



PUBLIC PROTECTOR
SOUTH AFRICA

**Address by Public Protector Adv Thuli Madonsela during the Annual
General Meeting of the American Chamber of Commerce in South
Africa (AmCham) at the Radisson Blu Hotel, Sandton in Johannesburg
on Thursday, March 07, 2013.**

**To the President of the Chamber , Ms Donna Oosthuizen
His Excellency, Consular General of the USA, Mr Earl R. Miller;
Chairperson of the Board of AmCham;
Members of the board;
Leaders of Industry
Members of AmCham;
Distinguished representatives of the US Embassy
Ladies and gentlemen;**

It is an honour and privilege to address this, the 35th Annual General Meeting of the American Chamber of Commerce in South Africa. I'm deeply grateful to the organisers for the privilege.

A special word of gratitude goes to Michael Judy for inviting me. I have learned from Ms O'Brien that your organisation comprises 250 American enterprises registered to do business in South Africa. She has also pointed out that your companies contributed about R230 billion to the local economy in 2011 while employing 130 000 locals. That is a huge contribution.

I suspect that in announcing bold plans for our country's economic growth and development, President Zuma and Minister Gordhan were counting on you among those that have to play their part in bringing such plans to fruition. This includes the realisation of our country's national development dream as outlined in the National Development Plan (NDP) and our Millennium Development Goals (MDG).

Why should you care about South Africa's development dreams or trajectory given the fact that you are guests in our country and not permanent citizens? More interestingly why should you be bothered about our national challenges such as maladministration and corruption whether within the state or in the private sector? Today is not an option is not an option for you to move your show elsewhere when you are no longer comfortable with the investment climate?

As I pondered these questions I thought about a poem titled "*The Cold Within*" authored by Anonymous and reproduced in John Mason's book titled "*Believe You Can: The power of a positive attitude*".

The poem narrates the story 6 people trapped in mutually dependent circumstances, a black and bitter cold in the face of a dying fire in need of logs. Each was of these six people was in possession of a single log of wood.

The first woman is said to have held hers back because she noticed a person outside her race and felt she could not benefit him. The next person held his back because he saw noticed the presence of someone outside his religion. The third person, a poor man in rags noticed the presence of a rich person and was not prepared to have the idle rich benefit from his effort. The rich man sitting across the poor man, held back his piece of wood because he did not want to benefit the lazy, shiftless poor. The fifth man withheld his to spite those he considered to be historically advantaged and the last man held his back because he never did anything in life expect for gain.

The poem ends with the following words:

*"The logs held tight in death's stilled hands
Was proof of human sin-
They didn't die from the cold without,
They died from the cold within."*

These six people unconsciously chose death because they forgot that you cannot light another's path without brightening your own.

I hope I am not wrong in believing that your invitation that I speak to you about my office and the role business needs to play in the fight against corruption today stems from your choice not to die from the cold within. This is the choice that all those who live in South Africa need to make. After all the *Freedom Charter*, which is one of the historical value statements that brought our magnificent country to its prided position within the global community, says that "*South Africa belongs to all who live in it black and white.*"

If something belongs to you, you value it and ensure that it continues to increase or, at the very least maintain its value. In the context of our country, what does choosing life instead of dying from the cold within mean? For me it means the choice of identifying your place in making South Africa work and playing your part with honesty and commitment.

That is all that my team and I endeavour to do as we go about discharging our constitutional responsibility of investigating and redressing improper conduct in all state affairs or the public administration.

You are probably aware that the Public Protector is established under section 181 of the Constitution and given power under section 182 "*...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; to report on that conduct; and to take appropriate remedial action*"

However, many of you might not be aware that the Constitution envisages additional powers for the Public Protector as prescribed in national legislation. As we speak these additional legislative powers, which have come from more than a dozen statutes, have caused my office to evolve into a multiple mandate, my office remit today includes playing a part in the anticorruption architecture of South Africa.

I am often concerned that when government outlines our country's anticorruption architecture, my office is often omitted. One of the implications is underfunding and inadequate synergy within the work of the anticorruption agencies.

The key mandates of my office to-date include the following:

1. A maladministration mandate, incorporating abuse of power and abuse of state resources, under the Public Protector Act of 1994;
2. The sole enforcement agency for the Executive Ethics Code under the Executive Ethics Act of 1998;
3. An anticorruption mandate deriving from improper conduct in section 82 of the Constitution, maladministration under the Public Protector Act and the reference made to the Public Protector within the provisions of the Prevention and Combatting of Corrupt Activities Act of 2004;
4. The Public Protector is a safe harbour for whistle-blowers under the Protected Disclosures Act of 2000;
5. One of several information regulators under the Promotion of Access to Information Act ; and
6. The final administrative review authority over decisions of the Home Builders' Registration Council under the Housing Protection Measures Act 95, 1998.

While the Public Protector is recognised as an Alternative Forum under *the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000*, this mandate is diminished in our current strategy as the Human Rights Commission and the other human rights focussed Chapter 9 institutions are better suited for this remit. Most of the other statutes merely recognise the residual jurisdiction of the Public Protector, for example the *Special Investigation Units and Special Tribunals Act (SIU Act)* and the *National Environmental Act (NEMA)* while a few assign the Public Protector a few tasks of an administrative nature as is the case with the *Public Finance Management Act of 1999* and the *National Archives and Record Services Act of 1996* requires that we be informed when records are destroyed.

Going back to the issue of the role of business in combating corruption, it simply boils down to doing the opposite of dying from the cold within. We are bound by destiny. We either rise together or fall together. Capital flight as I said earlier is no-longer the answer.

