

## Executive ethics reform is urgent as yet another Cabinet minister is in serious breach

### OP-ED

By Gary Pienaar and Ashley Fischhoff Daily Maverick 6 November 2018



*The front cover of the Ministerial handbook, 2007.*

### 137 Reactions

The last we heard of proposed amendments to the Executive Members' Code of Ethics was back in 2011 when draft amendments to the Executive Members' Ethics Act were published for public comment. This was intended to fill the gaps identified by then Public Protector Thuli Madonsela. As things stand we cannot be sure that President Cyril Ramaphosa and his Cabinet have made timely and full disclosure.

The Executive Members' Ethics (EME) Act of 1998 has attracted much attention during the democratic era, both in terms of its conceptualisation and its implementation. The act is tasked with establishing the code of conduct for the Executive, which comprises the president, deputy president, ministers, deputy ministers and members of provincial executive councils (or provincial cabinets).

The EME Act received significant attention during the Zuma administration, with numerous calls for its review, including those made by the public protector, whose responsibility it is to investigate any alleged breaches of the executive ethics code. However, despite numerous calls for review and recommendations contained in several public protector reports, the act has not been amended, while the code of conduct has received only modest adjustment to marginally strengthen sanctions.

Thuli Madonsela reported widespread "systemic" executive and legislative failure and recommended remedial action to review the ethics act.

Such neglect undermines transparency, accountability and weakens ethical conduct and good governance by government leaders. A weak monitoring and enforcement regime, with few meaningful consequences, has enabled numerous instances of wasteful expenditure and, ultimately, increasing disregard of ethical norms and constraints. This is clearly evident as we learn more about State Capture.

### Public protector's investigations

Various investigations by the public protector have not resulted in consistent findings. Lawrence Mushwana, who held the office from 2002 until 2009, identified only definitional and administrative issues in his investigations of alleged non-compliance.

On the other hand, Thuli Madonsela, Mushwana's successor, reported widespread "systemic failure" on account of executive and legislative failure. She recommended remedial action to review the EME Act, such as conceptual clarifications, definitional expansions, harsher and legally binding sanctions for misconduct, as well as reforms of the Ministerial Handbook which includes the Executive Members' Code of Ethics.

Shortly after Madonsela reported on then-President Jacob Zuma's breach of failing to lodge his disclosure of interests as required in terms of the code, Cabinet adopted interim sanctions applicable to members of Cabinet who are found guilty of violating the Executive Members' Code of Ethics. On 27 July 2010 Cabinet announced the following sanctions as an interim measure against breaches of the Code

A fine not exceeding the value of 30 days' salary and a reduction of salary or allowances for a period not exceeding 15 days.

These sanctions would be applied to members of the Executive until the Minister of Justice completed a review of the Executive Ethics Code. The post-Cabinet briefing noted that the minister of justice and constitutional development was finalising a comprehensive report that would address all the issues and gaps that were identified by the public protector. This report was expected to reach Cabinet no later than November 2010.

If it did, it hasn't resulted in any legislative amendment. Apart from a draft amendment bill, which was published for public comment in May 2011, no further action has been evident.

#### **What is required by the Act and Code?**

A recurrent theme across all the public protectors' reports has been the call to provide clearer direction regarding the identification, avoidance and effective management of conflicts of interest. Among other things, the act stipulates that members are required to act consistently with their public responsibilities, and to take active steps to prevent situations in which their official responsibilities may be in conflict with their private interests.

Members are thus required to submit a declaration of interest within 60 days of assuming office, in which all their financial interests, assets and liabilities must be disclosed.

An updated declaration is required when any financial interest is subsequently acquired, which includes "gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by family members or others with whom there is a close relationship", as determined by the code of conduct. This procedure is designed to ensure transparency and accountability within government and to build public trust in government.

Soon after her appointment to office, Madonsela identified a breach of the code by the new president, Jacob Zuma, who had failed to submit his declaration within the prescribed time frame. When confronted with this omission, then-President Zuma claimed confusion as to whom he should have submitted his declaration.

This situation arose after numerous previous recommendations by the public protector to clarify the law to prevent such supposed confusion, although in terms of the code the cabinet secretary is the designated recipient and custodian of all disclosures.

In order to effectively prevent non-compliance and manage conflicts of interest, explicit directions are also required regarding the person to whom a report involving the ethical conduct of the president should be submitted by the public protector. In terms of the existing provisions of the act,

no provision is made for a scenario where the president himself is the subject of the investigation and report. In addition, greater certainty was required regarding consequences, as were firmer sanctions for non-compliance and breaches.

It remains unclear whether President Cyril Ramaphosa and his Cabinet have made timely and full disclosure. Whether they have or not, the fact remains that there is an urgent need to review the EME Act in order to provide clear direction as to who is responsible for monitoring and enforcing compliance by the executive.

Further remedial action recommended by Madonsela, based on the existing provisions of the EME Act, is the need to explicitly incorporate prompt transactional disclosure into the code's disclosure of interests' procedures. This is to allow for prompt identification, and avoidance and effective management of conflicts of interest as they arise, and before they can have undue impact on executive discretion, and policy- or lawmaking.

In addition, Madonsela urged Parliament to provide clarity on the office or person to be approached by the president regarding the acceptance of gifts worth more than R1,000, and on what grounds this office or person should grant permission for acceptance.

