Dabi District Municipality would be the Overall Coordinator of Operations.
- 5.1.18.3. Further that, the aforesaid Municipality would assist the Free State Provincial Government with logistical arrangements and be refunded by the Free State Provincial Government for expenses incurred for the funeral. These are some of the duties and responsibilities allocated to the Department of the Premier by the Ministerial Handbook. It does not confirm a *'direct'* involvement of the Department of the Premier with the arrangements of the funeral as suggested by the Complainant.
- 5.1.18.4. Furthermore, that by referring the Hon. Jankielsohn to the relevant department regarding the expenditure of the funeral was not misleading, since it was confirmed in a submission approved by the Head of the Department: Free State Department of Public Works and Infrastructure on 7 February 2013, that the Department of Public Works committed itself to bearing the cost of the funeral including the expenses incurred by the Municipality.
- 5.1.19. Mr Jankielsohn responded to the Discretionary notice on 12 August 2019 as follows:

1. Your findings regarding the funeral costs of the former MEC for Health, Ms F. Ngubentombi.

The written reply by the Premier in the Legislature dated 20 November 2013 regarding the above issue (see pp 3-4 in attachment 1) is evasive, vague and displays a lack of preparation. The Premier should have ensured that the commitment made by the Provincial Government to refund the costs of the funeral was undertaken, and then obtained the relevant information from his Provincial Government Department and his own office in order to reply to the formal written question with the necessary detail. The vague and evasive reply is contemptuous of the Legislature and a breach of his constitutional responsibility to account to the Legislature. The Premier has a responsibility to obtain information requested from him by the Legislature from the relevant Provincial Government Department, and in this case from his own Department, who gave a commitment to refund expenses for the funeral.

Your response clearly indicates through both the letter of the DG of the Department of the Premier dated 5 December 2012 (see attachment 2) and the submission approved by the HOD of Public Works dated 7 February 2013 (cited in the discretionary notice) that the Provincial Government would refund the Fezile Dabi District Municipality for the costs of the funeral. You furthermore indicate that this is “*contrary to the assertion of the MEC for Public Works, Mr Mashinini who stated in his reply that the Department of Public Works never committed itself to refund the Municipality for the cost for the late MEC’s funeral*”. This clearly indicates that former MEC for Public Works, Mr S.

Mashinini, misled the Free State Legislature in his official reply to the Speaker dated 22 August 2014 (see attachment 3) relating to the question.

Mr Mashinini is also constitutionally accountable to the Legislature and is obliged to answer questions in an honest manner in line with this constitutional mandate. You have indicated his reply contradicts the documents of both the HOD of the Department of Public Works and DG of the department of the Premier, which I regard this as a breach of his oath of office and the Executive Ethics Code.

In line with the above, I would request that you revisit your finding regarding the Premier as “*unsubstantiated*” and also make a judgement regarding a breach of the Code of Ethics based on the misleading reply by MEC Mashinini that you have brought to my attention.

Section 7(9) Notice

- 5.1.20. During the course of my investigation, I also came across evidence indicating possible wrongdoing on the part of the former Premier. As a corollary to this, on 09 January 2020, I issued a notice in terms of section 7(9) of the Public Protector Act, 1994, to the Premier with a view to affording him the opportunity to furnish me with further evidence that negates what I already had and that in absence of same I was likely to make adverse findings against him and take remedial action to remedy the conduct failure.
- 5.1.21. The evidence obtained during the investigation, which appeared to indicate wrongdoing on the part of the former Premier was, *inter alia*, when the former Premier stated in his written reply to Hon Jankielsohn that the extent to which the Department of the Premier was involved in the funeral arrangements was merely to inform relevant Ministries, Departments and persons of the details of the official provincial funeral. This assertion appears to be deliberately misleading, because

in addition to informing departments, the Department of the Premier also announced that the Fezile Dabi District Municipality would, *inter alia*;

- 5.1.21.1. Be the Overall Coordinator of Operations,
 - 5.1.21.2. Play the leading coordinating role with regard to the hosting of the district memorial services, which included all reasonable and necessary expenditure to be incurred with regard to the district memorial service,
 - 5.1.21.3. Be required to assist the Free State Provincial Government with all logistical arrangements, including the contracting of services and incurring all reasonable and necessary expenditure with regard to the funeral preparations,
 - 5.1.21.4. liaise with the Funeral Planning Committee with regard to expenditure, specifically with the Chief Financial Officer of the Free State Department of Public Works, and
 - 5.1.21.5. Be refunded for all reasonable and necessary expenditure in respect of the funeral by the Free State Provincial Government.
- 5.1.22. On 17 July 2020, the former Premier responded to the section 7(9) notice by way of an affidavit which was accompanied by additional documentation and information. In his response, the former Premier asserted that:

“There is no merit to either of these findings.

I bore no direct responsibility for any arrangements related to the funeral of the late MEC. While some of these arrangements were done under the auspices of my (then) Department, I had no knowledge of same as this was carried out by my officials.

What the Public Protector failed to appreciate is that as the political head of the Department, not all affairs attended to by the Department are brought to my attention and/or require involvement. "Administrative" affairs, such as the logistical role played by the Department, would not have been brought to my attention.

In consequence, I would have had no subjective knowledge of the role my Department may have played in the funeral arrangements, and consequently could have had no knowledge to intentionally misled the Legislature when my answer was given. (sic)

Moreover, and as I shall address hereunder, the Public Protector lacks jurisdiction to investigate this complaint and/or make any findings against me. This is due to the fact that the events complained of, the complaint itself, and the Public Protector's findings all exceed the statutory two-year limitation on the Public Protector's remit.

This is contrary to section 6(9) of the PP Act. Importantly, the Public Protector's approach in this matter does not disclose a single reason why my case qualifies as an "exceptional circumstance". In the premises, the investigation and the intended Report is incompetent in law.

The Public Protector's position taken in respect of the investigation against me bears similarity to the "Bosasa / CR17" investigation conducted by her Office.¹ Although the Public Protector's section 7(9)(a) notice was issued before that Court's judgment, I am nonetheless advised that the approach taken by the High Court in that matter is dispositive of this investigation.

I am furthermore advised that the applications for leave to appeal against that judgment (which are pending before the Constitutional Court) are without merit".

Application of the relevant legal prescripts

- 5.1.23. Regarding whether Mr. Magashule misled the Provincial Legislature, the issue for my determination was whether applicable laws and prescripts were complied with. The applicable legislation and prescripts with regard hereto are the following:

The Constitution of the Republic of South Africa Act, [Act. No. 108 of 1996]

- 5.1.24. The Constitution of South Africa is the supreme law of the Republic and all other laws should conform to the Constitution.
- 5.1.25. In terms of section 132(1) of the Constitution, the Executive Council of a province consists of the Premier, as head of the Council and members appointed by the Premier from among the Members of the Provincial Legislature.
- 5.1.26. Section 133(2) states that Members of the Executive Council of a province are accountable collectively and individually to the Legislature for the exercise of their powers and the performance of their functions.
- 5.1.27. Members of the Executive Council of a province must act in accordance with the Constitution, in terms of section 133(3)(a). Sub-section (b) states that Members of the Executive Council of a province must provide the legislature with full and regular reports concerning matters under their control.
- 5.1.28. Section 136(1) states that Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

The Executive Members' Ethics Act, [Act. No. 82 of 1998]

- 5.1.29. The purpose of the Executive Members' Ethics Act is to provide for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils.
- 5.1.30. Section 2 of the Act provides that, the President must 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 Members of the Executive Council must comply in performing their official responsibilities.
- 5.1.31. In terms of section 4(1)(b) the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint from *inter alia* the Premier

or a Member of the Provincial Legislature of a province, if the complaint is against a Member of the Executive Council of the province.

- 5.1.32. Section 3(1) provides that the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4. In terms of sub-section (2), the Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the President, if the complaint is against a Cabinet member, Premier or Deputy Minister.
- 5.1.33. Sub-section (3) states that, if the Public Protector reports at the end of the period referred to in subsection (2) that the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.
- 5.1.34. Section 3(4) provides that when conducting an investigation in terms of this Act, the Public Protector has all the powers vested in her in terms of the Public Protector Act.

Executive Ethics Code

- 5.1.35. The purpose of the code of ethics is to provide for standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and Members of the Executive Council must comply in performing their official responsibilities.
- 5.1.36. Paragraph 2.3 (a) states that Members of the Executive may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature. In terms of sub-paragraph (b) Members of the Executive may not act in a way that is inconsistent with their position.

