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

PUBLIC PROTECTOR
SOUTH AFRICA

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE MEMBERS' ETHICS CODE BY THE FORMER MINISTER OF SOCIAL DEVELOPMENT MS. BATHABILE DLAMINI, MP

1. INTRODUCTION

1.1 This is a closing report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 3(3) of the Executive Members` Ethics Act, 1998 (the Executive Members` Ethics Act) read with section 8 of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 3(3) of the Executive Members' Ethics Act to the President of the Republic of South Africa, His Excellency, Mr Matamela Cyril Ramaphosa.

1.3 Copies of the report are also provided to the former Minister of Social Development, Ms Bathabile Dlamini, and to Ms Bridget Masango MP, Member of the Democratic Alliance (DA) in terms of section 8(3) of the Public Protector Act, 1994.

1.4 The report relates to an investigation into allegations of a violation of the Executive Ethics Code by the former Minister of Social Development, Ms. Bathabile Dlamini, hereinafter referred to as the former Minister.

2. THE COMPLAINT

2.1 On 14 March 2017, Ms Bridget Masango MP (Ms Masango), lodged a complaint with the Public Protector in terms of section 4(1)(a) of the Executive Members Ethics Act, 82 of 1998.

2.2 In her complaint, Ms Masango stated that on Thursday, 05 May 2016 the former Minister delivered a Budget Vote Speech in Parliament, in which she stated the following, *"As reaffirmed by the Ministerial Advisory Committee, SASSA is taking over the management and control of the payment process that is currently performed by a third party, from April 2017".*

2.3 In a briefing to the Portfolio Committee on Social Development on Wednesday, 01 February 2017, officials from SASSA informed the committee that SASSA would seek an extension from the Constitutional Court, of the existing contract with Cash Paymaster Services (Pty) Ltd on the basis of the department being unable to take over and manage the distributions of grants in South Africa.

2.4 Ms Masango is of the view that at the time of the former Minister's speech on the Budget Vote in May 2016, it was unlikely that the former Minister did not appreciate the fact that SASSA would not be ready to perform the function of distributing social grants. In other words, the former Minister should have or ought reasonably to have known that SASSA would not be in a position to manage the distribution of grants at that time she delivered her Budget Vote Speech.

2.5 In light of the aforementioned, it is prudent to mention that it was widely reported in the media that the former Minister had known since July 2015 of the inadequacies in SASSA to pay grant recipients on its own.

2.6 In this regard, it is Ms Masango's contention that the former Minister acted in contravention with section 2.3 (a) of the Executive Ethics Code which states that Members of the Executive may not *"wilfully mislead the legislature to which they are accountable".*

2.7 Further thereto, that the former Minister, in unison with SASSA, created an emergency to enable a circumvention of the Constitutional Court judgement, to extend an invalid contract with the current service provider, Cash Paymaster Services (Pty) Ltd.

3. THE ISSUES CONSIDERED AND INVESTIGATED

3.1 Based on the analysis of the complaint the following issues have been identified to inform and focus the investigation:

3.1.1 Whether the former Minister of Social Development, Ms. Bathabile Dlamini deliberately or inadvertently misled the National Assembly when she delivered her Budget Vote speech in which she made an undertaking on behalf of SASSA to take over the management and control of the payment process that was performed by Cash Paymaster Service (CPS), from April 2017 and in doing so, violated the Executive Code of Ethics,

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

4.1 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.

4.2 Section 182(1) of the Constitution provides that: -

"The Public Protector has the power as regulated by national legislation –

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

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

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

4.3 Section 4(1)(b) of the Executive Members' Ethics Act provides *inter alia* that *"The Public Protector **must** investigate, in accordance with section 3, any alleged breach of the code of ethics on receipt of a complaint by the Premier or*

a member of the provincial legislature of a province, if the complaint is against an MEC of the province.

