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**Statement to the South African Police Service: allegations of corruption and other unlawful activities against MEC Dr Benjamin “Benny” Malakoane and other senior officials of the Free State Department of Health**

**1 September 2014**

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I, the undersigned

Anele Boyce Yawa

do hereby state under oath:

1. I am an adult citizen of South Africa with the identification number 7603146120088. I am the General Secretary of the Treatment Action Campaign (“TAC”) and I make this statement in the public interest and the interests of justice. The TAC is a membership-based organisation that campaigns for quality healthcare for all who live in South Africa. The TAC actively monitors and seeks to improve the healthcare system in seven provinces, including the Free State. The TAC is a registered non-profit organisation with its national office located at 2<sup>nd</sup> Floor Westminster House 122 Longmarket Street Cape Town, 8001. I can be contacted at 021 421 1700.
2. The facts contained herein are, unless indicated by the context, within my own personal knowledge and are to the best of my knowledge and belief both true and correct.
3. I provide this statement to alert the South African Police Service of possible criminal activity by senior officials of the Free State Department of Health (“FSDoH”) in order that these activities may be investigated urgently.

4. If the below allegations are proven true, the Member of the Executive Committee for Health (“MEC”) of the FSDoH Dr Benjamin “Benny” Malakoane, the Head of Department (“HoD”) of the FSDoH Dr David Motau, the Deputy Director-General (“DDG”) of the FSDoH Mr Teboho Moji and other officials (“the officials”) may be found guilty of, amongst other crimes, the offense of “corrupt activities” in terms of section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (“the Act”).
5. If these officials are found guilty of corruption, they may each be fined or imprisoned for up to a life sentence in terms of section 26(1)(a) of the Act.

## **FACTS**

6. The Premier of the Free State, Mr Elias Sekgobelo "Ace" Magashule, appointed Dr Malakoane as the MEC of the FSDoH in March 2013. MEC Malakoane subsequently appointed Dr David Motau as the HoD and Dr Teboho Moji as the DDG.
7. MEC Malakoane is currently facing criminal charges in two prosecutions. My information is that the National Prosecuting Authority has charged MEC Malakoane with multiple counts of corruption for which he faces a minimum sentence of 15 years imprisonment. He was arrested in regards to these charges on 10 July 2013 following a 2010 Commission of Enquiry that produced incriminating allegations against him. On 27 August 2014, his prosecution was postponed for the fifth time. My information is also that he is simultaneously facing criminal charges in the Odendaalsru Regional Court relating to financial mismanagement and collusion in regards to a contract for sewage management.
8. An article titled “How a dying woman’s bed was taken by an ANC official” appeared in the Mail & Guardian on 4 July 2014. [P De Wet, A Green, M Malan, “How a dying woman’s bed was taken by an ANC official”, Mail & Guardian (4

July 2014)]. A copy of the article is attached as Annexure 1.

9. The article states that MEC Malakoane, with the assistance of HoD Motau and DDG Moji, ordered that a patient be admitted to the Intensive Care Unit (“ICU”) at Dihlabeng Regional Hospital despite that the patient did not qualify for admission to the ICU and patients who did qualify for admission had been turned away the same night because the ICU was at capacity. The article indicates that the officials ordered the patient to be admitted to the ICU due to the patient’s political position and connections. The patient was admitted and several other patients who qualified for admission were turned away while he was occupying a bed. One patient who was turned away died while waiting in an ordinary ward of the hospital.
  
10. The article reported the following details:
  - 10.1. On the night of 27 June 2014, MEC Malakoane and HoD Motau entered Pekholong District Hospital in Bethlehem and instructed health officials, who were subordinate to the MEC and the HoD, to refer a patient (“Patient X”) to Dihlabeng Regional Hospital to be admitted to the ICU. Pekholong District Hospital does not have an ICU whereas Dihlabeng Regional Hospital does.
  - 10.2. A doctor who informed the Mail & Guardian of this information requested anonymity for fear of being fired. Moreover, the real name of Patient X is known to the Mail & Guardian.
  - 10.3. It is alleged that Patient X was politically connected and an office bearer of the African National Congress.
  - 10.4. When Patient X arrived to Dihlabeng Regional Hospital, the ICU consultant on duty assessed him and found that he did not qualify for admission to the ICU because he was in the last stages of a chronic condition and was unlikely to recover. A senior doctor at Dihlabeng hospital explained “no other ICU in

the country would admit a patient like that, especially over other patients we could more likely save.” The ICU was at capacity and two critical patients had been turned away that night due to space constraints. Even though a patient with a prognosis like that of Patient X is usually cared for at a primary level, Patient X was admitted to a secondary level medical ward.

