STATE AND PARTY COLOURS

Report on an investigation into allegations of maladministration regarding Operation Hlasela and the Hlasela Fund of the Free State Provincial Government and alleged conflation between party and state

Report No: 1 of 2016/17
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Executive Summary

"The ‘misuse of public resources’ is widely recognised as the unlawful behaviour of civil servants, incumbent political candidates and parties to use their official positions or connections to government institutions aimed at influencing the outcome of elections”

European Commission for Democracy through Law (Venice Commission)

(i) "State and Party Colours" is my report as the Public Protector issued 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.

(ii) The report communicates my findings and remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged abuse of state resources to advance the African National Congress (ANC) election campaign during the 2011 municipal elections and the conflation of party and state through the activities of a programme known as Operation Hlasela, lodged by Mr. R Jankielsohn, Member of the Provincial Legislature (MPL) for the Democratic Alliance (DA) in the Free State Provincial Legislature on 28 July 2011.

(iii) Other complaints were subsequently lodged on the same matter by the Congress of the People (COPE), represented by Mr. M C Mokilane and by various members of the public during Public Protector Stakeholder Dialogues from 2012. These complaints went further to allege improprieties, including corruption, in the award of tenders and other contracts under the Operation Hlasela programme.

(iv) This report confines itself to the alleged use and/or abuse of state resources to advance a party’s electoral campaign under Operation Hlasela and the related allegation of conflation of state and party.
(v) The main allegations were that:

(a) Operation Hlasela is a Free State Provincial Government programme marketed by the Free State Premier as such.

(b) Large amounts of money are invested into the programme by numerous government departments.

(c) The Premier, Mr. Magashule, was praised by the President, Mr. Zuma, for the government programme.

(d) Operation Hlasela is merely an ANC election campaign under the pretext of a provincial government department’s campaigns and programmes.

(e) A truck drove around with photographs of President Zuma and Premier Magashule and a message saying “Vote ANC” and “Hlasela” on it (photographs provided).

(f) This amounts to abuse of state resources for party political purposes and conflation of party and state.

(vi) On analysis of the complaints and information already in the public domain on the matter, the issues to be investigated were:

(a) Did the Free State government abuse state resources to advance the African National Congress (ANC) election campaign during the 2011 municipal elections?

(b) Did the Free State government implement Operation Hlasela in a manner that amounts to conflation of state and party?

(c) Was any person or political party prejudiced by the conduct in question?
(vii) The investigation process was conducted through correspondence with relevant parties, meetings and interviews with the complainant and relevant officials of the department as well as the sourcing and analysis of all relevant documents.

(viii) All relevant laws, policies and related prescripts were considered for the purposes of establishing the standard that was expected with regard to the conduct of the Free State government in the circumstances in question.

(ix) Key laws and policies that were taken into account to determine if there had been abuse of state resources to advance a party’s electoral campaign and a conflation of state and party as alleged, were principally those setting the standards that should have been upheld by public functionaries in the Free State government regarding proper use of public resources and those relating to the requirements of a free and fair election.

(x) I took into account that the conduct of the Premier of the Free State Province in respect of Operation Hlasela had to comply with section 136 of the Constitution, which prescribes minimum ethical standards for members of the Executive with particular attention paid to section 136(2)(b), which prohibits acting in any way that is inconsistent with the office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests.

(xi) I further took into account section 195 of the Constitution setting out basic principles of public administration that all public functionaries, regardless of designation, have to comply with and which, accordingly, should have been complied with in the conceptualisation and execution of Operation Hlasela. Of particular relevance to the allegation of abuse of state resources for political party electioneering is section 195, requiring public administration to be governed by the democratic values and principles enshrined in the constitution, in particular the efficient, economic and effective use of resources to be promoted.
(xii) Given the context of electoral fairness, the conduct of the Free State government also had to be scrutinised for compliance with electoral laws and related prescripts aimed at ensuring fair play, including the electoral Code of Conduct. For example, prior to elections parties sign the electoral code of conduct, which is provided for in Schedule 2 of the Electoral Act 73 of 1998 and which requires that parties adhere to certain standards of behaviour, specifically during the campaigning period. Ultimately, the code of conduct forbids any political party or person from misusing a position of power or influence to alter the regulation or end result of an election.