4.4 In ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others***[1], the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector: -

4.4.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;[2]

4.4.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced;[3]

4.4.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far–reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;[4]

4.4.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow;[5]

4.4.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the

[1] CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.
[2] Para [65].
[3] Para [67].
[4] Para [68].
[5] Para [69].

demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to;[6]

4.4.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of the investigation and the type of findings made;[7]

4.4.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;[8]

4.4.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation;[9]

4.4.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case.[10]

4.4.10 The remedial action taken by the Public Protector has a binding effect.[11] The Constitutional Court further held that: "*When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the*

[6] Para [70].
[7] Para [71].
[8] Para [71(a)].
[9] Para [71(d)].
[10] Para [71(e)].
[11] Para [76].

remedial action taken against those under investigation cannot be ignored without any legal consequences."[12]

4.5 In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows, when confirming the powers of the Public Protector: -

4.5.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution;[13]

4.5.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question;[14]

4.5.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers;[15]: -

a) Conduct an investigation;

b) Report on that conduct; and

c) To take remedial action.

4.5.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings;[16]

[12] *Ibid* para [73].
[13] Para [79].
[14] Para [82].
[15] Para [100 – 102].
[16] Para [104].

4.5.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court;[17]

4.5.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector form taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct;[18]

4.5.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action;[19]

4.6 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.

4.7 The conduct of former Minister Dlamini amounts to conduct in state affairs, and therefore, the matter falls within the ambit of the Public Protector's mandate.

4.8 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

5. THE INVESTIGATION

5.1 Methodology

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

[17] Para [105].
[18] Para [107 – 108].
[19] Para [112].

5.2 Approach to the investigation

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

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

5.2.2.1 What happened?

5.2.2.2 What should have happened?

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

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

5.2.3 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 alleged conduct of the former Minister of Social Development, Ms. Bathabile Dlamini constitutes a violation of the Executive Ethics Code.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the former Minister to prevent a possible violation of the Executive Ethics Code.

5.3 Key sources of information

5.3.1 Documents

The relevant documents obtained and analysed were primarily:

5.3.1.1 National Assembly, Questions for Written Reply, Question No. 1657 from Ms Masango to the former Minister publicised on 19 August 2016;

5.3.1.2 National Assembly, Questions for Written Reply, Question No. 2136 from Ms Masango to the former Minister publicised on 14 October 2016;

5.3.1.3 National Assembly, Questions for Oral Reply, Question No. 10 [written question 1378] from Ms E R Wilson to the former Minister, publicised on 16 August 2016;

5.3.1.4 National Assembly, Questions for Written Reply, Question No. 1167/2016 from Ms. Masango to the former Minister publicised on 22 April 2016;

5.3.1.5 Minister Bathabile Dlamini: Social Development Department Budget Vote Speech 2016/17, dated 4 May 2016. An Affidavit deposed by the former Minister of Social Development, Ms Bathabile Dlamini, dated 31 March 2017;

5.3.1.6 Report in terms of section 38 of the Superior Courts Act, 10 of 2013: Referee, BM Ngoepe J; CCT48/17, 4 April 2018;

5.3.1.7 An Affidavit deposed by the former Minister of Social Development, Ms. Bathabile Dlamini, dated 31 March 2017.

5.3.2 **Correspondence sent and received**

5.3.2.1 Letter to former President Jacob Zuma from the Public Protector, informing him of the investigation, dated 10 May 2017;

5.3.2.2 Letter to former Minister Bathabile Dlamini from the Public Protector, informing her of the investigation, dated 10 May 2017;

5.3.2.3 Response received from the former Minister, dated 31 May 2017;

5.3.2.4 Follow up letter to former Minister Bathabile Dlamini from the Public Protector, dated 10 May 2017.

5.3.3 **Cases**

5.3.3.1 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2013] ZACC 42: 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC)* ***[AllPay 1]***;

5.3.3.2 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC)* ***[AllPay 2]***;

