Alleged maladministration by Master in the Ntsane estate matter

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Executive Summary

(i) This is my report issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of the provisions of section 182(1)(c) of the Constitution following an investigation into allegations of maladministration and improper conduct in connection with allegations of failure by the Master of the High Court of South Africa (the Master), Pretoria office, to deal with the conduct of Mr Mkhavelo of Mkhavelo Attorneys, who acted as Ms L Ntsane’s agent in the winding up of the estate of her late husband, Mr Tsoeu Ezekiel Ntsane and the unfairness of Regulation 910 of the Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934 (the Attorneys Act) which regulates the administration of the deceased estate.

(iii) The complaint was lodged with my office by Ms Ms L Ntsane (the Complainant) on 26 March 2018.

(iv) Based on an analysis of the allegations, the following issues were identified to inform and focus the investigation:

(aa) Whether the Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys Act which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances; and

(bb) Whether there is an undue delay by the Master of the High Court to render assistance to Ms Ntsane to finalise the winding up of the estate of her late husband.
(v) Key laws and policies taken into account to help me determine if there had been improper conduct/ and or maladministration by the Master were principally those imposing administrative standards that should have been upheld by the Master and/or its officials. Those are the following:

(a) The Administration of Estates Act 66 of 1965 which regulates the estate of a deceased person; and

(b) Regulation 910.2 of the Attorneys Act which also regulates the administration of the deceased estate.

(vi) During the investigation process, I issued a notice in terms of section 7(9)(a) of the Public Protector Act, to the Acting Chief Master on 15 November 2019 to afford the Acting Chief Master an opportunity to respond to my provisional findings.

(vii) Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the complaint received when weighed against the standard that was expected to be upheld by the Master, I now make the following findings:

(a) Regarding whether the Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances:

(aa) The Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys Act which regulates the administration of the deceased's estate, thereby prejudicing the Complainant under the circumstances.

(bb) The Master's Office has held several discussions with members of the legal fraternity regarding the risks and negative implications of the application of
Regulation 910. Notwithstanding the fact that discussions are being held regarding the challenges posed by Regulation 910, the Master’s Office has taken too long to ensure that the said regulation is repealed.

(cc) The Master and other legal institutions conceded that the risks of Regulation 910 include the fact that the Master cannot act against an agent whenever there is an undue delay or there is non-compliance by the said agent; the staff in the Master’s office receive kick-backs from attorneys whenever the public is referred to them for assistance to wind up the estate and sometimes agents disappear with the estate funds.

(dd) The delay to repeal Regulation 910; has caused prejudice not only to the Complainant, but to all other beneficiaries in a similar position as her and the beneficiaries.

(ee) The Attorney paid himself R49 000.00 legal fees from the estate before its finalisation. He also charged the Complainant R3000.00 for the issuing of a letter of executorship.

(ff) The failure by the appointed agents to administer the estate in the matter caused prejudice to the other beneficiaries of the estate because only the Complainant enjoyed the comfort of the house and usage of the vehicles which form part of the estate.

(gg) The conduct of the Master amounts to improper conduct as envisaged in section 182(1) of the Constitution maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
(b) Regarding whether there is an undue delay by the Master of the High Court to render assistance to Ms Ntsane to finalise the winding up of the estate of her late husband:

(aa) The allegation that there is an undue delay by the Master of the High Court to render assistance to the Complainant to finalise the winding up of the estate of her late husband is not substantiated.

(bb) My investigation revealed that upon her appointment as the Executrix of the estate, the Complainant appointed the Attorney as her agent in terms of Regulation 910, against whom she raised several complaints of his improper conduct in winding up the estate. These resulted in her changing agents on three (3) occasions.

(cc) I also found that due to the agents' failure to address the queries raised by the Master regarding the winding up of the estate, the Master removed the Complainant as the Executrix in terms of section 54 of the Administration of Estate Act.

(dd) The Master, however, undertook to re-appoint the Complainant as the Executrix of the estate and also arrange a meeting of all interested parties in order to finalise the winding up of the estate. The process had not been concluded at the date of the report.

(ee) The conduct of the Master does not constitute improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.