(xiii) With South Africa being a signatory of applicable international instruments seeking to ensure democratic elections, including ensuring equality of opportunities for all electoral candidates and electoral parties, it is my considered view that the conduct of the Free State government had to comply with the objectives and spirit of international standard setting frameworks regarding free and fair elections, with particular emphasis on the prevention of the misuse of public power and resources by any person or party to gain electoral advantages and/or to induce voters to act in a particular way. In this regard ICCPR General Comment No. 25 issued in terms of Article 25 of the International Covenant on Civil and Political Rights (ICCPR), provides, amongst others, the following:

"Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind".

(xiv) By the time the investigation commenced, it was common cause that the Free State government was implementing a programme referred to as Operation Hlasela, which was widely referred in the speeches of Premier Ace Magashule and others as well as advertised in the Free State government’s website, newsletter and other communication avenues aimed at accelerating service delivery particularly with a view
to combatting poverty and enhancing housing service delivery. For example in his speech to the Zion Christian Church (ZCC) mass prayer service in Bloemfontein on 19 March 2011, Premier Magashule said:

"In our State of the Province Address two weeks ago, we reported on the progress we are making to improve the living conditions of our people through our new service delivery strategy dubbed Operation Hlasela.

Operation Hlasela is our new strategy that puts the poor at the centre of key development interventions. We launched Operation Hlasela shortly after we took office in 2009 to improve and fast-track service delivery.

Operation Hlasela is a clarion call to all our social partners and civil society to collaborate with government and to jointly and urgently eliminate duplication and wastage, eradicate poverty, to tackle under-development and to stimulate our economy to improve the lives of our people.

- Re hlasela bofuma.
- Re hlasela bonokwane le manyofonyofo.
- Re hlasela thekefetso ya Bo Mme le Bana, Re hlasela kgetholio ya morabe le ya bong.

We call on the church to partner with us as we attack poverty, and fight criminal elements in our society. Operation Hlasela offers us an opportunity to work together with our social to bring about real, concrete change in the lives of our people.

Through Operation Hlasela we are also working with the private sector. For example, we have launched a programme with the Netcare Group, which operates the largest private hospital network in South Africa. We will jointly implement a nursing training programme aimed at alleviating the shortage of available human resources in this critical occupation.

Operation Hlasela is the concrete manifestation that this ANC-led government is truly a caring government which responds faster to the needs of the poor and the vulnerable in our society."

(xv) The Free State Branch of the ANC had also communicated about Operation Hlasela, including through a statement issued by the then ANC Provincial Secretary, Sibongile Besani on 17 February 2011, which stated, amongst others that: "Operation Hlasela is a government programme that has embraced the ANC 2009 election manifesto. Operation Hlasela articulates our manifesto in the best way understood and accepted by Free Staters."

(xvi) At the commencement of the investigation, I had a meeting with Premier Ace Magashule at his instance on 28 October 2011 to discuss the nature and funding of
Operation Hlasela. Premier Magashule clarified that there were two programmes using the name Operation Hlasela. He explained that one was a government Service Delivery Vehicle while another was a private initiative seeking to reinforce government efforts primarily aimed at housing delivery.

(xvii) He conceded that the logos and colours of the two Operation Hlaselas were the same, resulting in confusion. He accepted that this was improper and accepted advice to change the name of one of the programmes. Soon thereafter the private initiative was changed to Friends of the Free State while the government programme retained the name Operation Hlasela.

(xviii) I am grateful for the cooperation of Premier Magashule and the steps taken to remedy the problems we both identified at the commencement of the investigation.

(xix) Sadly in the response to the notice served on Premier Magashule on the basis of section 7(9) of the Public Protector Act advising him of evidence implicating him as Premier and the government of the Free State province regarding improper conduct in relation to Operation Hlasela received on 12 April 2016 Premier Magashule denied any wrong doing regarding Operation Hlasela and specifically denied both that the ANC gained any advantage from the conflated branding of Hlasela and that there was conflation of party and state at the time the complaints arose.

(xx) However, Premier Magashule did not deny that the Hlasela name had, at the time, been used for both the private ANC-endorsing Hlasela and the official programme of the government of the Free State or that a Hlasela branded truck with his and President Zuma's photographs and a message saying "Vote ANC" was driving around communities during the 2011 local government elections.

(xxi) While the Premier made a valid point that the government of the day has a right to make whatever lawful means it can to expedite service delivery and that it is inevitable that progress made by the government of the day regarding service delivery will be
attributable to the governing political party, his contention that the ANC cannot be
legitimately said to have benefited from the conflated Hlasela branding, is in my
considered view, rather naïve.