Code of Conduct and Ethics for Members of the Free State Provincial Legislature

- 5.1.37. The Code of Conduct and Ethics for Members of the Free State Provincial Legislature serves to provide for guidelines on principles, ethical conduct as well

as rules and obligations that the Members of the Free State Provincial Legislature are expected to abide with.

5.1.38. In terms of paragraph 3.1 of the code, a Member of the Free State Legislature must be loyal to the Republic of South Africa and its people. He or she must uphold the laws of the Republic of South Africa and act with respect towards the institution of the Legislature. A member must ensure that his or her conduct, whether in a personal or official capacity does not bring the Legislature into disrepute, or damage public confidence in the system of government.

5.1.39. Paragraph 3.7 states that a Member of the Free State Legislature is accountable for his or her decisions and actions to the public and must submit himself or herself to whatever scrutiny is appropriate to his or her office.

Ministerial Handbook: State Official and Provincial Official Funeral Policy, 2007

5.1.40. This Handbook is a guideline for benefits and privileges, to which Members and their families are entitled, in the execution of their duties. These benefits and allowances refer to both the time during term of office and in some cases, to the time thereafter.

5.1.41. The State official and Provincial official Funeral Policy describes different categories of funerals commensurate with the status of the deceased figures, and identifies key role-players, structures and processes.

5.1.42. It describes the responsibilities and support roles of national and provincial government.

5.1.43. In terms of paragraph 1.3 of the aforesaid policy, a Provincial Official Funeral is divided into categories one and two with elements of Police Ceremonial Honours. Categories one includes the Speaker of the Legislature and Members of the Executive Council.

- 5.1.44. Paragraph 2.8(b) states that in respect of Provincial Official Funerals, the relevant Provincial Department and entities shall be responsible for reasonable costs related to the services they are expected to offer.
- 5.1.45. In terms of paragraph 3.1(b), the Director-General in the Presidency, on the confirmation of a demise covered by this policy, shall issue a notice to all spheres of Government, State Organs and the public at large, announcing the demise and instructing those concerned to commence the immediate implementation of the procedures in this policy.
- 5.1.46. In terms of paragraph 3.5(b), the Director-General in the Office of the Premier appoints the Overall Coordinator of Operations (OCO). Sub-paragraph (c) states that the OCO shall be part of the Funeral Planning Committee, which shall also include the Presidency and all other relevant government departments and State organs. Where appropriate, provincial staff and/or local government may also be included.
- 5.1.47. The OCO will direct, orchestrate, co-ordinate and control the implementation of the chapters in this policy manual that deal with the funeral Implementation.
- 5.1.48. In terms of paragraph 3.9(a) the Director-General in the Department of Public Works will ensure that all the infrastructural needs of all the points identified by the Funeral Planning Committee are provided for.

The Conclusions that could be made based on the application of the law to the facts

- 5.1.49. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that:
- 5.1.49.1. In his reply to Mr Jankielsohn`s question regarding his departments involvement in the funeral arrangements and the expenditure of the Fezile District Municipality in respect of the funeral, the former Premier asserted that;

“

The Department of Public Works was responsible for the payment. The extent to which the Office of the Premier was involved in the arrangements extended to informing relevant Ministries, Departments and persons of the details of the official provincial funeral as declared by the presidency. Further questions should be directed to the relevant department”.

5.1.49.2. In the aforesaid reply, the former Premier elaborated on the execution of his departments responsibilities in terms of the Ministerial Handbook, identified the department responsible for the cost relating to the funeral expenses and directed that those departments responsible for the cost be engaged in all questions relating to cost. This reply can be construed as vague and to an extent inadequate, but cannot be regarded as evasive and/or misleading.

5.1.49.3. In terms of the Provincial Official Funeral Policy contained in the Ministerial Handbook of 2007, *informing* Ministries and departments includes issuing of a notice to all spheres of Government, State Organs and the public at large, announcing the demise and then instructing those departments and individuals concerned to commence with immediate implementation of the procedures in the policy.

5.1.49.4. In a letter dated 05 December 2012, the former DG in the Department of the Premier distributed a letter to all relevant departments and individuals, informing them of the demise of the late MEC responsible for Health and announced that the Fezile Dabi District Municipality would, *inter alia*:

5.1.49.4.1. Be the Overall Coordinator of Operations,

5.1.49.4.2. Play the leading coordinating role with regard to the hosting of the district memorial services, which included all reasonable and necessary expenditure to be incurred with regard to the district memorial service,

5.1.49.4.3. Be required to assist the Free State Provincial Government with all logistical arrangements, including the contracting of services and incurring all reasonable and necessary expenditure with regard to the funeral preparations,

- 5.1.49.4.4. Liaise with the Funeral Planning Committee with regard to expenditure, specifically with the Chief Financial Officer of the Free State Department of Public Works, and
- 5.1.49.4.5. Be refunded for all reasonable and necessary expenditure in respect of the funeral by the Free State Provincial Government.
- 5.1.49.5. These are some of the duties and responsibilities allocated to the Department of the Premier by the Ministerial Handbook. It does not confirm a *'direct'* involvement of the Department of the Premier with the arrangements of the funeral as suggested by the Complainant.
- 5.2. **Regarding whether Mr Mashinini, in his capacity as the MEC responsible for the Provincial Department of Public Works and Infrastructure of the Free State, made a misleading statement to the Free State Provincial Legislature in his response to a question relating to the funeral arrangements of the late MEC previously responsible the Free State Provincial Department of Health, Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code.**

Issues that are Common Cause

- 5.2.1. MECs are appointed by the Premier from amongst the members of the Provincial Legislature. The Premier designates powers and functions to the MECs. Conventionally MECs are assigned portfolios in specific areas of responsibility.
- 5.2.2. MECs are accountable to the Provincial Legislature, both individually and as a collective, and must regularly report to the legislature on the performance of their responsibilities.
- 5.2.3. Mr. Malambule Samuel Mashinini was sworn in as a Member of the Executive Council on 29 May 2014, during which he served as the MEC responsible for the Free State Department of Public Works and Infrastructure and has since moved

on to the portfolio responsible for the Free State Department of Police, Roads and Transport.

Issues that are in dispute

- 5.2.4. The issue for my determination was whether Mr Mashinini, misled the Provincial Legislature in his response to a question relating to the funeral arrangements of the late MEC previously responsible the Free State Provincial Department of Health, Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code.
- 5.2.5. During the course of the investigation, I came across information indicating that the MEC responsible for the Free State Department of Public Works and Infrastructure, Mr Malambule Samuel Mashinini might have misled the Free State Provincial Legislature in his response to a Question posed by Hon. Jankielsohn. On the basis of the legal precedence enunciated in the seminal case of ***Public Protector vs Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1 June 2011)***, I took a conscious decision to investigate the matter.
- 5.2.6. The evidence indicates that, Hon. Jankielsohn asked Mr. Mashinini to respond to the following:
- “
- Whether the department will refund the cost incurred for the late MEC for Health, Ms F Ngubentombi to the Fezile Dabi District Municipality; if not, why not, if so,*
- (a) *What are the total costs incurred,*
- (b) *What is the amount claimed by the Municipality and*
- (c) *How much will the department refund and*
- (d) *When will it be paid?”*
- 5.2.7. In his response, Mr. Mashinini stated that the Department of Public Works and Infrastructure did not commit to refund the cost incurred for the funeral for the late MEC of Health to the Fezile Dabi District Municipality. Further, that the Department was not aware of any claim submitted by the Fezile Dabi District Municipality for the refund of cost incurred for the funeral. Mr. Mashinini indicated

further that the cost incurred by the Department amounted to R2 347 035.37 for *inter alia* VIP tents, catering, equipment etc. and one hundred and three thousand one rand and fifty cents (R103 001.50) for adverts in newspapers.