5.3.3.3 *Black Sash Trust v Minister of Social Development and Others [2017] ZACC 8, March 2017;*

5.3.3.4 *Black Sash Trust v Minister of Social Development and Others [2018] ZACC 36, September 2018;*

5.3.4 **Legislation and other prescripts**

5.3.4.1 The Constitution of the Republic of South Africa, 108 of 1996;

5.3.4.2 The Public Protector Act, 23 of 1994;

5.3.4.3 The Executive Members' Ethics Act, 82 of 1998;

5.3.4.4 The Executive Ethics Code;

5.3.4.5 The South African Social Security Agency Act 9 of 2004.

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

6.1 **With regard to whether the former Minister of Social Development, Ms Bathabile Dlamini deliberately or inadvertently misled the National Assembly when she delivered her Budget Vote speech in which she made an undertaking on behalf of SASSA to take over the management and control of the payment process that was performed by Cash Paymaster Service (CPS), from April 2017 and in doing so, violated the Executive Code of Ethics;**

Issues that are Common Cause

6.1.1 On 3 February 2012, SASSA concluded a contract with Cash Paymaster Services (Pty) Ltd (CPS) to provide services for the payment of social grants for a period of five years. On 29 September 2013, the Constitutional Court held that the award of the tender to provide services for payment of social grants to CPS was constitutionally invalid.

6.1.2 On 17 April 2014 the Constitutional Court suspended the declaration of invalidity on the premise that either a new five-year tender be awarded following a proper procurement process or that SASSA takes over the payment of social grants when the suspended contract with CPS came to an end on 31 March 2017.

6.1.3 SASSA was ordered by the Constitutional Court to report to the Court on progress of the new tender process and its outcome. In November 2015, SASSA finally reported that it had decided not to award a new tender, but that SASSA would take over the payment of social grants and meet the deadline of 31 March 2017. On accepting this assurance the Court discharged its supervisory order.

Issues that are in dispute

6.1.4 The issue for my determination is whether former Minister of Social Development, Ms Bathabile Dlamini (former Minister Dlamini) deliberately or inadvertently misled the National Assembly when she delivered her Budget Vote speech in which she made an undertaking on behalf of SASSA to take over the management and control of the payment process that was performed by Cash Paymaster Service (Pty) Ltd (CPS), from April 2017.

6.1.5 The Complainant stated in her complaint that it is implausible that at the time of the delivery of the budget vote speech in May 2016, the Minister was not fully aware that SASSA would not be ready to perform the critical function of distributing the social grant payments in South Africa. Further, that the former Minister together with SASSA, created an emergency, whereby they would be able to circumvent the Constitutional Court's judgements and extend the invalid contract with the current service provider, CPS.

6.1.6 In her Budget Vote Speech 2016/17 on 4 May 2016, the former Minister Dlamini stated *inter alia* that, *"As reaffirmed by the Ministerial Advisory Committee, SASSA is taking over the management and control of the payment process that is currently performed by a third party, from 1 April 2017. The intention is to have a single payment platform, which will facilitate the payment of Social Assistance through multiple channels".*

6.1.7 In *Black Sash Trust v Minister of Social Development and Others [2017] ZACC 8, March 2017,* Froneman J held in his judgement that since April 2016 the responsible functionaries of SASSA have been aware that it could not comply with the undertaking to the Constitutional Court that it would be able to pay social grants from 1 April 2017. Further, that SASSA intends to enter into a contract with CPS without a competitive tender process as required by section 217 of the Constitution in order to continue the payment of social grants. Froneman J stated that the Minister and SASSA did not inform the Court of these developments until 28 February 2017 when

SASSA and its CEO launched an application on an urgent basis for an order authorising it to take further steps to ensure payment of social grants from 1 April 2017.