- 10.5. The following morning, on Saturday 28 June 2014, MEC Malakoane issued an instruction to the Clinical Manager on duty at Dihlabeng hospital to admit Patient X to the ICU. Deputy Director-General for the FSDoH Mr Teboho Moji delivered this instruction on behalf of MEC Malakoane. The Clinical Manager on duty at the ICU said that it was explained to him “the MEC had promised family members the patient would go to ICU.”
- 10.6. Another doctor at Dihlabeng hospital explained that “the medical professionals on duty were in trouble for not sending [Patient X] straight to ICU” even though Patient X had already been admitted to a higher level of care than he should have been.
- 10.7. On 2 July 2014, Patient X remained in the ICU with no improvements to his condition. It is alleged that during the previous days, several critical patients deserving of admission to the ICU were turned away due to the lack of capacity. It is particularly alleged that a patient who qualified for admission to the ICU but was turned away died in an ordinary ward of the hospital on Monday 30 June 2014.
11. In addition to the information reported in the Mail & Guardian, I have reason to believe that Patient X was a relative or associate of another senior political leader in the Free State.
12. I also have reason to believe that members of the staff at Dihlabeng Regional Hospital and Pekholong District Hospital can confirm the facts reported in the Mail & Guardian.

13. In media reports, MEC Malakoane appears to have provided conflicting responses to these allegations. In a radio interview with eNCA aired at 12h00 on 11 July 2014, MEC Malakoane's spokesperson, Mr Mondli Mvami, asserted that MEC Malakoane went to Pekholong Hospital, saw Patient X and assessed his file. Mr Mvami explained "the MEC is a doctor in his own right. He saw this patient, he saw the file, he called the clinical specialist in the hospital, assessed the file and jointly agreed with the specialist that this was a deserving case for the ICU." I am in possession of a recording of this radio interview and can provide it upon request.
14. In contrast, an article appearing on page 15 of the Mail & Guardian on 22 August quotes MEC Malakoane as providing a very different account: "I didn't even know the patient's identity or that he had been transferred to ICU ... All I did was to ask [medical personnel] to isolate the patient, who appeared to be in a coma, to prevent psychological trauma to the ones next door." [M Malan, "They call me a killer when I know I'm a saviour, says Malakoane", Mail & Guardian (22 August 2014)].

#### **POSSIBLE CORRUPTION**

15. If the above allegations are proven, MEC Malakoane and other officials may be found guilty of the offense of "corrupt activities" in terms of section 4 of the Prevention and Combating of Corrupt Activities Act.
16. Section 4 of the Act reads as follows:

#### *4. Offences in respect of corrupt activities relating to public officers*

##### *(1) Any -*

- (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person,*

*whether for the benefit of himself or herself or for the benefit of another person; or*

*(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-*

*(i) that amounts to the-*

*(aa) illegal, dishonest, unauthorised, incomplete, or biased; or*

*(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*

*(ii) that amounts to-*

*(aa) the abuse of a position of authority;*

*(bb) a breach of trust; or*

*(cc) the violation of a legal duty or a set of rules;*

*(iii) designed to achieve an unjustified result; or*

*(iv) that amounts to any other unauthorised or improper inducement to do or not to do*

*anything, is guilty of the offence of corrupt activities relating to public officers.*

(2) *Without derogating from the generality of section 2(4), “to act” in subsection (1), includes-*

- (a) voting at any meeting of a public body;*
- (b) performing or not adequately performing any official functions;*
- (c) expediting, delaying, hindering or preventing the performance of an official act;*
- (d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;*
- (e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;*
- (f) showing any favour or disfavour to any person in performing a function as a public officer;*
- (g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or*
- (h) exerting any improper influence over the decision making of any person performing functions in a public body.*

17. I believe that the officials may have agreed to accept “gratification” for the benefit of Patient X in the form of a bed in the ICU and the financial and other resources that accompany the bed.

18. In addition, I believe that:
  - 18.1. MEC Malakoane may have agreed to accept “gratification” in the form of goodwill and political favour from Patient X and/or his political connections, including another senior political leader in the Free State;
  - 18.2. HoD Motau may have agreed to accept the same “gratification” from these sources as well as from MEC Malakoane; and
  - 18.3. DDG Moji may have agreed to accept the same “gratification” from these sources as well as from MEC Malakoane and HoD Motau.
  