- 5.2.8. In his response to my letter of 23 January 2017, Mr Magashule referred, *inter alia*, to a letter addressed to the Municipal Manager of the Fezile Dabi District Municipality, Ms. Lindi Molibeli, dated 5 December 2012, in which she was informed that the Fezile Dabi District Municipality would assist the Free State Provincial Government with all logistical arrangements for the funeral, including the contracting of services and all expenses incurred pertaining to such services.
- 5.2.9. Furthermore, that such reasonable and necessary expenses would be refunded by the Free State Provincial Government to the Fezile Dabi District Municipality and that the Fezile District Municipality must liaise with the Chief Financial Officer of the Free State Department of Public Works with regard thereto.
- 5.2.10. Mr Magashule subsequently enclosed a request for approval by the Free State Department of Public Works to incur expenditure towards the burial of the late MEC. The foregoing submission was made by the Chief Financial Officer (CFO) of the Free State Department of Public Works, Mr. MNG Mahlatsi on 7 February 2013 and approved by the Head of Department (HOD) Mr M.W Seoke on even date.
- 5.2.11. In paragraph 2.7 of the above submission it is indicated that, “The cost of the funeral shall be borne by the Department of Health and Public Works, the logistical arrangements of Sasolburg shall be made by the Fezile Dabi District Municipality and the Municipality shall put a claim against the Free State Provincial Government.” (own emphasis)
- 5.2.12. In a letter to the Speaker of the Free State Provincial Legislature, Honourable (Hon.) Sisi Mabe, dated 22 August 2014, a signed response from the former MEC for Public Works and Infrastructure, Mr Mashinini to a question from Hon Jankielsohn was attached.

- 5.2.13. He stated that Mr Mashinini's reply contradicts the above submission of the Department Public Works and Infrastructure to incur expenditure towards the burial of the late MEC and the letter from the DG of the Department of the Premier, dated 05 December 2012, in which the Fezile District Municipality was instructed, *inter alia*, to liaise specifically with the Chief Financial Officer of the Free State Department of Public Works with regard to expenditure.
- 5.2.14. According to the Complainant, Mr Mashinini is constitutionally accountable to the Legislature and is obliged to answer questions in an honest manner in line with his Constitutional mandate.
- 5.2.15. It is thus the contention of the Complainant that Mr Mashinini misled the Provincial Legislature and as such violated the Executive Ethics Code.
- 5.2.16. A letter was sent to MEC Mashinini on 12 June 2020, to inform him of the allegation that he misled the Provincial Legislature and requested him to provide evidence that negates the evidence of a possible violation of the Executive Ethics Code in my possession. MEC Mashinini responded on 15 July 2020 as follows:
- “
- I was sworn in as a Member of the Executive Council on 29 May 2014. I was not a Member of the Executive Council before this date, especially not during the period immediately preceding the funeral of the late MEC Ngubentombi.*
- I was also not a Member of the Free State Legislature and only became a Member subsequent to the 2014 Elections.*
- In order to respond to the question I had to rely on information which I received on request from the Head of the Department since MECs has no financial management responsibility and there would consequently not be any record of this in the archives of my predecessor.*
- I responded to the question of Mr Jankielsohn, MP, with the information as received from the Head of the Department.*

I was much later, the specific date I cannot remember, informed by the previous Premier, Mr ES Magashule, that it was brought to his attention that my reply to the question was factually incorrect. I informed him that the reply was based on information received from the Head of the Department.

I, therefore, wish to submit that although the information provided may be incorrect, I never willfully misled the Legislature or breached the Executive Ethics Code in any other way whatsoever". (sic)

Application of the relevant legal prescripts

5.2.17. Regarding whether Mr. Mashinini misled the Provincial Legislature, the issue for my determination is whether applicable laws and prescripts were complied with. The applicable legislation and prescripts with regard hereto are the following:

The Constitution of the Republic of South Africa Act, [Act. No. 108 of 1996]

5.2.18. The Constitution of South Africa is the supreme law of the Republic and all other laws should conform to the Constitution.

5.2.19. In terms of section 132(1) of the Constitution, the Executive Council of a province consists of the Premier, as head of the Council and members appointed by the Premier from among the Members of the Provincial Legislature.

5.2.20. Section 133(2) states that Members of the Executive Council of a province are accountable collectively and individually to the Legislature for the exercise of their powers and the performance of their functions.

5.2.21. Members of the Executive Council of a province must act in accordance with the Constitution, in terms of section 133(3)(a). Sub-section (b) states that Members of the Executive Council of a province must provide the legislature with full and regular reports concerning matters under their control.

5.2.22. Section 136(1) states that Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

The Executive Members' Ethics Act, [Act. No. 82 of 1998]

- 5.2.23. The purpose of the Executive Members' Ethics Act is to provide for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils.
- 5.2.24. Section 2 of the Act provides that, the President must 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 Members of the Executive Council must comply in performing their official responsibilities.
- 5.2.25. In terms of section 4(1)(b) the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint from *inter alia* the Premier or a Member of the Provincial Legislature of a province, if the complaint is against a Member of the Executive Council of the province.
- 5.2.26. Section 3(1) provides that the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4. In terms of sub-section (2), the Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the President, if the complaint is against a Cabinet member, Premier or Deputy Minister.
- 5.2.27. Sub-section (3) states that, if the Public Protector reports at the end of the period referred to in subsection (2) that the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.
- 5.2.28. Section 3(4) provides that when conducting an investigation in terms of this Act, the Public Protector has all the powers vested in her in terms of the Public Protector Act.

Executive Ethics Code

- 5.2.29. The purpose of the code of ethics is to provide for standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and Members of the Executive Council must comply in performing their official responsibilities.
- 5.2.30. Paragraph 2.3 (a) states that Members of the Executive may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature.
- 5.2.31. In terms of sub-paragraph (b) Members of the Executive may not act in a way that is inconsistent with their position.

Code of Conduct and Ethics for Members of the Free State Provincial Legislature

- 5.2.32. The Code of Conduct and Ethics for Members of the Free State Provincial Legislature serves to provide for guidelines on principles, ethical conduct as well as rules and obligations that the Members of the Free State Provincial Legislature are expected to abide with.
- 5.2.33. In terms of paragraph 3.1 of the code, a Member of the Free State Legislature must be loyal to the Republic of South Africa and its people. He or she must uphold the laws of the Republic of South Africa and act with respect towards the institution of the Legislature. A member must ensure that his or her conduct, whether in a personal or official capacity does not bring the Legislature into disrepute, or damage public confidence in the system of government.
- 5.2.34. Paragraph 3.7 states that a Member of the Free State Legislature is accountable for his or her decisions and actions to the public and must submit himself or herself to whatever scrutiny is appropriate to his or her office.

Ministerial Handbook: State Official and Provincial Official Funeral Policy, 2007

- 5.2.35. This Handbook is a guideline for benefits and privileges, to which Members and their families are entitled, in the execution of their duties. These benefits and allowances refer to both the time during term of office and in some cases, to the time thereafter.
- 5.2.36. The State official and Provincial official Funeral Policy describes different categories of funerals commensurate with the status of the deceased figures, and identifies key role-players, structures and processes.
- 5.2.37. It describes the responsibilities and support roles of national and provincial government.
- 5.2.38. Paragraph 2.8(b) states that in respect of Provincial Official Funerals, the relevant Provincial Department and entities shall be responsible for reasonable costs related to the services they are expected to offer.
- 5.2.39. In terms of paragraph 3.9(a) the Director-General in the Department of Public Works will ensure that all the infrastructural needs of all the points identified by the Funeral Planning Committee are provided for.
- 5.2.40. In the seminal case of ***Public Protector vs Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1 June 2011)***, the court held that,
- “The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting but is enjoined to actively discover the truth. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances. The Act confers upon the Public Protector sweeping powers to discover information from any person at all—there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. It would be invidious for a court to mark the work of the Public Protector as if it was marking an academic essay.*
- But at least one feature of an investigation that must always exist—the investigation must have been conducted with an open and enquiring mind which is open to all possibilities and reflects upon whether the truth has been told”.*

The Conclusions that could be made based on the application of the law to the facts

5.2.41. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that:

5.2.42. In his response of 15 July 2020, Mr Mashinini conceded to providing information to the Legislature that was factually incorrect, contrary to the provisions of paragraph 2.3 (a) of the Executive Ethics Code, which states that Members of the Executive may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature. Mr. Mashinini argued that it was not his intention to mislead the Legislature.

5.2.43. **Principles in previous findings of the Public Protector in a similar investigation (Touchstones)**

Report No: 33 of 2017/18 on an investigation into allegations of a violation of the Executive Ethics Code in the matter between Ms Natasha Mazzone, MP of the Democratic Alliance (DA), and the former Minister of Public Enterprises, Ms Lynne Brown.

5.2.43.1. The report relates to an investigation into the alleged violation of the Executive Ethics Code by the former Minister of Public Enterprises, Ms Lynne Brown, MP (Minister Brown).