Subsequent to his response to the notice issued in terms of section 7(9) of the Public
Protector Act, 1994, the Premier was happy to revert to the agreement that there had
been a conflation of party and state and reiterated that he had fixed this by changing
the name of the programme from Operation Hlasela Fund to Friends of the Free State.

(xxi) Having considered the evidence uncovered during the investigation and the Free State
government’s submissions, against the relevant regulatory framework, I make the
following findings:

(a) **Regarding whether the Free State government abused state resources to
advance the African National Congress (ANC) election campaign during
the 2011 municipal elections, I find that:**

(aa) There is no conclusive evidence showing abuse or misuse of state
resources to advance the ANC’s electoral campaign during the 2011
Local Government Elections;

(bb) Evidence reveals that at the time the complaint arose, there were two
Hlasela initiatives, one called *Operation Hlasela*, an official state
funded service delivery accelerating vehicle of the Free State
Government driven by the Premier and a *Private Hlasela Fund* funded
by private individuals, including civil servants and civil society entities to
support the state Hlasela initiative. In pursuit of following the Public
Protector’s advice to the Premier, the Private Hlasela Fund was
renamed Friends of the Free State and also now brands its programme as Friends of the Poor;

(cc) The private Hlasela initiative openly endorsed the ANC’s electoral campaign and had a truck advertising “Vote ANC” during the 2011 local government elections;

(dd) Although no state funds were used for the Private Hlasela initiative, state platforms and communications resources were used to advertise and laud Operation Hlasela without distinguishing between the government’s Operation Hlasela and the ANC manifesto-endorsing Private Hlasela Fund, whose benefit to the ANC, in terms of free publicity and skewed implications for electoral fair play cannot be reasonably denied; and

(ee) Regardless of intention, the undermining of fair play in the electoral process was inconsistent with Schedule 2 of the Electoral Act, Sections 136 and 195 of the Constitution and the spirit of article 17 of the African Charter on Democracy, Elections and Governance and article 25 of the ICCPR.

(b) Regarding whether the Free State government implemented Operation Hlasela in a manner that amounts to conflation of party and state, I find that:

(aa) The allegation of conflation of party and state is sustained;

(bb) Regardless of intentions and separate ownership as well as separate sources of funding for the two Hlaselas, the branding and marketing of the two was indistinguishable and the two were marketed and lauded at government platforms;
(cc) The arrangement not only confused the public regardless of what activities are government sanctioned and funded and which are privately sponsored, government itself used state communication resources to promote and laud both without always distinguishing the two.

(dd) Until the two Hlaselas were distinguished, the private initiative cannot be said to have not benefited from the shared branding and the free advertising of the Government’s Operation Hlasela, at state expense.

(ee) Regardless of intention, the undermining of fair play in the electoral process was inconsistent with Schedule 2 of the Electoral Act, Sections 136 and 195 of the Constitution; the spirit of article 17 of the African Charter on Democracy, Elections and Governance and article 5 of the ICCPR.

(c) **Regarding whether any person or political party was prejudiced by the conduct in question, I find that:**

(aa) Other political parties and independent candidates were indeed prejudiced.

(bb) Although I have no reason to doubt the bona fides of Premier Magashule and the Free State government regarding the intention of using the two Hlaselas to accelerate service delivery, the arrangement which allowed use of government platforms to promote the ANC-manifesto—endorsing Private Hlasela Fund, did provide free advertisement for the ANC which was not provided to other parties and independent candidates and accordingly undermined equal access to
advertising and other communications channels, thus compromising fair play between the ANC and other parties.

(xxiii) Having noted that the Private Hlasela Fund has since been renamed thus eliminating the confused branding, the remedial action I am taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The Premier is to ensure:

(aa) That a provincial policy is developed and circulated in all government institutions within the province, setting out a clear separation between state and party activities at all times and that all provincial state functionaries and employees are made aware of this policy; and

(bb) That no government platform or state functionary is required or allowed to use their position, power and public resources under their control to market political party matters.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION REGARDING OPERATION HLASELA AND THE HLASELA FUND OF THE FREE STATE PROVINCIAL GOVERNMENT AND ALLEGED CONFLATION BETWEEN PARTY AND STATE

1. INTRODUCTION

1.1. "State and Party Colours" 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, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(1) of the Public Protector Act to the Premier of the Free State Provincial Government, Mr. ES Magashule;

1.3. A copy of the report is also provided to the Speaker of the Free State Province, Leaders of the DA and the Congress of the People Free State Province to take note of the outcome of the investigation.