19. The relationships between these individuals may constitute a “mutually beneficial symbiosis ... generating a sense of obligation” on the officials; such relationships have been determined to be a form of “gratification” for the purposes of a charge of corruption under section 4 of the Act. [*S v Shaik* 2007 (1) SA 240 at 33].
  
20. By ordering Patient X to be admitted to the ICU, I believe that the officials may have:
  - 20.1. abused their position of authority;
  - 20.2. violated a legal duty and a set of rules; and
  - 20.3. acted in a manner designed to achieve an unjustified result.
  
21. I believe that the officials’ act of ordering Patient X’s admission may have included:
  - 21.1. a failure to adequately perform his official functions;
  - 21.2. showing favour to Patient X and disfavour to other patients in performing a function as a public officer;
  - 21.3. diverting property belonging to the state to Patient X for purposes unrelated to those for which it was intended; and
  - 21.4. exerting improper influence over the decision making of people performing



functions in a public body.

22. In regard to the set of rules that the officials violated, I believe that they may have contravened accepted practice in the medical field by ordering Patient X to be admitted to the ICU in that Patient X did not qualify for admission to the ICU. In addition, they may have bypassed accepted protocol in the medical field. In resource-limited environments like an ICU, admission criteria are measured by qualified staff on duty, who must weigh clinical need, prognosis and the availability of resources. These decisions require significant experience, expertise and knowledge of the competition for a bed.
23. Because other patients were waiting to be admitted to the ICU ahead of Patient X, the officials may have violated those patients' right of access to healthcare services and not to be denied emergency medical treatment in terms of section 27 of the Constitution of the Republic of South Africa 1996 ("the Constitution"). In doing so, MEC Malakoane may have violated his constitutional obligation in terms of section 133(3) of the Constitution, which requires him to ensure that constitutional rights are respected, promoted and fulfilled.
24. Furthermore, I believe the MEC may have acted in contravention of section 136(2)(b-c) of the Constitution as well as the Executive Ethics Code made in terms of the Executive Members Ethics Act 82 of 1998. These laws specifically prohibit MECs from:
  - 24.1. using their position to enrich themselves;
  - 24.2. improperly benefitting another person;
  - 24.3. acting in a way inconsistent with their office; and
  - 24.4. exposing themselves to a situation involving the risk of a conflict between their official responsibilities and private interests.
25. In addition, I believe that the officials involved may have violated their obligations created in terms of section 195(1)(a-b) of the Constitution, which

requires public administration to be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- 25.1. a high standard of professional ethics;
- 25.2. efficient, economic and effective use of resources must be promoted;
- 25.3. services must be provided impartially, fairly, equitably and without bias; and
- 25.4. public administration must be accountable.

#### **POSSIBLE CRIMINAL OFFENCES IN TERMS OF THE PUBLIC FINANCE MANAGEMENT ACT**

26. The Public Finance Management Act 1 of 1999 (“the PFMA”) provides that HoD Motau is the Accounting Officer of the FSDoH.

27. Section 38 of the PFMA provides that the Accounting Officer:

- 27.1. must ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- 27.2. is responsible for the effective, efficient, economical and transparent use of the resources of the department;
- 27.3. must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct;
- 27.4. on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board; and
- 27.5. must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who:
  - 27.5.1. commits an act which undermines the financial management and

internal control system of the department, trading entity or constitutional institution; or

27.5.2. makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure.

28. Section 86 of the PFMA provides that an Accounting Officer of a department is guilty of an offence if he or she “wilfully or in a grossly negligent way” fails to comply with these responsibilities. I believe that HoD Motau may have wilfully or in a grossly negligent way failed to comply with the above provisions of the PFMA. Section 86 provides that he may be fined or imprisoned for up to five years if convicted of this crime.

## **CONCLUSION**

29. In light of the above information, I submit this statement to the South African Police Service in order that they may investigate these allegations urgently.

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**Anele Boyce Yawa**  
**021 422 1700**  
**anele.yawa@mail.tac.org.za**

Signed and sworn to before me at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 2014, the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath and that the deponent considers the prescribed oath to be binding on the deponent’s conscience.

COMMISSIONER OF OATHS

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

DESIGNATION: \_\_\_\_\_