5.2.43.2. The complaint was lodged with the Public Protector on 22 May 2017 by Ms Natasha Mazzone, MP of the Democratic Alliance (the Complainant) in terms of Section 4(1)(a) of the Executive Members` Ethics Act, 82 of 1998. Ms Mazzone attached to her complaint, the following Parliamentary Questions [PQ 2701] posed to Minister Lynne Brown on 2 December 2016:

“(1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duhva power plant; (2) did Eskom appoint the specified company

to source a new supplier to replace the exploded boiler at the Duhva power plant; if not, why not; if so, what (a) were the fees payable to the specified company in this regard and (b) are the further relevant details; (3) (a) which other contracts of engagement have been concluded between Eskom and the specified company and (b) what are the costs involved in each case?”

- 5.2.43.3. Minister Brown replied that no amount was paid to Trillian Capital Partners for the Duhva Power Plant insurance claim and that Eskom did not appoint Trillian Capital Partners to negotiate the settlement. Minister Brown further asserted that Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the boiler that had exploded at the Duhva Power Plant and that there were no other contracts of engagement concluded between Eskom and Trillian Capital Partners.
- 5.2.43.4. In her complaint Ms. Mazzone referred to media reports stating that Trillian Capital Partners invoiced Eskom for R266 million and R153 million respectively.
- 5.2.43.5. It is Ms Mazzone`s contention that Minister Brown misled Parliament when she failed to disclose that there were contracts of engagement between Eskom and Trillian Capital Partners, and in so doing breached the Executive Ethics Code.
- 5.2.43.6. Having considered the evidence and information obtained during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- 5.2.43.7. The allegation that Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that these were contracts of engagement between Eskom and Trillian Capital Partners was substantiated.
- 5.2.43.8. In her written reply to the Parliamentary Question, Minister Brown inadvertently misled Parliament in her assertion that there were no other contracts of engagement concluded between Eskom and Trillian Capital Partners. By

inadvertently misleading Parliament, Minister Brown violated the provisions of paragraph 2.3(a) of the Executive Ethics Code.

5.2.43.9. Minister Brown's failure to act responsibly and in accordance with her constitutional and legal obligations to be accountable for Eskom as the Minister of Public Enterprises when she replied to the Parliamentary Question was inconsistent with her office.

5.2.43.10. She therefore also violated the provisions of paragraph 2.3(b) of the Executive Ethics Code 96(2) of the Constitution.

5.3. **Regarding whether Mr Magashule, the former Premier of the Free State made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the report by JGL Forensics Services into the contracts between the Office of the Premier and Letlaka Communications as well as recommendations made by the Minister of Finance to take criminal action against implicated individuals, and in doing so, violated the provisions of the Executive Ethics Code.**

Issues that are Common Cause

5.3.1. The National Treasury conducted a forensic investigation with its co-sourced forensic investigation firm JGL Forensic Services into the appointment of TU Dimensions Marketing and Communications CC t/a Letlaka Communications (Letlaka) as the preferred service provider to the Office of the Free State Premier and other Provincial Departments in the Free State Province, through the Premier's Office.

5.3.2. JGL Forensic Services appointed Mchunu Attorneys, to conduct an investigation into the appointment of Letlaka to the Office of the Free State Premier and other Provincial Departments in the Free State Province.

- 5.3.3. The purpose of the investigation was to assist the National Treasury to determine whether the Premier's Office adhered to public procurement processes and procedures.
- 5.3.4. The investigation by Mchunu attorneys revealed that the appointment of Letlaka by the Premier's Office did not adhere to the requirements of a transversal contracts as envisaged by Regulation 16A6.6 of the National Treasury Regulations.
- 5.3.5. This included the appointment of the Premier's Office as the implementing agent on behalf of the other Provincial Departments.
- 5.3.6. All the other Provincial Departments, which purported to appoint the Premier's Office as their implementing agent, also contravened the applicable Legislative Framework. It was recommended *inter alia* that the contract be cancelled as proper procurement processes were not followed.
- 5.3.7. The report by Mchunu Attorneys was incorporated into the final report submitted to the National Treasury by JGL Forensic Services. The full report was provided to the Office of the Premier on 25 February 2014 by the Office of the Accountant-General, National Treasury.

Issues that are in dispute

- 5.3.8. The issue for my determination is whether Mr Magashule misled the Free State Legislature regarding a National Treasury Report concerning the appointment of Letlaka Communications by the Office of the Premier, when Mr Magashule allegedly denied all knowledge of the report and/or the recommendations by the Minister(s) in his response to a question of Hon Jankielsohn in a sitting of the Free State Legislature on 21 May 2015.
- 5.3.9. During a sitting of the Free State Legislature on 21 May 2015, Hon Jankielsohn posed the following question to Mr Magashule in his former capacity as Premier of the Free State:

“

1. *Who the implicated parties are as identified in the National Treasury Commission report by JGL Forensics into the contracts between the Office of the Premier and Letlaka Communications?*
2. *Whether the Office of the Premier requested law enforcement agencies to thoroughly investigate the allegations and findings in the report and take appropriate action, as requested by the national Finance Minister, the former Minister Pravin Gordhan? If not, why not? If so, what are the relevant details?"*

5.3.10. In his response, Mr Magashule stated that, *"No, I am still looking into all these allegations by the opposition and I still want to know whether they have a report and if they have a report, can they give me the report"*

5.3.11. Hon Jankielsohn argued in his complaint that in the aforesaid response, Mr Magashule attempted to deny all knowledge of the report and the recommendations by former Finance Minister, Mr Pravin Gordhan.

5.3.12. During the same sitting of the Legislature on 21 May 2015, Hon Jankielsohn replied stating, *"Now, this report that was commissioned by the National Department of Finance is generally known. It was supplied to the Office of the Premier. It was replied to by the former DG (Office of the Premier) in a letter which we have copies of."*

5.3.13. In his response, Mr Magashule indicated *inter alia* that, *"...the report was not conclusive and I will then get a report from the MEC."* Mr Magashule argued that, as the result of the report being inconclusive, he was not allowed to 'talk' about it.

5.3.14. Further to his complaint, Hon Jankielsohn stated that, *"However, in two replies supplied in parliament on 14 August 2015 and 15 November 2013 by the Ministers of Finance (see attachment 5), it is clear that he (the former Premier) was made aware of the report and refused to take action regarding recommendations by the Ministers for him to take criminal action against the implicated individual."*

5.3.15. In question no. 448 of the Questions for Written Reply, publicized on 15 November 2013 at the National Council of Provinces, Mr. D. Worth of the DA in the Free

State posed the following question to the then Minister of Finance (Mr. Pravin Gordhan):

“

- 1) *Whether, with reference to an investigation undertaken by a certain company (name furnished) on behalf of the National Treasury into the appointment of a certain media company (name furnished) by the Office of the Premier of the Free State, have any action been taken against any individuals who have been implicated in flouting legislation with (a) this appointment and (b) the transversal contracts involved; if not, why not; if so, what are the relevant details;*
- 2) *Whether any further in-depth investigations have taken place to determine any financial misconduct that could lead to criminal charges relating to any aspects of the appointment and the contracts: if not, why not; if so, what are the relevant details?”*

5.3.16. In his reply, the Minister of Finance stated the following:

“

- 1) *The National Treasury concluded the said investigation in February 2013. The report contained details of the transgressions discovered and the parties involved.*

The report also included recommendations for the office of the Premier’s accounting officer (sic) in respect of the matters reported, including recommendations on disciplinary measures against the implicated officials. It is important to bear in mind that in terms of section 38(h) of the PFMA and section 4 of the Treasury Regulations the department’s accounting officer (sic) is responsible for taking corrective action.

- 2) *Nevertheless, the report confirmed the existence of financial misconduct and elaborated on the nature of the extent thereof, as well as the responsible parties within the office of the Premier. Details were provided in the report together with the recommendation that the office of the Premier should lay criminal charges with the SAPS against the implicated parties.*

3) ...”

5.3.17. In question no. 338 of the Questions for Written Reply, publicized on 14 August 2015, Mr. G. Michalakis of the DA in the Free State posed *inter alia* the following question to the Minister of Finance:

“

- 1) *Whether, in view of the recommendations by the previous Minister of Finance that criminal charges should be laid against senior officials in the Free State (details furnished), this was communicated to the Premier; if not, why not; if so, when?*
- 2) *Whether the Premier has responded....”*

5.3.18. The Minister of Finance confirmed in his response that the recommendations were communicated to the Premier and that a meeting took place on 8 October 2012 to discuss *inter alia* the misconduct related to the appointment of Letlaka Media CC.