(viii) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:
The Minister of Justice and Constitutional Development (the Minister)

(aa) The Minister must, within 60 working days from the date of this report, initiate a process of reviewing Regulation 910 in its totality and, inter alia, consider allowing the Master to work within the ambit of the Administration of Estate Act on the appointment processes and role of an Executor and how the office of the Master can be of assistance to Executors in the Administration of the Estate.

The Acting Chief Master

(bb) The Acting Chief Master must, within 30 working days from the date of this report, develop a process manual that explains the role and responsibilities of the Executors upon receipts of Letters of Executorship.

(cc) The Acting Chief Master must, within 30 working days from the date of this report, write a letter to the Legal Practice Council, to follow up on the action it will take in dealing with the conduct of the Attorney for withdrawing R49 000.00 from the estate late bank account before the winding up of the estate and for his charging of the Complainant R3 000.00 for the issuing of a letter of executorship.

(dd) The Master must within 30 working days from the date of this report, re-appoint the Complainant as the Executrix of the estate and also arrange a meeting of all interested parties in order to finalise the winding up of the estate.

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation and implementation of the remedial action:

1.2.1. Minister R Lamola, Minister of Justice and Correctional Services;

1.2.2. Adv JB Skosana, the Acting Director General of the Department of Justice and Constitutional Development; and

1.2.3. Ms T Bezuidenhout, the Acting Chief Master of the High Court of South Africa; and

1.2.4. The Complainant, Ms L Ntsane.

1.3 This report relates to an investigation into allegations of maladministration and improper conduct in connection with allegations of failure by the Master of the High Court of South Africa (the Master), Pretoria office, to deal with the conduct of Mr Mkhavele of Mkhavele Attorneys, who acted as Ms L Ntsane's agent in the winding up of the estate of her late husband, Mr Tsoeu Ezekiel Ntsanethe and the
unfairness of Regulation 910 of the Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934 (the Attorneys Act) which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances and/or undue delay by the Master of the High Court to render assistance to Ms Ntsane to finalise the winding up of the estate of her late husband.

2. THE COMPLAINT

2.1. The complaint was lodged by Ms L Ntsane (the Complainant) on 26 March 2018 who alleged the following:

2.1.1. When her husband passed away in December 2011, she was referred to Mr Mkhavelo Attorneys (the Attorney) to assist with the administration of the deceased estate. She indicated that the Attorney did not handle the estate properly in that:

2.1.1.1. He, inter alia, failed to make proper estimates on the value of the deceased’s house.

2.1.1.2. He stole R49 000.00 from her late husband’s ABSA bank account; and

2.1.1.3. The money in the deceased’s ABSA account was transferred to the Attorney’s Nedbank account, later withdrawn from the Nedbank account, deposited back and again withdrawn from the account. She mentioned that she was a beneficiary in the Attorney’s account.

2.1.2. She solicited the intervention of the former Deputy Master of the High Court, Ms Khumo Ramahanelo, to assist in the matter, but she failed;

2.1.3. The matter was escalated to the former Chief Master, Adv Lothian Basson, who in return instructed the former Master, Ms Sigcau, to assist her. Ms Sigcau allegedly informed her that an attorney dealing with an estate can only be paid if the winding
up of the estate was finalised and when the Master had given written consent that payment could be effected; and

2.1.4. She approached the Law Society, Law Clinic of the University of Pretoria, South African Police Service and Potgieters Inc, a firm of attorneys about the theft of the money from the estate by the Attorney, but the matter remained unresolved at the date of this report.

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

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

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

>“The Public Protector has power as regulated by national legislation—

(a) **to investigate** any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,

(b) **to report** on that conduct; and

(c) **to take appropriate remedial action**.”

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

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

3.5 In the Constitutional Court, in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:

3.5.1 The remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences" (para 73);

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

3.5.3 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);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
3.5.5 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);

3.5.6 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);

3.5.7 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 investigation and the type of findings made (para 71);

3.5.8 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(c));

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.10 “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));
3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

3.6.1 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.2 The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (paras 85 and 152);

3.6.3 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paras 91 and 92);

3.6.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (paras 100 and 101):

(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

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

3.6.6 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 (para105).
3.6.7 The fact that there are no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paras 107 and 108);

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

3.7 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitutes as ‘special circumstances’ depends on the merits of each case.