6.1.8 Further, that CPS also alerted SASSA in May 2016, that in order to prevent disruption in the payment process, it might be better for SASSA to extend the current CPS contract. Three legal opinions from different senior counsel were obtained by SASSA in 2016. All, in varying terms, warned SASSA that it was in trouble because it would not be able to pay the grants itself and that it should approach the Court to inform it of the situation. The first opinion was received by SASSA in June 2016, the second in October 2016 and another in November 2016. The Minister was informed that SASSA was unable to pay the grants only in October 2016.

6.1.9 However, Froneman J stated in his judgement that the Project Manager, Ms Zodwa Mvulane, was aware by 19 April 2016 at the latest of the possibility that SASSA might not be able to pay the grants by itself by the end of March 2017. Further, that it was for this reason that an opinion was sought from Counsel on certain of the legal implications of SASSA's inability to pay the grants by itself by the end of March 2017.

6.1.10 In a responding affidavit deposed by former Minister Dlamini on 31 March 2017, she stated that in September 2014, she had personally appointed a Ministerial Advisory Committee (MAC) to investigate and advice on the selection and implementation of the most appropriate, efficient and cost effective method of institutionalisation of the payment of social grants. Ostensibly, the MAC issued its report on 31 October 2014, which identified the creation of work-streams designed to focus on specific deliverables to ensure that SASSA would meet the Constitutional Court deadlines. According to the former Minister, the work-streams dealt with all physical infrastructure issues, as well as technical and legal issues.

6.1.11 The former Minister Dlamini further indicated that it appeared from the minutes, attached to the affidavits filed on behalf of SASSA, dated 25 and 26 January 2016, that members of SASSA's Executive Committee (EXCO) were concerned about

whether SASSA would be able to establish an in-house payment system in a year, but that they were of the view that if strategic partners such as banks were involved, it may be possible. She stated that by April 2016, it was clear to SASSA officials that based on their progress, they would not be ready to meet the objective of taking over fully from CPS on 31 March 2017. They then sought legal advice from Adv. Nazeer Cassim SC and Adv. Mostert on the legal implications of not meeting the court order. She asserted that an opinion was received by the Project Manager of the work-streams, Ms Mvulane and the Acting CEO of SASSA, Ms Raphaahle Ramogopa on 10 June 2016.

6.1.12 Further to her affidavit, the former Minister stated in *paragraph 29* that, although SASSA sought this legal opinion, she was not notified of this nor given sight of the legal opinion until after October 2016. Further, that officials at SASSA did not provide her with any of the legal opinions received, at the time they received them, hence she could not have been aware of the difficulties SASSA was facing at the time.

6.1.13 In an interview with the former CEO of SASSA, Mr Thokozani Magwaza on 4 March 2019, he stated that in May 2016, during the abovementioned Budget Vote Speech to Parliament in May 2016 by former Minister Dlamini, he was an Acting Director-General in the Department of Social Development and unable to confirm whether the former Minister was aware or ought reasonably to have been aware, at the time, that SASSA would not be able to take over the function of payments of social grants. Albeit he was appointed CEO of SASSA in June 2016, he only took office in November 2016.

6.1.14 Mr Zane Dangor, former Director-General of the Department of Social Development, could also not confirm, whether the former Minister was aware or ought reasonably to have been aware, at the time of her Budget Vote speech, that SASSA would not be able to take over the function of payments of Social grants, in an interview held on 4 March 2019.

6.1.15 In an interview with Ms Virginia Petersen, former CEO of SASSA, on 15 April 2019, Ms Petersen could also not confirm whether the former Minister was aware or ought reasonably to have been aware at the time of her Budget Vote speech, that SASSA would not be able to take over the function of payments of Social grants.

6.1.16 Ms Zodwa Mvulane, Project Manager of the work-streams confirmed in a telephonic interview on 12 June 2019 that she realised in April 2016 that SASSA would not be able to meet all the deliverables which would ensure that SASSA meets the court imposed deadline of 31 March 2017. She stated that the EXCO was informed of the challenges accordingly and undertook to obtain a legal opinion on 17 May 2016. The purpose of the legal opinion was to ascertain the extent to which SASSA would be implicated for not meeting all the deliverables before 31 March 2017, whether to inform the Constitutional Court albeit the court discharged its supervisory function and thirdly, the feasibility of extending the CPS contract.