5.3.19. I informed Mr Magashule of the allegations raised against him in a letter dated 23 January 2017 and he replied on 19 September 2017, stating that he never indicated in his response to the question of Hon Jankielsohn that he denied all knowledge of the report and of the recommendations by the Minister of Finance.

5.3.20. Moreover, that in the Transcriptions of Proceedings in the Free State Legislature of 21 May 2015, he never denied having received the report; in fact when Hon Jankielsohn exclaimed, *“Mr Magashule have it! Mr Magashule have it! Mr Magashule have the report!”* he replied, *“And then it was not conclusive. Do not worry! Do not worry!”* Mr Magashule argued that his response confirmed rather than deny knowledge of the report.

5.3.21. Mr Magashule indicated further, that on 8 February 2013, the former Accountant General in the National Treasury forwarded a letter to the Office of the Premier, which purported to be a summary of findings of a report which was in the possession of the National Treasury.

- 5.3.22. In response, a letter was submitted to the National Treasury on 22 February 2013 in which the DG in the Office of the Premier, Ms Rockman stated *inter alia* that notwithstanding the difficulty in responding to a summary of the findings of a report without access to the full report, “*The information obtained and the documentation removed by officials in the Office of the Accountant-General was obtained under false pretences and will therefore not be admissible in any further processes. Consequently the costs of the forensic investigation may constitute fruitless and wasteful expenditure.*”
- 5.3.23. Further that, the blatant unethical conduct of JGL Forensic Services, specifically relating to, “*...work conducted for the National Department of Water Affairs and Forestry may be a reference site to consider.*” In addition, this service provider’s conflict of interest in any matter relating to the Department of the Premier has been placed on record.”
- 5.3.24. Mr Magashule then stated that a copy of the National Treasury report was subsequently received from the Accountant-General of National Treasury on 25 February 2014. In a follow up letter to the Accountant-General from the DG in the Office of the Premier, dated 3 March 2014, reference was made to the letter of 22 February 2013 and whether the Accountant-General considered its contents, specifically with regard to the complaints against the officials in the Office of the Accountant-General and JGL Forensic Services. Ostensibly, no response in this regard was received from the Office of the Accountant-General.
- 5.3.25. In a copy of a Free State Question Paper, dated 10 September 2014, Hon Jankielsohn asked the following question:
- “
1. *Whether, with reference to the reply of question 1) published on 06 August 2014, the recommendations of the National Treasury commissioned report (attached), conducted by JGL Forensic Services, into the contracts between the (i) Office of the Premier, (ii) Letlaka Media Services and (iii) the transversal agreements between the Office of the Premier and other Provincial Departments were communicated to the Premier, if not, why not, if so, what were the recommendations?” (own emphasis)*

- 5.3.26. In this regard, Mr Magashule replied, saying that the attachment referred to in the aforesaid question, was supposedly a copy of the National Treasury report, but in fact was a copy of the Mchunu report. This Mchunu report was an incorporated segment of the National Treasury report, which comprised of findings made by Mchunu Attorneys following an investigation conducted by them.
- 5.3.27. Mr Magashule further asserted that although the Mchunu report found its way into the National Treasury report, editing to the Mchunu report has been effected by the authors of the National Treasury report, because there were differences noted between the incorporated version of the report and the standalone version.
- 5.3.28. According to Mr Magashule the standalone Mchunu report, erroneously referred to above by Mr Jankielsohn as “...*the National Treasury commissioned report...*” had no recommendations and therefore reference to “...*the recommendations of the National Treasury commissioned report...*”, by Mr Jankielsohn, was misdirected.
- 5.3.29. Further to his response, Mr Magashule also indicated that in his reply to Question 448 on 15 November 2013, the Minister of Finance, Mr Pravin Gordhan recommended that criminal charges be instituted, with the SAPS, against parties implicated in the National Treasury report, by the Department of the Premier. Mr Magashule argued that at the time of the Minister’s recommendation, he did not have sight of the National Treasury report until 25 February 2014 the following year and that the letter, under cover of which the report was submitted to his office, was from the then Acting Accountant-General, not the Minister or the Director-General of National Treasury.
- 5.3.30. This letter in itself did not recommend criminal action against implicated officials. Mr Magashule contended that there were no recommendations of such a nature made to him by the Minister himself at any stage.
- 5.3.31. This was confirmed in a draft response to Questions for Written Reply, dated 30 September 2015, in which Mr Magashule asserted that he was not aware of any

recommendations by the Finance Minister which were made to the effect that criminal charges be instituted against implicated officials.

- 5.3.32. Moreover, that the report itself did not recommend criminal action against implicated individuals as suggested by the Finance Minister in response to the question by Mr D A Worth in paragraph 6.2.16 above.
- 5.3.33. Mr Venter from the Office of the Premier advised on 30 August 2019, that the confusion created during the above Question and Answer sessions in the Provincial Legislature, was in respect of the National Treasury report into the Letlaka contract, which had three versions. The first being a summary of the findings of the National Treasury report provided to the Office of the Premier.
- 5.3.34. The second report was an undated final report by Mchunu Attorneys was which allegedly leaked and was meant to form part of the National Treasury report.
- 5.3.35. The third report was the full report, received by the Office of the Premier from the former Accountant-General of National Treasury on 25 February 2014.
- 5.3.36. According to Mr Venter, this is the reason why the former Premier insisted on knowing which report Mr Jankielsohn was referring to in his question to the Premier in the sitting of the Free State Legislature on 21 May 2015 [*paragraph 6.2.9 above*]. During the aforesaid sitting, the former Premier insisted in his reply, *"...I still want to know whether they have a report and if they have a report, can they give me the report."* According to Mr Venter, the former Premier reasonably believed that Mr Jankielsohn more than likely referred to the standalone, alleged leaked, Mchunu report and not the final National Treasury report.
- 5.3.37. During a question session for oral reply in the Free State Legislature, dated 21 May 2015, Hon Jankielsohn stated that *"...it is very clear in section 34 of the Prevention and Combating of Corrupt Activities Act [12/2004] that anyone who is aware of corrupt activities; especially a person in authority. Is obliged to report that to the necessary authorities and if they do not do so, they themselves are guilty of an offence."*

5.3.38. Mr Magashule replied, stating *inter alia*, “if I have to act on any corrupt activities, I will act on any corrupt activities.” Further thereto. in a written reply, dated 7 October 2015, Mr Magashule stated *inter alia* that he was, “... not aware to which Section of the Prevention and Combating of Corrupt Activities Act the Hon. Member refer.”

5.3.39. In this regard, it is relevant to note *inter alia* the following recommendations of suspected fraud against the Department of the Premier made in the National Treasury report:

Department: National Treasury

Assessment of Compliance: Appointment of Letlaka Media CC as Service Provider to the Office of the Free State Premier and other Provincial Department

Final Investigation Report

14 December 2012

5. Misrepresentations by service providers

5.1 As detailed hereinabove, it appears that Letlaka made certain material misrepresentations to the Department of the Premier during its bid application and furthermore overcharged the Department for certain of its services.

5.2 It is our recommendation that the abovementioned occurrences be fully investigated and reported to the South African Police. It is further recommended that, where prudent, civil action is instituted against Letlaka to recover the losses suffered by the Department of the Premier.

6. Disclosures by members of SMS

6.1 Through our investigations we determined that certain members of the Senior Management Service have ownership and/or membership in private registered entities. It should be considered that this membership may be in contravention of the Public Service Act, 1994 and the Public Service Regulations, 2001.

6.2 We recommend that compliance with the above Act and Regulations be investigated in respect of all SMS members of the Department of the Premier.