3.8 The Master of the High Court of South Africa is an organ of state and their conduct amounts to conduct in state affairs, as a result the complaints falls within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.9 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.
4. THE INVESTIGATION

4.1 Methodology

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

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

4.2 Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1. What happened?
4.2.1.2. What should have happened?
4.2.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
4.2.1.4. In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where she would have been, but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on the roles played by the Master when rendering assistance to the Complainant to finalise the winding up of the estate of her late husband and the unfairness of Regulation 910 of the Attorneys Act which regulates the administration of the deceased estate.
4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the Master.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him/her as close as possible to where they would have been had the institution concerned complied with the regulatory framework setting the applicable standards for good administration.

4.3 Notice issued in terms of section 7(9)(a) of the Public Protector Act:

4.3.1 During the investigation process, I issued a notice in terms of section 7(9)(a) of the Public Protector Act, to the Director General of the Department of Justice and Correctional Services (the Department) and Acting Chief Master on 15 November 2019 to afford them an opportunity to respond to my provisional findings. No response was received from either of them, despite evidence of delivery of the notice.

4.4 Based on analysis of the allegations, I identified the following issues to inform and focus this investigation:

4.4.1 Whether the Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934 which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances; and

4.4.2 Whether there is an undue delay by the Master of the High Court to render assistance to Ms Ntsane to finalise the winding up of the estate of her late husband.
4.5 The Key Sources of information

4.5.1 Documents

4.5.1.1 An email received from the Complainant outlining the complaint dated 22 March 2018.

4.5.1.2 Presentation to the Fiduciary Institute of Southern Africa, Master of the High Court, September 2018.


4.5.1.4 Minutes of a meeting between the Deceased & Insolvent Estates Committee of the Law Society of the Northern Province and the Master held on Friday, 31 August 2018 at 10:00 at the Offices of the Master in Pretoria.

4.5.2 Interviews conducted

4.5.2.1 Interviews with the Complainant 29 March 2019.

4.5.2.2 A meeting between me, the Complainant and the Acting Chief Master on 17 April 2019.

4.5.2.3 A meeting between my Investigation Team, the Complainant and the Acting Chief Master 17 September 2019.

4.5.3 Correspondence sent and received

4.5.3.1 A letter from my office to the Acting Chief Master, Ms T Bezuidenhout dated 09 May 2018.
4.5.3.2 A letter 25 January 2019 from Ms T Bezuidenhout to my office.

4.5.3.3 A letter dated 07 February 2019 from Ms T Bezuidenhout to my office.

4.5.4 Legislation and other prescripts

4.5.4.1 The Constitution.

4.5.4.2 The Public Protector Act.

4.5.4.3 Administration of Estates Act, no 66 of 1965.

4.5.4.4 The Attorneys Act.

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

5.1. Regarding whether the Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934 which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances:

Common cause issues

5.1.1 It is common cause that Regulation 910 provides that in the event of deceased estate, only an attorney, trust company or auditor can be appointed an executor where the value of the estate exceeds R250 000.
5.1.2 It is also common cause that in this matter, the value of the estate exceeded R250 000. The Complainant was initially appointed as the Executrix of the estate. Based on this, she appointed the Attorney as an agent to assist her in the winding up of the estate:

5.1.3 The Attorney paid himself R49 000.00 in legal fees from the estate before finalisation of the winding up of the estate.

5.1.4 The Complainant was also paid R80 000.00 by the Attorney before finalisation of the winding up of the estate.

5.1.5 The Master has since removed the Complainant as the Executrix of the estate and the Complainant also withdrew the Attorney's power of attorney to assist her in the administration of the estate. There was no appointed executor of the estate at the date of the notice. The Master removed the Complainant as the Executrix due to her failure to respond to queries from the Master.

*Issues in dispute:*

5.1.6 The issue for my determination is whether the Master failed to address the apparent unfairness of the Regulation 910 which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances.

5.1.7 The Complainant argued that she reported the death of her late husband to the Master and was appointed the Executrix. She, as a result, appointed the Attorney as an agent to assist her with the administration of the estate.

5.1.8 The Complainant indicated that the Attorney did not handle the estate properly in that:
a) He withdrew R49 000.00 from the estate late bank account as his fees for services rendered before the deceased estate was finalised and also charged her R3000.00 for the issuing of a letter of executorship.