1.4 The report communicates the outcomes of an investigation into the alleged abuse of state resources to advance the African National Congress' (ANC) election campaign during the 2011 municipal elections and the conflation of party and state through the activities of a programme known as Operation Hlasela, lodged by Mr. R Jankielsohn, Member of the Provincial Legislature (MPL) for the Democratic Alliance (DA) in the Free State Provincial Legislature on 28 July 2011.
2. THE COMPLAINT

The Complainant primarily alleged that the Free State government allowed the African National Congress, hereinafter referred to as the ANC, to use state resources for party political gain in preparation for the local government elections. Specific questions raised in the complaint included the following:

2.1 From the DA:

2.1.1 Operation Hlasela was a Free State Provincial Government Programme marketed by the Free State Premier as such.

2.1.2 Large amounts of money were invested into the programme by numerous government departments.

2.1.3 The Premier, Mr. Magashule, was praised by the President, Mr. Zuma, for the government programme and provided photographs of both Mr. Zuma and Mr. Magashule next to an ANC election campaign truck with the words "vote ANC” and "Hlasela" on it.

2.1.4 Operation Hlasela was merely an ANC election campaign under the pretext of the provincial government department’s campaigns and programmes.

2.1.5 This amounts to abuse of state resources for party political purposes and conflation of party and state.

2.1.6 The DA submitted a copy of an article from the Citizen Newspaper as captured hereunder:

09 March 2011 | The Citizen

Operation Hlasela draws more criticism
A project established by Free State premier Ace Magashule, Operation Hlasela, has again drawn criticism from opposition parties in the province as to its status as a government project or not.
BLOEMFONTEIN - A project established by Free State premier Ace Magashule, Operation Hlasela, has again drawn criticism from opposition parties in the province as to its status as a government project or not.

Democratic Alliance leader Roy Jankielsohn said that Hlasela was a “creating dependency on the premier” campaign. “The private sector are being conned into contributing to the Hlasela fund under the pretext that this was a government programme, while it is in fact the premier’s election campaign fund,” he said in reply to Magashule’s State of the Province speech. Jankielsohn said it was important that service delivery projects should be carried out in the province but there should be “a bigger picture” other than Hlasela.

He said currently the Free State only has “the premier’s election plan” and the plan includes using all the provincial government’s resources to promote the ANC and creating dependency on the premier. “That is why so many important functions of provincial departments are systematically being centralised in the office of the premier.”

Replying, Magashule said Hlasela was a registered non-governmental organisation with private money. “I, the MECs and mayor contribute to the fund. I pay R 1 000 into the fund a month,” Magashule said the fund had nothing to do with government and he could spend the funds anytime.

Jankielsohn said the DA would support any initiatives to eradicate unemployment and poverty in the province. He said the DA agreed with Magashule that the tax base in municipalities was insufficient. “We also know that a great deal of money is wasted by municipalities on non-core functions. Money is pilfered through tender manipulation and extortion of business people.” Jankielsohn said municipalities suffered because senior managers were not appointed for their expertise, but their affiliation to factions within the governing party. These party employed officials’ personal agenda’s appears to outweigh any service delivery agenda. “That is why the sewerage is running down the streets in our communities.”

Freedom Front Plus member Jan van Niekerk said the premier wanted to build a new province but he focused continuously on the past and apartheid. Cope leader in the legislature Casco Mokhitane also called on Magashule to be transparent of the Hlasela Fund project and whether it was run by private money or government funds.

The Free State government website indicates that Operation Hlasela was a campaign to address delivery related obstacles and to ensure that systems would be established to ensure fairness and transparency at local government level. The fund would also ensure that the poor had access to basic services.
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 the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by 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 The Free State government is an organ of state and its actions equate to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.
3.6 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

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 amount to maladministration?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the complainant as close as possible to where he/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 whether or not the department acted improperly.
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 department or organ of state to prevent maladministration and prejudice.

4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Did the Free State Government abuse state resources to advance the African National Congress’ (ANC) election campaign during the 2011 municipal elections?

4.3.2 Did the Free State government implement Operation Hlasela in a manner that amounts to a conflation of state and party?