6.1.17 She stated that the work-streams were only activated at the end of May 2016 and that the work-streams were geared towards fast-tracking achievement of the deliverables. She indicated that the former Minister was hopeful that the work-streams would ensure that SASSA meets the deadline and upon receiving the first report from the work-streams in October 2016, in addition to several legal opinions, the former Minister became aware of the possibility that the in-house solution may not be capable of being implemented and thus may need to consider continuing the contract with CPS.

Application of the relevant legal prescripts

6.1.18 With regard to whether the former Minister of Social Development, Ms Bathabile Dlamini misled the National Assembly in her Budget Vote Speech on 4 May 2016, the issue for my determination is whether applicable laws and prescripts were complied with.

The Constitution of the Republic of South Africa, 1996

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

6.1.20 In terms of section 92(3)(a), Cabinet Members must act in accordance with the Constitution.

6.1.21 Section 96 of the Constitution regulates the conduct of the Members of the Cabinet and Deputy Ministers.

6.1.22 Section 96(1) provides that Members of the Cabinet and Deputy Ministers must act in accordance with a Code of Ethics prescribed by national legislation.

The Executive Members' Ethics Act, 1998

6.1.23 The primary objective of the Executive Members' Ethics Act, 1998 is to provide for a Code of Ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils.

6.1.24 Section 2 of the Act provides that the President must publish a Code of Ethics prescribing standards and rules aimed at promoting open, democratic and accountable government.

6.1.25 Section 3 of the Act provides that the Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint by *inter alia* a Member of the National Assembly or a permanent delegate to the National Council of Provinces.

6.1.26 Sections 3(2) (a) provides that the Public Protector must submit a report of the alleged breach of a Code of Ethics within thirty (30) days of receipt of the complaint to the President if the complaint is against a Cabinet Member, Premier or Deputy Minister.

6.1.27 However, section 3(3) provides that if the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.

6.1.28 Section 3(4) provides that when conducting an investigation in terms of this section, the Public Protector has all the powers vested in her in terms of the Public Protector Act.

6.1.29 Section 3(5)(a) of the Act provides that the President must within a reasonable time, but not later than fourteen (14) days after receiving a report from the Public Protector on an investigation into allegations of a violation of the Code by a Cabinet member, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.

Executive Ethics Code

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

6.1.31 The relevant provisions of the Code with which Cabinet Ministers must comply with in performing their official responsibilities, provide as follows:

"***General Standards:***

2.1. Members of the Executive ***must*** *to the satisfaction of the President-*

(a) *perform their duties and exercise their powers diligently and honestly;*

(b) *fulfil all the obligations imposed upon them by the Constitution and law; and*

(c) *act in good faith and in the best interest of good governance, and*

(d) *act in all respects in a manner that is consistent with the integrity of their office or the government.*

2.2. In deciding whether members of the Executive complied with the provisions of paragraph 2.1 above, the President or the Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.

2.3. Members of the Executive may not:

(a) *Deliberately or inadvertently mislead the President, or the Premier or, as the case may be; the legislature.*

(b) *act in a way that is inconsistent with their position; …*

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

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

6.1.32.1 Ms Mvulane, became aware in April 2016 that SASSA will not be able to achieve all the deliverables to meet the court imposed deadline of 31 March 2017, in taking over the payment of social grants from CPS.

6.1.32.2 Ms Mvulane did not inform the former Minister of the challenges they were experiencing in achieving all the deliverables, instead sought legal advice to establish the legal ramifications for not meeting the court imposed deadline. Further legal opinions were sought and provided to the former Minister Dlamini only in October 2016. The Minister reasonably believed that the work-streams would overcome the challenges and ensure that SASSA meets the *seven-step* deliverables.