5.1.9 On 09 May 2018, my office raised the matter with the Acting Chief Master, Mrs T Bezuidenhout, as per a letter dated 09 May 2018.

5.1.10 Between 09 May 2018 and 25 January 2019, my office had been requesting progress on the matter through emails and telephone calls, with no written response forthcoming.

5.1.11 The Acting Chief Master responded to the allegations as per her letters dated 25 January 2019 and 7 February 2019.

5.1.12 On the allegation that the agent withdrew R49 000.00 from the account, the Acting Chief Master indicated that on 27 August 2013, a consultation was held with the Attorney who reported that R49 000.00 was towards his legal fees. The Acting Chief Master further indicated that fees were only payable once administration of the estate was finalised, which was not the case in this matter. She further indicated that the Master had no relationship with the agent and could not investigate the conduct of the Attorney, as the agent of the Executrix. She reported that the Master could not even make a determination whether the R49 000.00 charged by the Attorney for services rendered to the Complainant was reasonable or not. She said that the Law Society was the appropriate institution to investigate the Attorney’s conduct in this matter.

5.1.13 The Acting Chief Master further reported that the Complainant received R80 000.00 cash from the estate before the Liquidation and Distribution (L&D) account was approved and further that she has been freely using the assets in the estate to the detriment of the other beneficiaries.
Steps taken by the Public Protector to resolve the matter

5.1.14 On 17 April 2019, a meeting was held between myself, the Acting Chief Master and the Complainant to clarify outstanding issues to assist the Complainant to finalise the matter.

5.1.15 During the meeting, the Chief Master was requested to explain how the office of the Master protects the vulnerable, illiterates, people who do not understand the implication of the provision of Regulation 910. She was further requested to provide the steps her officer was taking to protect, instead of handing over the vulnerable to the agents who can mismanage the estate funds at the detriment of the beneficiaries.

5.1.16 The Acting Chief Master indicated that they have proposed to the Minister of Justice to review Regulation 910 and work within the ambit of the Administration of Estate Act 66 of 1965 (the Administration of Estate Act). She alluded that the Administration of Estate Act is very clear on the appointment processes and role of an Executor and how the office of the Master could be of assistance to Executors in the administration of the estate. Currently, the executor's agents have a tendency of charging exorbitant fees to the executors, thereby prejudicing the innocent beneficiaries.

5.1.17 The Acting Chief Master further explained the issue of fees charged during the administration of the deceased estate. She indicated that there is a fee arrangement that the Executor makes with the agent in terms of Regulation 910, an Executor's fees (3.5% of the capital amount is for the Executor's fees) and the Master's fees (which is R600.00 which does not go to the Master, but to the Revenue Services).

5.1.18 The following resolutions were taken at the meeting:
5.1.18.1 The Acting Chief Master would write a letter to the Attorney to re-pay the R49 000.00 withdrawn from the estate to be paid back into the estate late bank account; and

5.1.18.2 The Acting Chief Master would write a letter to the Law Society to follow up on the action the Law Society will take in dealing with the conduct of the Attorney for withdrawing R49 000.00 from the estate late bank account before the deceased estate was finalised and for also charging the Complainant R3000.00 for the issuing of a letter of executorship.

Evidence obtained independently on the challenges of Regulation 910

5.1.19 According to a post1 titled “Regulation 910, only you can be my agent” by Christelis Artemides Attorneys “although this Regulation 910 seems simple and straightforward, it has created a headache for the Masters Office and agents alike...the Master’s Office intends on soon announcing a policy change regarding this Regulation. The Master’s Office hopes that Regulation 910 is recalled in its totality, meaning individuals will be able to administer deceased estates without the use of agents.

Practical problems which the Master’s Office faces are that when an individual is appointed as an executor, and an agent is assisting them, no security can be requested. Therefore, any recourse the Master may have against the executor and not the agent, whom is (at most times) responsible for the delay or non-compliance.

The proposed policy change is that every nominated executor will go through the Master’s Own Verification Technology to be vetted. Where a person cannot obtain security required by the Master’s Office, they will be referred to an agent who is able to provide such security. In the event where an agent has been

appointed and has provided security, then the agent will be appointed as executor, to allow the Master's office to have a right of recourse against the agent."