4.3.3 Was any person or political party prejudiced by the conduct in question?

4.4 The Key Sources of Information

4.4.1 Documents

4.4.1.1 Photographs of the vehicle with Hlasela and ‘Vote ANC’ branding - date unknown - received from complainant;

4.4.1.2 Press release by the ANC Provincial Secretary for the Province of the Free State issued on 17 February 2011;

4.4.1.3 Registration certificates of the Operation Hlasela Fund and the revised Friends of the Free State Fund received and verified against originals - received from the department of Social Development (SOCDEV);
4.4.1.4 Constitution of Operation Hlasela Fund and the revised Friends of the Free State Fund received and verified against originals, received from SOCDEV;

4.4.1.5 Audited financial statements, bank statements and expenditure proof documents received from the Fund on 3 May 2013;

4.4.2 Interviews conducted

4.4.2.1 Interviewed of the complainant on 17 October 2011 requesting supporting documentation and evidence;

4.4.2.2 Interview of the complainant on 7 November 2011 and received newspaper articles as supporting documentation and evidence;

4.4.2.3 Meeting with the Premier of the Free State on 28 October 2011 about Operation Hlasela and the Hlasela Fund; and

4.4.2.4 Meeting with Board Members of the Friends of the Free State Fund on 24 April 2013.

4.4.3 Correspondence sent and received

4.4.3.1 Letters from the Premier of the Free State responding to allegations about Hlasela and the Fund dated 19 and 23 April 2012;

4.4.3.2 Letter from the Provincial Treasury responding to allegations about Hlasela and the Fund dated 26 July 2012;

4.4.4 Websites consulted/ electronic sources
4.4.4.1 www.agsa.co.za: Audit reports of the Free State Provincial Government and Municipal Entities in respect of Hlasela Projects.

4.4.5 Legislation and other prescripts

4.4.5.1 The Constitution of the Republic of South Africa, 1996;
4.4.5.2 The Electoral Act 73 of 1998;
4.4.5.3 The International Covenant on Civil and Political Rights
4.4.5.4 The African Charter on Democracy, Elections and Governance

5 THE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 All the issues investigated are regulated by the legal principles outlined hereunder:

5.1.1 Section 136 of the Constitution enjoins the Premier and other members of a provincial executive to act in accordance with the Executive Ethics Code proclaimed by the president in July 2000, which elaborates on ethical standards set out in the Constitution and the Executive Ethics Act. A key provision regulating activities is section 136(2)(b), which provides that "Members of the Executive of a province may not – Act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests."

5.1.2 The Premier and other public functionaries are further enjoined by section 195(1)(a) and (d) of the Constitution to ensure that the Free State Province is "governed by democratic values and principles enshrined in the constitution including the following principles – The promotion of a high standard of
“professional ethics; and the provision of services impartially, fairly, equitably and without bias.”

5.1.3 Prior to elections, political parties sign the electoral code of conduct, which is provided for in Schedule 2 of the Electoral Act and requires political parties to adhere to certain standards of behaviour, especially during the campaigning period. The code of conduct forbids any political party or person from misusing a position of power or influence to alter the regulation or end result of an election.

5.1.4 Given the context of electoral fairness, the conduct of the Free State Government also had to be scrutinised for compliance with electoral laws and related prescripts aimed at ensuring fair play, including the electoral Code of Conduct. For example, prior to elections, parties sign the electoral code of conduct, which is provided for in Schedule 2 of the Electoral Act 73 of 1998 and which requires that they adhere to certain standards of behaviour, specifically during the campaigning period. Ultimately, the code of conduct forbids any political party or person from misusing a position of power or influence to alter the regulation or end result of an election.

5.1.5 With South Africa being a signatory of international instruments seeking to ensure democratic elections, including ensuring equality of opportunities for all electoral candidates and electoral parties, it is my considered view that the conduct of the Free State government had to comply with the objectives and spirit of international standard setting frameworks regarding free and fair elections, with particular emphasis on the prevention of misuse of public power and resources by any person or party to gain electoral advantages and or to induce voters to act in a particular way.
5.1.6 ICCPR General Comment No. 25 issued in terms of Article 25 of the International Covenant on Civil and Political Rights (ICCPR), provides, amongst others, the following:

"Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind".

5.1.7 Also Article 17 of the African Charter on Democracy, Elections and Governance provides, amongst others that:

"State Parties reaffirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa".

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The evidence and information obtained relates to all three issues investigated.