5.3.40. Notwithstanding the findings and recommendations made in the National Treasury report, Mr Magashule refused to act on it and provided the following reasons to the former Finance Minister, Mr Nene, in a letter dated 13 October 2015:

Dear Mr Nene

APPOINTMENT OF LETLAKA MEDIA CC AS A SERVICE PROVIDER TO THE OFFICE OF THE PREMIER, FREE STATE AND OTHER PROVINCIAL DEPARTMENTS

1. I am aware that a written reply was submitted to the NCOP by your office in response to a question, published on 14 August 2015, relating to the above-mentioned matter.
2. I regrettably have to note that the response in certain aspects appears to be inaccurate. It is not correct that there was no response from me. On receipt of the letter from the Accountant General addressed to me and dated 24 February 2014, I instructed the Director General to engage with National Treasury in order to clarify a number of issues, which emanated from the report. The letter from the Director General, addressed to the Accountant General and dated 03 March 2014, has not as yet been responded to.
3. You may also be aware of the complaints levelled against both Treasury officials and your service provider, which, to my knowledge, have not been entertained as yet, apart from the fact that the Association of Certified Fraud Examiners South African Chapter, has decided to institute disciplinary steps against your service provider as a result of his conduct in this matter. It makes it very difficult to conclude that the report was prepared in an independent and unbiased way.
4. I have, nevertheless, carefully considered the report and it is my opinion that the conclusions and recommendations are not factually and legally sustainable. Apart from this, the author of the report regards it as a discussion and background document and it is further qualified not to express an opinion on the legal effect of the facts or the guilt or innocence of any person.
5. Something which I regard as quite important is the fact that despite being in possession of a report relating to the investigation, the Auditor General made no adverse finding regarding the appointment of Letlaka Media CC during the annual audits of my Department.
6. I am of the view that this matter has now been dragging on for a considerable period of time and needs to be disposed of. I do not intend to take any steps against any official and I consequently regard the matter as closed.

Yours faithfully



**E.S. MAGASHULE, MPL
PREMIER: FREE STATE**

DATE: 13th October 2015
PREMIER 2015.13OCT. MFN FINANCE

Discretionary Notice

5.3.41. A Discretionary notice was sent to the Complainant, Mr Jankielsohn on 31 July 2019, to inform him of my intended conclusion on the issue relating to the investigation into whether the former Premier made a misleading statement to the Free State Provincial Legislature, in his response to the question relating to the report by JGL Forensics Services into the contracts between the Office of the Premier and Letlaka Communications as well as recommendations made by the Minister of Finance to take criminal action against implicated individuals.

5.3.42. The allegation of blatantly misleading the Legislature by denying any knowledge of the report by JGL Forensic Services as well as the recommendations of the Minister of Finance, were unsubstantiated for the following reasons:

- 5.3.42.1. The report by JGL Forensic Services on the appointment of Letlaka Media CC as service provider to the office of the Premier and other Provincial Departments was finalised on 14 December 2012, and received by the Office of the Premier on 25 February 2014.
- 5.3.42.2. During the sitting of the Free State Legislature on 21 May 2015, the Office of the Premier had already received and responded to the report of JGL Forensic Services.
- 5.3.42.3. Upon examination of the responses of the former Premier to the questions and statements made by Mr Jankielsohn in the transcriptions of proceedings in the Free State Legislature on 21 May 2015, it could not be established on the face of it, that the former Premier denied having any knowledge of the National Treasury report by JGL Forensic Services nor could it be established that he refused to implement the recommendations of the Minister of Finance. In fact, the reply by the Minister of Finance to the questions posed by Hon. Michalakis on 14 August 2015 occurred after the supposed misleading of the Legislature on 21 May 2015 and therefore not relevant to the issue for my determination.
- 5.3.42.4. The former Premier stated that he had no knowledge of the recommendations of the Minister of Finance instructing him to lay criminal charges against senior officials, as it was never communicated to him by the Minister. There was no evidence of such communication.
- 5.3.43. In his response to the Discretionary notice, Mr Jankielsohn stated the following:

2. Your findings regarding the former Premier misleading the Legislature regarding the Letlaka contracts

I cannot concur with your finding that the allegations of misleading the Free State Legislature and thus violating the Executive Ethics Code regarding the issue of Letlaka is "*unsubstantiated*" for the following reasons.

During the sitting of the Legislature on 21 May 2015 (see attachment 4 pp 3-6) the Premier was requested to supply answers to the following questions for oral reply:

1. *“Who are the implicated parties as identified in the National Treasury Commission report by JGL Forensics into contracts between the Office of the Premier and Letlaka Communications?”*
2. *“Whether the Office of the Premier requested law enforcement agencies to thoroughly investigate the allegations and findings in the report as take appropriate action, as requested by the national Finance Minister, the former Minister Pravin Gordhan? If not, why not? If so, what are the relevant details?”*

The Premier replied as follows:

“No, I am still looking into all the allegations by the opposition and I still want to know whether they have a report and if they have a report, can they give me the report?”

In my follow up question, after some introductory comments, I specifically posed the following question:

“Now, my question to the Premier is whether he adhered to the request by the National Minister when he got the report from the MEC of Finance. Will he abide by the anti-corruption legislation? Because it appears that Letlaka has the best Premier that money can buy” (This is with reference to section 34 Combatting of Corrupt Activities Act).

The Premier replied as follows to the follow up question:

“Letlaka did not buy anybody! The support for black companies will continue in th Province without being apologetic, but the report was not that conclusive and I will the get the report from the MEC.”

The Premier deliberately evaded answering any of the two clearly defined question: thereby refusing to be held accountable to the Legislature. Furthermore, by requesting th report from the opposition he is indicating that he did not have a copy of the report, yet in his reply to my follow up question he states that the report *“was not that conclusive”* which implies that he had read the report and was making a judgement on its content.

Besides his deliberately attempting to mislead the Legislature through his evasive answers, he is clearly refusing to be held accountable by the Legislature and clearly di not take any trouble to prepare for the questions.

5.3.44. The second part of Mr Jankielsohn’s reply to the Discretionary notice was as follows:

There are two replies from two separate Ministers of Finance relating to this issue:

The first reply published by the NCOP on 15 November 2013 (see attachment 5) to a question asked by Mr D.A. Worth to the Minister of Finance indicates that the report *“confirmed the existence of financial misconduct and elaborated on the nature and extent thereof, as well as the responsible parties within the department of the premier. Details were provided in the report together with the recommendations that the department of the Premier should lay criminal charges with the SAPS against implicated officials”*.

The Minister goes on to emphasise that *“It is the view of the national Treasury that the law enforcement agencies should thoroughly investigate the allegations and findings within the report and take the necessary appropriate action”*.

The second reply published by the NCOP on 14 August 2015 to four questions asked by Mr G. Michalakis see attachment 6) to the next Minister of Finance indicates, among others, the following:

Question 1: *“Whether, in view of the recommendations by the previous Minister of Finance that criminal charges should be laid against senior officials in the Free State (details furnished), this was communicated to the Premier, if not, why not, if so, when?”*

Reply: *“Yes, the recommendations were communicated to the Premier. In addition to letters that were sent to the Premier’s office, the then Minister of Finance and Free State’s Premier had a bilateral meeting to discuss, amongst other issues, misconduct related to the appointment of Letlaka media CC. The meeting took place on 8 October 2012.”*

In reply to the third question the MEC for Finance indicates that: *“The then Director-General was subsequently appointed as Member of the Executive Council (MEC) of Finance on 11 March 2013, which made the investigations complicated”*.

However, in a reply to a written question in the Legislature dated 7 October 2015 (see attachment 7) the Premier contradicts the replies by the two Ministers by stating the following:

1. *“The Premier is not aware of any recommendations which were made to the effect that criminal charges be instituted against any official following the so-called Letlaka investigation.*
2. *The Premier is not aware to which Sections of the Prevention of Corrupt Activities Act the Hon. Member refer.*
3. *It is incorrect to allege that there was no formal response to national Treasury from the Province. A letter s directed to national Treasury on 3 March 2014. No reply to this correspondence was received to date.*
4. *It must be noted that, in spite of being in possession of the report relating to the so-called Letlaka investigation, no adverse findings were made by the Auditor General during the annual PFMA audit regarding the appointment of Letlaka Communications & Marketing and various other service providers to certain transversal contracts. The Hon. Member is referred to the relevant audit reports of the Office of the Premier”.*

5.3.45. Mr Jankielsohn stated that during the question session of 21 May 2015, the Premier refused to answer a follow up question in relation to his obligations regarding section 34 of the Prevention and Combating of Corrupt Activities Act, 2004. Mr Jankielsohn referred to the Premier’s response in paragraph 2 in the above abstract, in which the former Premier stated that he was not aware of which section of the Prevention and Combating of Corrupt Activities Act of 2004, Mr Jankielsohn was referring to.

5.3.46. Mr Jankielsohn cited section 34(1) in his response to the Discretionary Notice, which states that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. In terms of sub-section (2) any person who fails to comply with subsection (1), is guilty of an offence.

Section 7(9) Notice

5.3.47. During the course of my investigation, I came across evidence indicating possible wrongdoing on the part of the former Premier and as such, I informed the former Premier in a notice in terms of section 7(9) of the Public Protector Act, 1994, dated 09 January 2020, to furnish further evidence that negates what I already had and that in absence of same I was likely to make adverse findings against him and take remedial action to remedy the conduct failure.