5.1.20 The Master's Office presented the following as the risks of Regulation 910 at the Fiduciary Institute of Southern Africa conference on 28 September 2018:

"Risks of insisting on an agent:

- Master cannot act against an agent- needs to act against the executor
- Master requests an agent but we do not verify acceptance of agent/ID of an agent
- Fraud in offices and on estates (kickbacks);
- Agents charge exorbitant fees from executor/beneficiaries
- Agents do not do their work and Master can do nothing
- Agents disappear with estate fund-no recourse/accountability"

5.1.21 The challenges of Regulation 910 were further discussed and confirmed at a meeting between the Deceased and Insolvent Estates Committee of the Law Society of the Northern Provinces and the Master's Office held on 31 August 2018. Paragraph 8.2 of the minutes of the meeting provides as follows:

"Ms Venter said that the existence of Regulation 910 had been discussed and deliberated on many occasions and the Master requested many different legal opinions in this regard but that in general, it was problematic for the Master to hold the correct party responsible in instances of noncompliance. Attorneys are appointed as agents in most instances and not as the executor of the estate. She said that it was agreed that Regulation 910 must be scrapped and in future executors who had been nominated and exempted from providing security in the will, could be requested to provide security to the Master to be appointed. She said that to protect the beneficiaries, the attorney would then have to be
appointed as the executor of the estate and not the agent. She said that in
general, the Master would always have a discretion to require security...

Ms Bezuidenhout said that there are problems where the staff received kick-
backs from the attorneys when they refer the public to the specific attorneys to
assist as agents."

5.1.22 It is evident from the above information from the Master and legal fraternity that
Regulation 910 poses a high risk of mismanagement of estate by the agent which
causes prejudice to the beneficiaries.

5.1.23 On 17 September 2019, a follow up meeting was held between my investigation
team, the Acting Chief Master and Complainant to seek progress regarding
implementation of the resolutions taken on 17 April 2019.

5.1.24 The Acting Chief Master indicated that there was amount of R150 000.00 that
was in the ABSA late estate account from which the Attorney withdrew
R49 000.00 and the Complainant was paid R80 000.00.

5.1.25 The Complainant produced a summons by FirstRand Bank Limited which sought
to attach the house which forms part of the estate due to monthly bond
repayment. The Acting Chief Master indicated that the Complainant must
personally deal with this issue, however it was resolved that the Complainant
would work with her representative, Ms Thekiso, to resolve the pending legal
action by FirstRand Bank urgently before the property was attached. The court
process on the matter was still underway at the date of the notice.

5.1.26 The Acting Chief Master conceded that Regulation 910 of the Attorneys Act has
created headache for the Masters Office and agents alike. The practical
problems which the Master's office faces are that when an individual is appointed
as an executor, and an agent is assisting them, no security can be requested.
Therefore, any recourse the Master may have is against the executor and not the agent whom is at most times responsible for the delay or non-compliance with the legislative prescripts of administration of the estate.

5.1.27 During the meeting of 17 April 2019, the Acting Chief Master indicated that the conduct of the Attorney in handling the estate was referred to the Law Society for further investigation.

Section 7(9)(a) notice issued in terms of the Public Protector Act

5.1.28 On 11 November 2019, I issued a notice in terms of section 7(9)(a) of the Public Protector Act to the Acting Director General of the Department and the Acting Chief Master. The notice was intended to make known to them my intended adverse findings against the Department.

5.1.29 They were give ten (10) days to respond to the notice in line with rule 24(2)(d) of the Rule Relating to Investigations of the Public Protector and matters incidental thereto, 2018. No response had been received from either official at the date of this report, despite proof of delivery of the notices to them by my investigation team.

Application of the relevant legal prescripts

Administration of Estates Act, no 66 of 1965

5.1.30 Section 13 (1) of the Administration of Estates Act provides that no person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act. The Complainant was correctly issued with letter of Executorship, but the executorship was withdrawn by the Master.
5.1.31 Section 50 (4) of the Administration of Estate Act further provides that an executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 34(11) or 35(12), as the case may be, unless payment of such remuneration has been approved in writing by the Master.