6.1.1 The complainant submitted that Operation Hlasela is a Free State Government Programme that has been marketed as such by the Premier of the Free State.

6.1.2 The complainant submitted photographs taken during the 2011 local government election of ANC election vehicles that had Hlasela printed on their vehicles as a form of campaigning strategy as illustrated hereunder:
6.1.3 The complainant regarded the logo of Hlasela on a political party vehicle as an abuse of state resources for party political purposes and a conflation of political party and state.

6.1.4 The Office of the Premier responded that the perception that there are two distinct but interlinking Operation Hlasela Programmes is incorrect. The Fund is a registered non-profit organisation with the Free State Department of Social Development, in terms of the Non-Profit Organisation Act, 1997.

6.1.5 The Office of the Premier further reported that my office had advised the Premier in a meeting held on 28 October 2011 that the confusion may be created through the terminology used, namely “Operation Hlasela” as a service delivery methodology and the “Operation Hlasela Fund”. My office further advised that this apparent confusion could possibly be clarified with a change of the name of the Fund.

6.1.6 The Premier duly communicated this notice to the Trustees of the Fund about changing the name and amending of the constitution of the Fund, which is in due process of completion. The Fund is now known as the Friends of the Free State Fund and a copy of the proposed constitution was submitted.

6.1.7 On 17 February 2011, the ANC Provincial Secretary for the Province of the Free State issued a press statement indicating that “Operation Hlasela is a government program that has embraced the ANC 2009 election manifesto. The truck which the DA was referring to was “a donation” which the party received from private businesses and it was made public at a rally in Welkom during January 2011. The truck was in addition to a truck made available by the ANC head office.”
ANC: No arrogance in election slogan
2011-02-17 20:08

Bloemfontein - The ANC in the Free State on Thursday denied being arrogant for using a provincial government slogan "Operation Hlasela", which was painted on an ANC election campaign truck. South Africa was expected to go to polls for its 2011 local government elections before the end of May.

"Operation Hlasela is a government programme that has embraced the ANC 2009 election manifesto," said provincial ANC secretary Sibongile Besani. He was reacting to a local Democratic Alliance allegation that the provincial government's Operation Hlasela had been exposed as a state sponsored ANC activity. Free State DA leader Roy Jankielsohn said local premier Ace Magashule had taken the concept of "abuse of state resources for party political purposes" and the "conflation of political party and state" to new heights with the ANC's election truck seen in Bloemfontein. The DA, which showed photos of the truck, said the ANC vehicle was blatantly painted with "Hlasela" along its sides with ANC slogans and party politicians, including the face of President Jacob Zuma.

"The ANC's Free State election truck is a symbol of how the ANC have destroyed Madiba's dream of a democratic South Africa," said Jankielsohn.

Childish

Besani said it was "childish" to complain that Hlasela ANC was written on the party truck. "Operation Hlasela articulates our manifesto in the best way understood and accepted by Free Staters." He said the truck which the DA was referring to was "a donation" which the party received from private businesses and it was made public at a rally during January 2011. The truck was in addition to a truck made available by the ANC head office, said Besani. However, the DA felt the vehicle represented the arrogance and abuse of the state and people under the ANC government. Jankielsohn said Magashule knew no boundaries when it came to conflating the ANC with the state. "This government program (Hlasela) has now formally been turned into an ANC election campaign". The Free State opposition party said Zuma praised Magashule recently for launching Hlasela within the provincial government and was now a partner in the gross abuse of a state driven and state sponsored provincial election program.
Besani denied that the funds of Operation Hlasela had anything to do with the ANC’s “budget”. A spokesperson for the premier’s office William Bulwane said Hlasela was a programme of action for the present administration adopted by the provincial executive committee. “I am not sure why the DA linked it with the ANC election campaign.” Bulwane also said he was not sure which truck the DA was talking about. “The ANC has its election truck with the face of President Jacob Zuma and ANC logos which was meant for campaigning,” he said, adding that if the DA wanted one, no one would stop them.

6.1.9

The response of the Premier of the Free State Provincial Government to the Notice issued in terms of Section 7(9) of the Public Protector Act, 1994

6.1.9.1

The Premier responded in a letter dated 12 April 2016 as follows:

**ANC Election Campaign: 2011 Municipal Elections**

(a) “As set out in paragraph 6.1.1 you are likely to find that the ANC benefitted during the 2011 Municipal Elections through the use of a single name, uniform branding and integrated activities as a result of which confusion was created regarding Party and State activities. It is also indicated that you are likely to find that the ANC was placed at an advantageous position regarding funding for its Campaign.