- 5.3.48. It could not be established that the former Premier deliberately misled the Free State Provincial Legislature in his response to the question of the Hon Jankielsohn by denying any knowledge of the report by JGL Forensic Services as well as the recommendations of the Minister of Finance.
- 5.3.49. However, the National Treasury report indicated fraudulent activity with the procurement of Letlaka Communications, which in terms of section 34(1) of the Prevention and Combatting of Corrupt Activities Act, 2004, obligates a person in a position of authority to report such activity to the SAPS. Failure to do so amounts to an offence in terms of sub-section (b).
- 5.3.50. The report was provided to the former Premier in February 2014 and as such was made aware of the suspected fraudulent activity, but failed to report it to the SAPS as required by the above provision and as such violated section 34(1)(b) of the Prevention and Combatting of Corrupt Activities Act, 2004.
- 5.3.51. He also deliberately misled the Legislature when he stated in his written reply of 7 October 2015, that he was not aware of which section in the Prevention and Combating of Corrupt Activities Act, 2004, Hon Jankielsohn was referring to, during the question session of 21 May 2015, whereas in the transcriptions of the aforesaid proceedings, it specifically indicates that Hon Jankielsohn was referring to section 34 of the Act.
- 5.3.52. The former Premier responded to the section 7(9) notice in an affidavit with additional documentation and information, dated 17 July 2020. In the aforesaid response the former Premier asserted *inter alia* that;

“While Dr Jankielsohn, MPL, factually mentioned section 34 of PRECCA in the context of a debate held within the Legislature, nothing turns on it. This is due to the fact that section 34 of PRECCA specifies which particular individuals bear a statutory duty to report corruption.

A Premier (as I was then) is not listed in that section. Therefore, the Public Protector could not have found me to have breached a duty that I did and do not bear in law.”

Application of the relevant laws and prescripts

5.3.53. With regard to whether Mr Magashule misled the Provincial Legislature, the issue for my determination is whether applicable laws and prescripts were complied with. The applicable legislation and prescripts with regard hereto are the following:

The Constitution of the Republic of South Africa, 1996

5.3.54. The Constitution of South Africa is the supreme law of the Republic and all other laws should conform to the constitution.

5.3.55. In terms of section 132(1) of the Constitution, the Executive Council of a province consists of the Premier, as head of the Council and members appointed by the Premier from among the Members of the Provincial Legislature.

5.3.56. Section 133(2) states that Members of the Executive Council of a province are accountable collectively and individually to the Legislature for the exercise of their powers and the performance of their functions.

5.3.57. Members of the Executive Council of a province must act in accordance with the Constitution, in terms of section 133(3)(a). Sub-section (b) states that Members of the Executive Council of a province must provide the legislature with full and regular reports concerning matters under their control.

5.3.58. Section 136(1) states that Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation

The Executive Members Ethics Act, 1998

5.3.59. The purpose of the Executive Members Ethics Act is to provide for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and Members of Provincial Councils.

5.3.60. The President must 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 Members of the Executive Council must comply in performing their official responsibilities.

5.3.61. In terms of section 4(1)(b) the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint from the Premier or a Member of the Provincial Legislature of a province, if the complaint is against a Member of the Executive Council of the province.

Executive Ethics Code

5.3.62. The purpose of the code of ethics is to provide for standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and Members of the Executive Council must comply in performing their official responsibilities.

5.3.63. Paragraph 2.3(a) states that Members of the Executive ***may not*** *deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature.*

5.3.64. In terms of sub-paragraph (b) Members of the Executive ***may not*** *act in a way that is inconsistent with their position.*

Code of Conduct and Ethics for Members of the Free State Provincial Legislature, 2009

5.3.65. The Code of Conduct and Ethics for Members of the Free State Provincial Legislature serves to provide for guidelines on principles, ethical conduct as well as rules and obligations that the Members of the Free State Provincial Legislature are expected to abide with.

5.3.66. In terms of paragraph 3.1 of the Code of Conduct and Ethics, a Member of the Free State Legislature must be loyal to the Republic of South Africa and its people. He or she must uphold the laws of the Republic of South Africa and act with respect towards the institution of the Legislature. A member must ensure that his or her conduct, whether in a personal or official capacity does not bring

the Legislature into disrepute, or damage public confidence in the system of government.

5.3.67. Paragraph 3.7 states that a Member of the Free State Legislature is accountable for his or her decisions and actions to the public and must submit himself or herself to whatever scrutiny is appropriate to his or her office.

Prevention and Combating of Corrupt Activities Act, 2004

5.3.68. This act provides *inter alia* for the strengthening of measures to prevent and combat corruption and corrupt activities as well as to provide for the offence of corruption and offences relating to corrupt activities.

5.3.69. Hon Jankielsohn cited section 34(1) which states that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2,3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2;

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R 100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

5.3.70. In terms of sub-section (2), subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.

5.3.71. For purposes of subsection (1), sub-section (4) outlines the following persons to hold a *position of authority*, namely-

(a) the Director-General or head, or equivalent officer, of a national or provincial department;

(b) in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No.117 of 1998);

- (c) any public officer in the Senior Management Service of a public body;
- (d) any head, rector or principal of a tertiary institution;
- (e) the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1981):
- (f) the executive manager of any bank or other financial institution:
- (g) any partner in a partnership;
- (h) any person who has been appointed as Chief Executive Officer or an equivalent officer of any agency, authority, board, commission, committee, corporation council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;
- (i) ...

The Conclusions that could be made based on the application of the law to the facts

5.3.72. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that:

5.3.73. Upon examination of the responses of Mr. Magashule to the questions and statements by the Hon. Jankielsohn in the Transcriptions of Proceedings in the Free State Legislature on 21 May 2015, it could not be established on the face of it, that Mr. Magashule denied having any knowledge of the report by JGL Forensic Services. In fact, it was established that the former Premier confirmed rather than denied having had access to the National Treasury report.

- 5.3.74. It was also established that confusion was created during the Question and Answer session in the Provincial Legislature as the result of three reports in circulation on the same investigation. The first being a summary of the findings in the final National Treasury report, the second, an undated report by Mchunu Attorneys which was meant to form part of the final National Treasury report and a third being the final National Treasury report. This confusion brought about uncertainty of which report members were referring to, hence the request by the former Premier for a copy of the report from Mr Jankielsohn.
- 5.3.75. This was construed by Mr Jankielsohn as an affirmation by the former Premier to not have had sight of the National Treasury report, which in his view was misleading since the former Premier already acknowledged receipt of the report.
- 5.3.76. Furthermore, it was also established that during the Question and Answer session, the former Premier was of the view that the Mchunu report leaked before it was incorporated into the National Treasury report and as such the former Premier contended, during the sitting, to view the report to which Mr Jankielsohn was referring to in order to establish whether Mr Jankielsohn was in possession of a leaked report.
- 5.3.77. It was also established that the Office of the Premier did not have sight of the National Treasury report when the the Minister of Finance, Mr Pravin Gordhan recommended, during the sitting of the Provincial Legislature on 15 November 2013, that criminal charges be instituted with the SAPS against officials implicated in the National Treasury report. In fact, the Department of the Premier only received the final National Treasury report on 25 February 2014 from the Acting Accountant-General of National Treasury.
- 5.3.78. Furthermore, that when the Office of the Premier received the report, the Office of the Premier immediately expressed its discontent with the manner in which officials within National Treasury conducted themselves in respect of the investigation as well as its dissatisfaction with JGL Forensic Services, who conducted the investigation.

- 5.3.79. This was communicated to the former Minister of Finance, Mr Nene, in addition to the former Premier's subsequent refusal to lay criminal charges against implicated officials as recommended by the former Ministers of Finance, notwithstanding the fact that the report itself did not recommend criminal action to be laid against implicated officials as suggested by the former Finance Ministers.
- 5.3.80. It was also established that the provisions of section 34(1) of the Prevention and Combating of Corrupt Activities Act, 2004 which states that any person who holds a position of authority must report knowledge or suspicion of an offence to any police official, was not applicable to Mr. Magashule in his former capacity as Premier, because he is not listed under the provision as a person *holding a position of authority*.