5.1.32 The evidence discussed above indicates that the Complainant received R80 000.00 cash from the estate before the L&D account was approved and further that she has been freely using the assets in the estate, such as the usage of the house and vehicles, without the consent of the other beneficiaries.

5.1.33—The Attorney withdrew R49 000.00 from the estate late bank account as his fees for services rendered before the deceased estate was finalised. The Attorney further charged the Complainant R3000.00 for the issuing of a letter of executorship.

5.1.34 During the meeting of 17 April 2019, the Complainant indicated that at some stage she lodged a complaint with the Master's office and she received a written response from a certain official who indicated that she did not see anything wrong with the payment of the R49 000.00 to the Attorney from the estate funds.

5.1.35 The Acting Chief Master acknowledged having seen the said response and indicated that the official, Ms S Serapelo, the former Assistant Master, has since resigned. She indicated that the letter was wrongly drafted as it also referred to the said R49 000.00 to be the 3.5% Executor fees which is not at all. The Acting Chief Master indicated that the Attorney was only entitled to his fees from the estate account after the finalisation of the estate.

*The Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934*

5.1.38 Regulation 910.2 of the of the Attorneys Act stipulates that *"subject to the provisions of paragraph 3 and 4, no person other than an attorney, notary or
conveyancer as defined in section 1 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act no 23 of 1934), (hereinafter in these regulations referred to as an attorney, notary or conveyancer, as the case may be) or an agent referred to in section 22 of the Magistrates' Courts Act, 1944 (Act no 32 of 1944), (hereinafter in these regulations referred to as a law agent) shall liquidate or distribute the estate of the deceased person." In the event that an individual is nominated as an executor, such as a surviving spouse, the Master of the High Court will require the appointment of an agent, in compliance with Regulation 910.

5.1.39 In terms of Regulation 910, an executor must appoint an attorney where the value of the estate exceeds R250 000.00. The Complainant appointed the Attorney as an agent to assist in the administration of the estate.

5.1.40 As a result of the appointment of the Attorney as an agent of the Complainant in terms of Regulation 910, the office of the Master confirmed that:

5.1.40.1 The Attorney paid himself R49 000.00 in legal fees from the estate before finalisation of the winding up of the estate;

5.1.40.2 The Attorney charged the Complainant R3000.00 for the issuing of a letter of executorship; and

5.1.40.3 Due to improper administration of the estate by the Attorney, other beneficiaries were prejudiced in that they had no right to the usage of the house and vehicles. Only the Complainant enjoyed the free use of the assets to the exclusion of the other beneficiaries.

5.1.41 As indicated under the evidence discussed above, the Master has no claim or recourse against the Attorney as the agent in terms of Regulation 910.
Conclusion

5.1.42 Based on the evidence gathered above, it can be concluded that the Master could do nothing in terms of Regulation 910 to act against the conduct of the Attorney.

5.1.43 It can, however, also be concluded that the legal fraternity, particularly the Master, has taken too long to ensure the repeal or review of Regulation 910.

5.2 Regarding whether there is an undue delay by the Master of the High Court to render assistance to Ms Ntsane to finalise the winding up of the estate of her late husband:

Common cause:

5.2.1 It is common cause that the estate of the Complainant’s late husband had not been wounded up at the date of this report.

Issues in dispute

5.2.2 The issue for my determination is whether the Master unduly delayed to render assistance to the Complainant to finalise the winding up of the estate of her late husband.

5.2.3 The Complainant argued that the Master’s office unduly delayed to wind up the estate since 2012.

5.2.4 Upon raising the complaint with the Master, the Acting Chief Master denied the Complainant’s allegation that their office unduly caused the delay in finalising the estate.
5.2.5 She indicated that there had been disputes between the Complainant and the Attorney regarding the administration of the estate. She said that on 9 October 2012, the Attorney informed the Master that his mandate had been terminated by the Complainant on 4 August 2012. During the course of October and November 2012, the Complainant was requested by the Master to appoint a new agent to assist, but she failed to do so.