(b) The only evidence, which appears to support these possible findings is a private vehicle, which had an Operation Hlasela logo on it and which drove around, apparently campaigning for the ANC during the Local Government Elections of 2011. This was a vehicle which was in fact donated by a church to the Friends of the Free State Fund. Apart from the fact that the elections were Local Government elections and had nothing to do with the Provincial Government, as Premier I had absolutely no control over what private entities placed on their vehicles in support of the campaign of the ANC. I also find it extremely difficult to
accept that through one vehicle, branded with the logo of Operation Hlasela, the ANC benefited unduly and that is was placed at an advantageous position regarding funding for its campaign. I could not find any indication in the Notice that the investigation revealed any other facts in support of this. Although apparently resolved, the mentioning of what the Auditor General reported on the financial statements of Mafube Local Municipality supports my contention that what is contained in your Notice does not take cognizance of the separation of powers between provincial- and local Government.

(c) As indicated during our meeting Operation Hlasela is a service delivery methodology which was adopted in order to address holistically the needs of a specific community, who is targeted through a specific initiative of the Provincial Government. Such an approach involves intervention by all relevant Departments of the Provincial Government as well as National Departments where necessary. Typically, the construction of houses, upgrading of township roads, issues of water and sanitation, building and upgrading of medical facilities such as Clinics, upgrading of facilities at schools, the involvement of members of the community and in the EPWP and Community Development Worker Programs as well as other interventions such as township gardens and support to SMME’s, are implemented in a co-ordinated and meaningful manner. There is no significant difference between the aims and objectives of Operation Hlasela as a service delivery methodology and, for instance, Batho Pele.

(d) Apart from what was stated in paragraph 4.1(b) above, I find it difficult to understand why a political party may not in an election campaign mention a Policy, which the Government that it had voted into power, has developed. If such a finding is now made by the Public Protector, it
will have serious implications for any election campaign after that, since a political power will not be able to mention any successes of the Government in its campaign for Elections.

(e) I also find it incomprehensible how the utilization of a private entity of a Government logo in support of a Party in Local Government Elections transgresses either section 139 or 195 of the Constitution. I also wish to submit that whatever the issue could be with regard to the display of the Operation Hlasela logo on the vehicle, it could not be a conflict between any official responsibility, which I had and any possible definition of private interest as quoted in paragraph 5.1.1 of the Notice. It could neither be a personal, private or business interest as mentioned in the Executive Ethics Code, referred to in the same paragraph.”

7. MEASURING CONDUCT AGAINST THE RULES

7.1 The issue regarding whether the Free State government abused state resources to advance the African National Congress’ (ANC) election campaign during the 2011 municipal elections and the issue whether the Free State government implemented Operation Hlasela in a manner that amounts to a conflation of state and party is regulated by the following legal principles:

7.1.1 Section 136(2)(b) of the Constitution provides that “Members of the Executive of a province may not – Act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests.”

7.1.2 Section 195(1)(a) and (d) of the Constitution provide that “public administration must be governed by democratic values and principles enshrined in the
constitution including the promotion of a high standard of professional ethics; and the provision of services impartially, fairly, equitably and without bias."

7.1.3 Schedule 2 of the Electoral Act requires political parties to adhere to certain standards of behaviour, especially during the campaigning period. The code of conduct forbids any political party or person from misusing a position of power or influence to alter the regulation or end result of an election.

7.1.4 It has been established in the evidence that the private Hlasela initiative openly endorsed the ANC’s electoral campaign and provided a truck that advertised “Vote ANC” during the 2011 local government elections.

7.1.5 Although no state funds were used for the private Hlasela initiative, state platforms and communication resources were used to advertise and laud Operation Hlasela without distinguishing between the government’s Operation Hlasela and the ANC Manifesto-endorsing private Hlasela Fund, whose benefit to the ANC, in terms of free publicity and skewed implications for electoral fair play cannot be reasonably denied.

7.1.6 Regardless of intention, the conduct alluded to above undermined fair play in the electoral process and is inconsistent with Schedule 2 of the Electoral Act, Sections 136 and 195 of the Constitution, the spirit of article 17 of the African Charter on Democracy, Elections and Governance and article 5 of the ICCPR.