The only development to date so far was Presidential Proclamation Number R.34 of 2017, published in the Government Gazette on 6 November 2017, in which administration of the EME Act has been transferred from the Presidency to the minister of justice and constitutional development. This transfer of responsibility to a Cabinet member appointed at the discretion of the president is unlikely to ensure authoritative independent oversight of executive compliance with the existing act and code. There is still no sign of any progress of the necessary legislative amendments

## **Sanctions**

Meanwhile, contestation over members' compliance with their duty to formally disclose their interests continues. Repeated non-compliance has been recorded; in one year only 40% of members submitted their disclosure forms within the prescribed time frame. Such continued non-compliance highlights both the ineffective implementation of sanctions and penalties and the lax nature of these sanctions.

The EME Act does not characterise contravention as a criminal offence. Madonsela recommended that sanctions applicable in terms of the parliamentary code of conduct be replicated in the EME Act. Describing the issue of non-compliance as a matter of urgency, Madonsela recommended the introduction of stricter sanctions for breaches of the code and report-backs on progress with implementation of sanctions.

The inadequacy of the interim sanctions are highlighted in the context of the Constitutional Court's finding on 27 September 2018 that then-Minister of Social Development Bathabile Dlamini had, among other things, not acted in good faith in the SASSA inquiry chaired by Judge President Bernard Ngoepe, and had subsequently failed to make full disclosure to the Constitutional Court.

The ConCourt referred the matter to the national director of public prosecutions, "to consider whether Minister Dlamini lied under oath and, if so, whether she should be prosecuted for perjury". Even if no prosecution ensues, the findings by the inquiry and the court render even the most stringent sanction in terms of the 2010 amendments — a fine not exceeding the equivalent of 30 days' salary — patently inadequate.

The inadequacy of the interim sanctions is emphasised by the public protector's finding published on 31 October 2018 (echoing the finding by the North Gauteng High Court in 2017) that Minister Malusi Gigaba had lied under oath to the court. In addition to a possible perjury charge, the public protector found that Gigaba's conduct constituted a breach of the EME Act and code. These serious breaches demand a fundamental review of the executive ethics framework.

Due to political considerations, it has proven rare for sanctions to be imposed on members of the executive or on the president. The president can be sanctioned only if required by the public protector and applied by Parliament. To rectify this, discretion in the imposition of sanctions should be minimised and stronger and non-discretionary sanctions introduced to address the issue of non-compliance with disclosure requirements, as well as breaches. In addition, the Act should explicitly include the president within its scope and a process devised to deal with transgressions by the president.

### **Integrity Commissioner**

Some years ago, the Institute for Democracy in South Africa (Idasa) recommended the introduction of an "integrity commissioner" who would be sufficiently qualified, experienced and independent to provide assistance and advice to the president, or premier, or even the cabinet secretary when approached by the president. The commissioner would be responsible for dealing with all aspects of the ethics code, with particular emphasis on ensuring compliance with disclosure requirements, scrutinising disclosures and providing advice on the propriety of accepting gifts. An independent integrity commissioner may be the only credible solution that will also enable the public protector to retain investigative independence.

It is evident that the executive branch of government is subject to extremely weak self-regulation, which has imperilled the integrity of significant parts of government and, indeed, the state and the entire constitutional order.

### **Ministerial Handbook reform**

The Ministerial Handbook, which incorporates the provisions of the EME Act, provides guidelines for the benefits and privileges to which members and their families are entitled, both during their time in office and thereafter. Reports of non-compliance have been numerous and persistent since the handbook's introduction in 2007.

Some examples include the spending of roughly R1m in 2009 by then minister of higher education, Blade Nzimande, on a new BMW. Former acting Northern Cape premier Sylvia Lucas charging R50,000 in fast-food bills to a government credit card. In 2011, the former minister of women, children and people with disabilities, Lulu Xingwana, taking a delegation of 49 members to a gender summit in New York. These are simply a few of the countless cases of maladministration and misconduct reported in the media.

Pravin Gordhan, in his 2013 budget speech, recommended substantial reform of the Ministerial Handbook, including the removal of a first-class flight option, the abolition of government credit cards, and a budget cut on luxury hotels, telephone bills, food and alcohol.

Gordhan argued that a cut in executive members' privileges could save up to R2bn in wasteful expenditure and called for the handbook reforms to apply not only to members of Cabinet and national, provincial and local government, but also to leaders of state entities and state-owned enterprises.

Repeated calls for belt-tightening ,as the economy continues to exclude a large minority and deep social inequality persists, have yet to be revised in the Handbook, leaving ample latitude for unacceptable and unsustainable largesse.

### **Lifestyle audits**

During a recent question and answer session in the National Council of Provinces, President Ramaphosa promised a “really robust system of lifestyle audits” for top government officials to be in place by the end of October 2018.<sup>3</sup>

He said that it would apply to everybody in senior positions, including himself. He explained that it would not “end just with the executive”, but should be implemented throughout senior public service structures, indicating that the Financial Intelligence Centre will be crucial in implementing the system as it is “able to keep track of movements of money and cash in various entities and bank accounts”.

He predicted that once this lifestyle audit takes place “there will not be any place to hide. People will be found if they are involved in wrongdoing” .

If these independent lifestyle audits are incorporated into the law, together with other long overdue amendments to the Executive Members Ethics Act and code, we could expect real action against unethical and corrupt conduct. **DM**

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