5.2.6 The Acting Chief Master indicated that on 6 December 2012, the Master was informed by the Complainant that Messrs MKM Attorneys would act as her agent as per Regulation 910. The Acting Chief Master indicated that reminders were sent to the new attorneys to respond to the query sheet as issued, however a letter was received from another firm of attorneys, Potgieters Inc, advising that they now held instructions to assist the Complainant with the finalization of the estate. During October 2013, a letter was received by the Master from Potgieters Inc. indicating that the Complainant had not contacted them, notwithstanding requests made to her, and therefore they were withdrawing until such time as they receive a mandate from her.

5.2.7 The Acting Chief Master indicated that on 16 October 2013, the Complainant was removed as an Executrix due to failure on her part to respond to queries from the Master. She further stated that during August 2014, a letter was once again received by the Master from Potgieters Inc, requesting appointment of an Executor. On 19 November 2014, Mr FJ van Eeden, from Potgieters Inc, was thus appointed as the Executor. However, according to the letter dated 13 December 2017, Mr van Eeden waived his right as the Executor on the basis that the firm, Potgieters Inc. was closing at the end of December 2017.

5.2.8 During May 2015, Potgieters Inc. was requested to submit an amended L&D account after he had discussed it with the Complainant. This was indeed submitted on 6 May 2015. The Chief Master indicated that due process was
followed and permission was granted to advertise the account on 14 September 2015.

5.2.9 The Acting Chief Master indicated that it is at this stage that the Master should have taken step when there was a gap of 18 months without the matter being dealt with by Potgieters Inc.

5.2.10 During my meeting of 17 April 2019, the Acting Chief Master was asked to explain the period it takes for the Master to finalise the administration of the deceased estate.

5.2.11 The Acting Chief Master indicated that the Master is not the one who finalizes the estate, but that the Executrix. In terms of the processes, from the moment the executrix is appointed she has six (6) months to lodge the L&D Account which was in fact done in this matter. The Master will then look into the L&D Account and if the query sheet is issued then the executrix is then given 30 days to comply with the query sheet. In this matter, the query sheet was issued to Complainant’s agents.

5.2.12 She further explained that once the query sheet was addressed and the Master was satisfied that the account is in order, the Master would approve the account and instruct to the executrix to advertise the account in certain newspaper especially usually in the area where the assets are or where the beneficiaries are residing. Once that is done, then the advertisement will indicate that the account will lay open for inspection for 21 days at either the Magistrate Court or the Master’s Office. If no objection is received against the L&D Account, then the Master will then instruct the executrix to distribute the account in terms of intestate or in terms of the will. If the objection is lodged, the Master will then refer the matter to the executrix to give comment on the objection and then the Master will then make a ruling on the objection. Any party who is not happy with the ruling of the Master on the objection can then take that matter on review to
the High Court. She indicated that in a normal case, administration of deceased estate is not supposed to take more than a year to finalise.

5.2.13 During the meeting with my investigation team on 17 September 2019, the Acting Chief Master reported that another cause of delay to finalise the winding up of the estate was the lack of cooperation by the Complainant with her stepson Mr Ntsane Ntsane. However, in order to fast track the process of winding up the estate, the Acting Chief Master undertook to re-appoint the Complainant as the Executrix and then engage the other beneficiaries, particularly Mr Ntsane Ntsane, in order to finalise the estate.

Application of the law

5.2.14 Section 18(1)(a) of the Administration of Estates Act provides that the Master shall, if any person has died without having by will nominated any person to be his executor, appoint and grant letters of executorship to such person or persons whom he may deem to be fit and proper to be executor or executors of the estate of the deceased. The Complainant was accordingly appointed as an executrix of the estate by the Master in terms of section 1.

5.2.15 Due to the fact that the value of the estate exceeded R250 000.00, the Complainant appointed the Attorney as her agent to assist in finalising the estate in terms of Regulation 910 discussed above.

5.2.16 Section 29 makes provision for the executor to advertise the estate in the local newspaper where the deceased resided. According to the Master’s office, the estate was advertised accordingly with no objection received. Permission was granted to advertise the account on 14 September 2015.

5.2.17 Section 54(1)(b)(v) provides that “an executor may at any time be removed from his office by the Master if he fails to perform satisfactorily any duty imposed upon
him by or under the Act or to comply with any lawful request of the Master..." As indicated above, the Master reported that several queries were raised with the Complainant, but she failed to respond, hence her removal from the executorship. She further changed her agents appointed in terms of Regulation 910 on several occasions.