6. FINDINGS

Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the response to a section 7(9)(a) notice issued to the former Premier of the Free State and a letter issued to the former MEC responsible for the Free State Department of Public Works and Infrastructure, I now make the following findings:

- 6.1. **Regarding whether Mr. Magashule made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the funeral arrangements of the late Ms. Ngubentombi, and in doing so violated the provisions of the Executive Ethics Code;**
- 6.1.1. The allegation that Mr. Magashule blatantly misled the Free State Provincial Legislature in his response to the question of the Hon. Jankielsohn regarding both his Department's involvement in the funeral arrangements as well as the commitment by his office to ensure that the Provincial Government refunds the municipality, **is not substantiated**.
- 6.1.2. In his written reply to the question of Hon. Jankielsohn, Mr. Magashule confirmed what was already known, which was that the Department of Public Works would be responsible for the expenditure for the funeral, that the extent to which the

Office of the Premier was involved in the arrangements extended to informing relevant Ministries, Departments and persons of the details of the official provincial funeral as declared by the presidency, which in terms of the Ministerial handbook is to announce the demise and instructing those concerned to commence with immediate implementation of the procedures in the policy and lastly, to advise the Hon. Jankielsohn to direct his questions relating to cost to the responsible department.

6.1.3. As alluded to by Mr Jankielsohn, this response may have been somewhat vague and to an extent inadequate, but cannot be regarded as evasive and/or misrepresenting of facts and as such, it could not be established that the former Premier deliberately or inadvertently mislead the Legislature, contrary to the provisions of paragraph 2.3(a) of the Executive Ethics Code.

6.2. **Regarding whether Mr Mashinini, in his capacity as the MEC previously responsible for the Provincial Department of Public Works and Infrastructure of the Free State, made a misleading statement to the Free State Provincial Legislature in his response to a question relating to the funeral arrangements of the late MEC previously responsible the Free State Provincial Department of Health, Ms. Ngubentombi and in doing so, violated the provisions of the Executive Ethics Code.**

6.2.1. The allegation that Mr. Mashinini misled the Free State Provincial Legislature in response to the question of the Hon. Jankielsohn relating to the funeral arrangements of the late MEC for Health, Ms. Ngubentombi, **is substantiated**.

6.2.2. In his reply to the question of Mr Jankielsohn of whether his department will refund the Fezile Dabi District Municipality for the cost incurred for the funeral of the late MEC, Mr. Mashinini stated in a written reply that his department did not commit to refund the cost incurred for the funeral for the late MEC of Health to the Fezile Dabi District Municipality.

6.2.3. However, contrary to this assertion, the DG in the Department of the Premier, instructed the Fezile District Municipality to *inter alia* liaise with the Free State

Department of Public Works with regard expenditure relating to logistical arrangements for the funeral of the late MEC.

- 6.2.4. Furthermore, that the HOD of the Department of Public Works, Mr M.W Seoke approved a submission by the CFO which stated specifically that the cost of the funeral shall be *borne* by the Department of Health and Public Works and that the Fezile Dabi District Municipality shall have a claim against the Free State Provincial Government for the logistical arrangements for the funeral.
- 6.2.5. According to Mr Mashinini, *“I responded to the question of Mr Jankielsohn, MP, with the information as received from the Head of the Department. I was much later, the specific date I cannot remember, informed by the previous Premier, Mr ES Magashule, that it was brought to his attention that my reply to the question was factually incorrect. I informed him that the reply was based on information received from the Head of the Department. I, therefore, wish to submit that although the information provided may be incorrect, I never willfully misled the Legislature or breached the Executive Ethics Code in any other way whatsoever”.*
(sic)
- 6.2.6. By providing inaccurate information to the Provincial Legislature, Mr. Mashinini inadvertently misled the Legislature, contrary to the provisions of paragraph 2.3(a) of the Executive Ethics Code which states that Members of the Executive may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature.
- 6.2.7. In doing so, Mr Mashinini also breached section 136(1) of the Constitution, for not acting, as a Member of the Executive, in accordance with Executive Ethics Code and section 133(3)(a) of the Constitution for failing to act in accordance with the Constitution.
- 6.2.8. Further thereto, the MEC also breached paragraph 3.1 and 3.7 of the Code of Conduct and Ethics for Members of the Free State Provincial Legislature, which states that a Member of the Free State Legislature must uphold the laws of the Republic of South Africa and act with respect towards the institution of the Legislature. A Member of the Free State Legislature is accountable for his or her

decisions and actions to the public and must submit himself or herself to whatever scrutiny is appropriate to his or her office.

6.3. Regarding whether Mr. Magashule made a misleading statement to the Free State Provincial Legislature in his response to the question relating to the report by JGL Forensics Services into the contracts between the Office of the Premier and Letlaka Communications as well as recommendations made by the Minister of Finance to take criminal action against implicated individuals, and in doing so violated the provisions of the Executive Ethics Code.

6.3.1. The allegation that Mr. Magashule deliberately misled the Free State Provincial Legislature in his response to the question of the Hon. Jankielsohn by denying any knowledge of the report by JGL Forensic Services, as well as the recommendations of the Ministers of Finance, **is not unsubstantiated**.

6.3.2. It was established that during the Question and Answer session in the Provincial Legislature a misunderstanding occurred between members concerning the National Treasury report. Three versions of the report was in circulation of which one version had leaked.

6.3.3. The former Premier`s responses to questions was formulated with the view to ascertaining which version of the report a member was referring to in light of the possibility that it may be the leaked report. In this regard, his reply cannot be construed as misleading in any way, given the context in which it was provided.

6.3.4. Moreover, that it was established that the former Premier acknowledged rather than denied having had access to the National Treasury report, therefore, could not be found to have misled the Provincial Legislature by denying having knowledge of the report which had been provided to him, contrary to the provisions of paragraph 2.3(a) of the Executive Ethics Code.

6.3.5. It was established that the former Premier conceded to denying having knowledge of the recommendations to lay criminal charges against officials implicated in the

National Treasury report, by the former Ministers of Finance, during a sitting of the Provincial Legislature.

- 6.3.6. When the aforesaid recommendations was communicated in the Provincial Legislature, the former Premier did not have access to the report until the following year. Upon receipt of same the former Premier communicated his discontent with the investigation process as well as JGL Forensics Services who conducted the investigation.
- 6.3.7. Failure by the National Treasury to consider and examine these areas of dissatisfaction, the former Premier escalated his discontent to the former Minister of Finance, Mr Nene advising him that due to these unresolved issues and other shortcomings in the report, he is unable to lay criminal charges against officials.
- 6.3.8. In this regard, it could not be established that the former Premier contravened paragraph 2.3(a) which states that Members of the Executive “*may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature*”, nor could it be established that he contravened sub-paragraph (b) by acting in a way that is inconsistent with his position.
- 6.3.9. The former Premier also did not fail to comply with the provisions of section 34(1) of the Prevention and Combatting of Corrupt Activities Act, 2004, based on the provisions of sub-section (4) which does not list the Premier as a person holding a position of authority and therefore the provisions of section 34(1) is not applicable to him.

7. REMEDIAL ACTION

- 7.1. In light of the above findings, I am taking the following appropriate remedial action as contemplated in section 182(1)(c) of the Constitution, with a view to remedying a violation of the Executive Ethics Code referred to in this report:
- 7.1.1. I have made no adverse findings against the former Premier of the Free State, Mr Elias Sekgobelo "Ace" Magashule and as such no remedial action, as envisaged by section 182(1)(c) of the Constitution, 1996, was taken against him.

7.2. The Premier of the Free State Province, Ms Sisi Ntombela, to;

7.2.1. Take cognisance of the findings of a violation of the Constitution and the Executive Ethics Code by a Member of the Executive Council, to ensure that such conduct is not repeated and to take appropriate corrective action to prevent a recurrence of such conduct referred to in this report;

7.2.2. In terms of section 3(6) of the Executive Members' Ethics Act, the Premier must within a reasonable time, but not later than 14 days after receiving a report, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.

8. MONITORING

8.1. The Director-General (DG) in the Office of the Premier must within thirty (30) days of receipt of this report provide me with an action plan, indicating timelines, in respect of the above-mentioned remedial action.

8.2. The Free State Provincial Legislature Committee on Ethics and Members' Interests must apprise me of the steps taken against Mr. Mashinini for breaching the the Code of Conduct and Ethics for Members of the Free State Provincial Legislature

8.3. All actions directed in this report as part of the remedial action taken by the Public Protector in terms of the Public Protector's powers under section 182(1)(c) of the Constitution must be finalised within six (6) months from date of the report.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA

DATE: 11/09/2020

Assisted by Mr Godwin Kock (Senior Investigator: Good Governance and Integrity Branch)