7.2 Regarding whether any person or political party was prejudiced by the conduct in question:

7.2.1 The evidence obtained indicates that other political parties and independent candidates were indeed prejudiced.
7.2.2 The arrangement which allowed use of government platforms to promote the ANC-Manifesto-endorsing private Hlasela Fund, did provide free advertisement for the ANC which was not provided to other parties and independent candidates and accordingly undermined equal access to advertising and other communication channels thus compromising fair play between the ANC and other parties.

8. FINDINGS

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

8.1 Regarding whether the Free State Government abused state resources to advance the African National Congress' (ANC) election campaign during the 2011 municipal elections, I find that:

8.1.1 There is no conclusive evidence showing abuse or misuse of state resources to advance the ANC's electoral campaign during the 2011 local government elections;

8.1.2 Evidence reveals that at the time the complaint arose, there were two Hlasela initiatives, one called Operation Hlasela, an official state funded service delivery acceleration project of the Free State government driven by the Premier and a private Hlasela Fund funded by private individuals, including civil servants and civil society entities to support the state's Hlasela initiative. In pursuit of following the Public Protector's advice to the Premier, the Private Hlasela Fund was renamed Friends of the Free State and also brands its programme as Friends of the Poor;
8.1.3 The private Hlasela initiative openly endorsed the ANC's electoral campaign and had a truck advertising “Vote ANC” during the 2011 local government elections;

8.1.4 Although no state funds were used for the private Hlasela initiative, state platforms and communication resources were used to advertise and laud Operation Hlasela without distinguishing between the government's Operation Hlasela and the ANC Manifesto-endorsing private Hlasela Fund, whose benefit to the ANC, in terms of free publicity and skewed implications for electoral fair play cannot be reasonably denied; and

8.1.5 Regardless of intention, the undermining of fair play in the electoral process was inconsistent with Schedule 2 of the Electoral Act, Sections 136 and 195 of the Constitution, the spirit of article 17 of the African Charter on Democracy, Elections and Governance and article 5 of the ICCPR.

8.2 Regarding whether the Free State government implemented Operation Hlasela in a manner that amounts to conflation of party and state, I find that:

8.2.1 The allegation of conflation of party and state is sustained;

8.2.2 Regardless of intentions and separate ownership as well as separate sources of funding for the two Hlaselas, the branding and marketing of the two was indistinguishable and the two were marketed and lauded in government platforms;

8.2.3 The arrangement not only confused the public regardless of what activities are government sanctioned and funded and which are privately sponsored, government itself used state communication resources to promote and laud both without always distinguishing the two.
8.2.4 Until the two Hlaselas were distinguished, the private initiative cannot be said to have not benefited from the shared branding and the free advertising of the Government’s Operation Hlasela, at state expense.

8.2.5 Regardless of intention, the undermining of fair play in the electoral process was inconsistent with Schedule 2 of the Electoral Act, Sections 136 and 195 of the Constitution, the spirit of article 17 of the African Charter on Democracy, Elections and Governance and article 25 of the ICCPR.¹

8.3 Regarding whether any person or political party was prejudiced by the conduct in question, I find that:

8.3.1 Other political parties and independent candidates were indeed prejudiced.

8.3.2 Although I have no reason to doubt the bona fides of Premier Magashule and the Free State Government regarding the intention of using the two Hlaselas to accelerate service delivery, the arrangement which allowed for the use of government platforms to promote the ANC-Manifesto-endorsing private Hlasela Fund, did provide free advertisement for the ANC which was not provided to other parties and independent candidates and accordingly undermined equal access to advertising and other communications channels thus compromising fair play between the ANC and other parties.

9. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

¹ ICCPR General Comment No. 25: Article 25 (Participation in public affairs and the right to vote) para 19.
9.1 The Premier

9.1.1 Is to ensure that a provincial policy is developed and circulated in all government institutions within the province, setting out a clear separation between state and party activities at all times and that all provincial state functionaries and employees are made aware of this policy; and

9.1.2 Is to ensure that no government platform or state functionary is required or allowed to use their position, power and public resources under their control to market political party matters.

10. MONITORING

10.1 The Public Protector is to be advised on the Premier’s response to this report, including planned action, indicating time lines, within 30 days of the issuing of this report.

10.2 The implementation of the remedial action should be finalised within six months of the date of this report.

10.3 Bi-monthly reports are to be submitted to the Public Protector. A final report should be submitted within six months of the date of the report.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 05/05/2016

Assisted by: Free State Provincial Office