Conclusion

5.2.18 It can also be concluded that the Master did not flout any applicable legal prescripts in the winding up of the estate in this matter, instead evidence indicate that the Complainant’s agents were the main contributors in delaying finalisation of the estate.

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings:

6.1 Regarding whether the Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934 which regulates the administration of the deceased estate, thereby prejudicing the Complainant under the circumstances:

6.1.1 The Master of the High Court failed to address the unfairness of Regulation 910 of the Attorneys Act which regulates the administration of the deceased’s estate, thereby prejudicing the Complainant under the circumstances.

6.1.2 The Master’s Office has held several discussions with members of the legal fraternity regarding the risks and negative implications of the application of Regulation 910. Notwithstanding the fact that discussions are being held regarding
the challenges posed by Regulation 910, the Master’s Office has taken too long to ensure that the said regulation is repealed.

6.1.3 The Master and other legal institutions conceded that the risks of Regulation 910 include the fact that the Master cannot act against an agent whenever there is an undue delay or there is non-compliance by the said agent; the staff in the Master’s office receive kick-backs from attorneys whenever the public is referred to them for assistance to wind up the estate and sometimes agents disappear with the estate funds.

6.1.4 The delay to repeal Regulation 910, has caused prejudice not only to the Complainant, but to all other beneficiaries in a similar position as her and the beneficiaries.

6.1.5 The Attorney paid himself R49 000.00 legal fees from the estate before its finalisation. He also charged the Complainant R3000.00 for the issuing of a letter of executorship.

6.1.6 The failure by the appointed agents to administer the estate in the matter caused prejudice to the other beneficiaries of the estate because only the Complainant enjoyed the comfort of the house and usage of the vehicles which form part of the estate.

6.1.7 The conduct of the Master amounts to improper conduct as envisaged in section 182(1) of the Constitution maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.2 Regarding whether there is an undue delay by the Master of the High Court to render assistance to Ms Ntsane to finalise the winding up of the estate of her late husband:

6.2.1 The allegation that there is an undue delay by the Master of the High Court to render assistance to the Complainant to finalise the winding up of the estate of her late husband is not substantiated.

6.2.2 My investigation revealed that upon her appointment as the Executrix of the estate, the Complainant appointed the Attorney as her agent in terms of Regulation 910, against whom she raised several complaints of his improper conduct in winding up the estate. These resulted in her changing agents on three (3) occasions.

6.2.3 I also found that due to the agents’ failure to address the queries raised by the Master regarding the winding up of the estate, the Master removed the Complainant as the Executrix in terms of section 54 of the Administration of Estate Act.

6.2.4 The Master, however, undertook to re-appoint the Complainant as the Executrix of the estate and also arrange a meeting of all interested parties in order to finalise the winding up of the estate. The process had not been concluded at the date of the report.

6.2.5 The conduct of the Master does not constitute improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.
7 REMEDIAL ACTION

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

The Minister of Justice and Constitutional Development (the Minister)

7.1.1 The Minister must, within 60 working days from the date of this report, initiate a process of reviewing Regulation 910 in its totality and, inter alia, consider allowing the Master to work within the ambit of the Administration of Estate Act on the appointment processes and role of an Executor and how the office of the Master can be of assistance to Executors in the Administration of the Estate.

The Acting Chief Master

7.1.2 The Acting Chief Master must, within 30 working days from the date of this report, develop a process manual that explains the role and responsibilities of the Executors upon receipts of Letters of Executorship.

7.1.3 The Acting Chief Master must, within 30 working days from the date of this report, write a letter to the Legal Practice Council, to follow up on the action it will take in dealing with the conduct of the Attorney for withdrawing R49 000.00 from the estate late bank account before the winding up of the estate and for his charging of the Complainant R3 000.00 for the issuing of a letter of executorship.

7.1.4 The Master must within 30 working days from the date of this report, re-appoint the Complainant as the Executrix of the estate and also arrange a meeting of all interested parties in order to finalise the winding up of the estate.
8. MONITORING

8.1. The Acting Chief Master must submit an action plan, within fifteen (15) working days of issuing this report, indicating how the remedial actions mentioned above will be implemented.

8.2. The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 12/02/2020