As the world has become a global village what happens in one economy affects other economies. For example, the rest of the world felt the European upheavals in the last few years have also impacted on the global economy.

They say when the dollar sneezes the rand catches a cold. I suspect the dollar and other currencies are also impacted by rand setbacks even though the impact may be small. Add to this global peace which is threatened by economic upheavals and related maladies such as poverty, inequality and the threat of revolutions. In addition there aren't many virgin economies where the grass is guaranteed to stay green for along time as was the case in the past.

Playing a part in nurturing the economy and democracy where your interests are invested is arguably a contemporary must for sustainable business growth.

What then should business do? You must agree with me that on the challenge of corruption, the responsibility of business with regard to corruption transcends the omissions of the 6 people

who died from the cold within. With business the reality is that the problem is not entirely an issue of omissions as was the case with the six people who died from the cold within. Truth be told, some business people are responsible for the fire dying due to lack of logs to start with. They have participated in stealing the logs so to speak.

How so?

Corruption is a bilateral crime. It takes two to tango. Those of you that are familiar with the OECD Convention, prohibiting the Bribery of Foreign Public officials, should be aware that it anticipates that business people are the corruptor that corrupts foreign public officials by offering or agreeing to pay bribes or related gratification.

This takes us to the definition of corruption. The simplest definition is the one used by Transparency International. In the TI context corruption is simply understood as *“the abuse of entrusted power for private gain”*. Although this definition is too broad, it does communicate the fact that corruption involves people placed in positions of trust making decisions and taking actions to advance their self interest rather than the interests of the power giver or doing the right thing. The key statute on corruption in South Africa, the Prevention and Combating of Corrupt Activities Act 12 of 2004(PCCAA), provides the following:

“Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person, or for the benefit of another person, in order to act, personally or by influencing another person so as to act, in a manner –

(a) that amounts to the-

(aa) illegal, dishonest, unauthorized, 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;

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

(dd) that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offence of corruption”

You will note that the bilateral nature of corruption is clear in the PCCAA.

Corruption can take place anywhere. It can be in an NGO, including a church or sports entity. It can be at a school or institution of learning. The corruption we are familiar with involves those in public offices taking bribes to distort their decisions or grant opportunities unfairly. Day to day transactional corruption as experienced with agencies such as traffic officers, licencing agencies and public service providers such as the Department of Home Affairs and the South African Social Security (SASSA) is often referred to as retail corruption.

Also common are procurement and employment related corruption.

Investigations conducted by my office usually deal with allegations of corruption in the two areas of procurement and employment opportunities. This was the case in the *Against the Rules* cases that dealt with the leasing of buildings to house the national and provincial headquarters of the South African police services. It was also the case in our investigation that resulted in the report titled the "*On the Point of Tenders*" investigation which dealt with a contract issued by a provincial Department of Transport to a company linked to a prominent politician and improper relationships of that created with companies benefiting from contracts it regulated as part of its contract. It was also the case in *It Can't be Right- Self interest in the Midvaal* where politician contracted to control the legal work of a municipality reportedly used the space to benefit himself at the expense of poor people and the municipality. Our systemic investigations into RDP housing and supply chain management in health include similar allegations. A report I issued under the title *Costly Letters*, relating to allegations of bribery in which, it was claimed that some business people tried to use their alleged proximity to a high-ranking politician to "buy government support" in order for their business transaction to succeed.

Of key concern to my office are trends observed from these cases. These include:

1. Tenders given to persons or entities without the capacity or skills who immediately subcontract;
2. Price inflation, this was the case on the reports titled(*On the Point of Tenders* and *Against the Rules*;
3. Exponential Price Escalation (Gautrain and Nkandla allegations);
4. False billing and Double billing, this is the case in allegation regarding the case in G-Fleet allegations and others. Double billing proven in *On the Point of Tenders*.
5. Shoddy or unfinished work paid in full or paid beyond value received or delayed projects; this is the case in many of the RDP houses investigations.
6. Survival of the un-fittest businesses propped up through tenders; a situation where people without business skills are given tenders.
7. Demoralisation of genuine experts and entrepreneurs;
8. Harassment of whistle-blowers and
9. Distortion of policies in the public sector.

What can business do to play a meaningful role in combating corruption? It's a matter of dos and don'ts. Business can:

1. Take whistle-blowers seriously and protect them;
2. Use peer pressure and peer review to ensure ethical conduct by association members;
3. Sign and uphold pledges against corruption;
4. Report incidences of corruption, including requests for bribes;
5. Help build leadership, management and compliance capacity in the public sector;
6. Act decisively against employees that engage in corrupt deals.

Business can:

1. Refrain from offering or agreeing to provide bribes or other forms of gratification;

2. Refuse to form part of cartels and report invitations to participate in such cartels, including the illicit sharing tenders (I'll scratch your back if you scratch mine and price fixing);
3. Refrain from using power and connections to influence the issuing of unnecessary tenders or getting tenders you do not qualify for.

In conclusion, these are my humble non- expert views on the role of business in combating corruption. I'm certain, however, that there is more that can be done to root out corruption in all sectors of society. My interest is action seeking to root out corruption within the state. If we play our part by meaningful and decisively contributing to the anti-corruption struggle we can contribute to bring about a state that is accountable, acts with integrity at all times and is responsive to its entire people. This will ultimately ensure that we do not die from the cold within.

Our destinies are linked even if you were to relocate your business to other parts of the globe. May your organisations prosper as our nation prospers and fulfils its dreams. Let us place our logs on the fire and keep our people's hopes and dreams alive.

Thank you.

Adv Thuli Madonsela

Public Protector of the Republic of South Africa