6.1.32.3 None of the key witnesses interviewed (Mr Magwaza, Ms. Petersen and Mr. Dangor) could provide *prima facie* evidence indicating that the former Minister misled the National Assembly, during her Budget Vote Speech on 4 May 2016, when she stated that SASSA will be ready to take over the management and control of social grant payments from CPS on 1 April 2017.

6.1.32.4 The evidence indicates that the legal opinions sought, laid the basis of SASSA not being able to take over control and management of social grant payments and that such was only provided to the former Minister in October

2016. There is also no evidence to indicate that the former Minister received the legal opinions before that date.

6.1.32.5 The evidence also indicates that the former Minister was of the opinion, when she delivered her Budget Vote speech, that SASSA would be capable of taking over control of the social grant payments by 1 April 2017; if she held the opposite view, the work-streams would have been unnecessary and a wasteful expense. The work-streams were primarily implemented with a view to achieving all the deliverables.

7. FINDINGS

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

7.1 **With regard to whether the former Minister of Social Development, Ms. Bathabile Dlamini deliberately or inadvertently misled the National Assembly when she delivered her Budget Vote speech in which she made an undertaking on behalf of SASSA to take over the management and control of the payment process that was performed by Cash Paymaster Service (CPS), from April 2017 and in doing so, violated the Executive Code of Ethics**

7.1.1 The allegation that the former Minister of Social Development, Ms Bathabile Dlamini deliberately or inadvertently misled the National Assembly when she delivered her Budget Vote speech in which she made an undertaking on behalf of SASSA to take over the management and control of the payment process that was performed by Cash Paymaster Service (CPS), from April 2017 and in doing so, violated the Executive Code of Ethics, could not be substantiated.

7.1.2 In *Black Sash Trust v Minister of Social Development and Others [2017] ZACC 8, March 2017,* Froneman J held in his judgement that since April 2016 the responsible functionaries of SASSA have been aware that it could not comply with the undertaking to the Constitutional Court that it would be able to pay social grants from 1 April 2017,

however, confirmed that former Minister Dlamini only became aware of SASSA's inability to make such payments in October 2016.

7.1.3 According to the Project Manager at the time, Ms Mvulane, the first legal opinion was only sought on 17 May 2016 and received in June 2016. The work-streams were activated around the same time and commenced in July 2016. Therefore, during the Budget Vote Speech on 4 May 2016, these responsible functionaries were also of the view, that SASSA was capable of taking over the control and management of the payments of social grants by 1 April 2017. It was only after receiving the legal opinion in June and the first report in October 2016 on the work-streams that all hope crumbled.

8. OBSERVATION

8.1.1 Even though I did not make any findings against former Minister Bathabile Dlamini on a violation of the Executive Ethics Code in connection with the allegation that she misled the National Assembly, note should be taken that the Constitutional Court in *Black Sash Trust v Minister of Social Development and Others [2018] ZACC 36, September 2018,* pursuant to the outcome of the Ngoepe inquiry into whether the former Minister should be held personally liable for SASSA's failure to comply with the Constitutional Court order, pronounced that the former Minister be held liable for the cost of the application in her personal and official capacity and that the National Director of Public Prosecutions considers whether former Minister Dlamini lied under oath.

9. REASON FOR CLOSURE

9.1 Based on the information and evidence obtained during the investigation, I could not make a finding on the allegation that the former Minister of Social Development, Ms. Bathabile Dlamini deliberately or inadvertently misled the National Assembly and contravened the Executive Ethics Code, when she delivered her Budget Vote speech on 4 May 2016.

9.2 A Discretionary Notice was sent on 1 August 2019 to Ms Masango in accordance with Rule 42(1) of the Public Protector Investigation Rules published in Government Gazette No. 41903 and no response was received by the return date of 21 August 2019. The matter will be considered as finalised.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 23/09/2019