



Address by Public Protector Adv. Thuli Madonsela during the 18th Commonwealth Lawyers Conference in Cape Town, Western Cape on Monday, April 15, 2013.

**Chairperson, Dr Adilla Hassim;
Fellow Panelists, Dr. Nechi Ezeako, Principal Consultant/CEO EI-Values Advisory (Nigeria) and Mr. James Maton, Partner at Edwards Wildman Palmer UK LLP; Dr Adila Hassim, Director: Litigation and Legal Services, Section 27(South Africa)
Distinguished guests;
Ladies and gentlemen;**

It is an honour and privilege to address the 18th Commonwealth Law Conference, a very important gathering indeed.

Our session focuses on ***“Anti-Bribery and Corruption in the Corporate World.”*** I am delighted that the conference organisers chose to focus on private sector bribery and corruption. Corruption is often seen as a public sector malady afflicting mostly politicians. In reality this malady afflict all persons in all parts of society.

How many of you in this room can proudly say I’ve never paid a bribe. A lot of good people I know have told me that they have paid a traffic officer in the middle of the night because it seemed the only reasonable option. Is that proper?

The late former Chief Justice, Arthur Chaskalson once said the following about corruption:

“Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.”

As a Public Protector commonly or Ombudsman, which is the common term used for my office in most jurisdictions, I thought it best to primarily focus on lessons drawn from the exercise of my mandate. My remit is mostly restricted to conduct in state affairs, including corruption.

The Public Protector is a **senior public officer** appointed under section 181 of the Constitution with power vested by section **181 of the Constitution 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**.

Section 182 requires the services of the Public Protector **to be accessible to all persons and communities. It has been argued that this gives the people the right to complain**

The 6 key statutory mandates of the Public Protector include:

Investigating maladministration, including abuse of power and abuse of state resources under the Public Protector Act;

Enforcing the Executive Ethics Code under the Executive Members' Ethics Act;

Investigating allegations of corruption under the Prevention and Combatting of the Corrupt Activities Act read with the PPA

Receiving protected disclosures and protecting whistle-blowers under the Protected Disclosures Act

Bodies in jurisdiction, include 40 national government departments, 103 provincial government departments, 278 municipalities, 533 public entities, several institutions and statutory bodies such as SAA and SABC and 21 universities. Administrative actions of parliament and more than hundreds different courts also fall within the jurisdiction. The jurisdiction also extends to private entities exercising public power and private persons acting in state affairs.

Perhaps we should start by defining bribery and corruption.

WHAT IS BRIBERY? .

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which South Africa is a signatory, defines bribery as follows:

“Bribery is defined by the Convention as the offering, promising or giving of something in order to influence a public official in the execution of his/her official duties. Bribes can take the form of money, other pecuniary advantages, such as a membership in an exclusive club or a promise of a scholarship for a child, or non-pecuniary advantages, such as favourable publicity. Similar definitions concerning bribery of corporate employees are used in private sector codes of conduct. Every bribery transaction involves a supply side (the briber) and a demand side.”

But where do we draw the line? What about a lawyer who brings a clerk of court or registrar flowers? I'm told that is how it started with traffic officers.

WHAT IS CORRUPTION?

Transparency International defines corruption as "***the abuse of entrusted power for private gain.***"

Corruption Watch, a South African corruption-busting nonprofit making organization aligned to labour federation COSATU, defines corruption as "***the abuse of public resources to enrich or give unfair advantage to individuals, their family or their friends.***" This definition restricts

corruption to state affairs and excludes the private sector.

SOUTH AFRICA'S LEGAL FRAMEWORK

South Africa has a comprehensive legal framework to fight corruption and all its forms, including bribery. The main law regulating the issue of corruption in South Africa is the Prevention and Combatting of Corrupt Activities Act of 2004 has a very complex provision on corruption. The key provisions regarding corrupt offences are found in section 3-13. Section 3 provides that

“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 ...”***

The elements of the offence include illegality, dishonesty and bias in decision making influenced by the gratification. The elements include the abuse of a position of authority, breach of trust or a violation of legal duty. It is important to note that South African law does not restrict corruption to offering, solicitation and acceptance of bribes. Other forms of gratification are given equal consideration. This is important given the fact that contemporary forms of corruption seldom take the form of straight bribes.

Other laws that form part of the South African anti-corruption, including bribery framework include the following:

- a. The constitution;
- b. Prevention of organized crime act, 1998, whose provisions include the civil forfeiture of criminal assets used to commit offences or are the proceeds of unlawful activity;
- c. Protected disclosures act, 2000, which seeks to regulate and encourage whistle-blowing while protecting whistle-blowers;
- d. Witness protection act, 2000, is also self-explanatory;
- e. Promotion of access to information act, 2000, which regulates access to information;
- f. Public finance management act, 1999, which promotes efficient and effective use of resources by public entities; and
- g. Financial intelligence centre act, 2001, which seeks to combat money laundering.

ANTI-CORRUPTION AGENCIES AND RELATED BODIES

All the above laws give powers to several state establishments, with a view to stemming corruption in its different forms. Such bodies include the following:

- a) The public protector;
- b) The directorate for priority crime investigation or the hawks (south african police service);
- c) The independent police investigative directorate;

- d) The asset forfeiture unit (national prosecuting authority);
- e) The anti-corruption coordinating committee (department of public service and administration);
- f) The public service commission; and
- g) The auditor-general.

These bodies work with traditional checks and balances such as the courts, National Prosecuting Authority and Parliamentary Structures.

CASE STUDIES

I thought it might help to share a few case studies from my office's investigation of maladministration involving corruption, including bribery.

On the Point of Tenders

On the Point of Tenders is my report following the investigation into allegations of impropriety and corrupt practices relating to the awarding of contracts for goods and services by a provincial Department of Roads and Transport. It was also alleged that the company that got the tender was engaging in corrupt practices with the entities it was overseeing mainly involving entering into contracts with those entities requiring that it be given contract work.

It Can't be right: Self Interest in the Midvaal

The corruption dimension related to an allegation that the municipality failed to manage a conflict of interest of a lawyer whose contract covered virtually all legal aspects of the municipality was involved in a scheme where poor people indebted to the municipality were encouraged by the lawyer to "donate" their immovable property, mostly homes to the municipality. People are said to have lost their properties for debts below half a thousand dollars. I confirmed the allegation in respect of one property.

My finding was that the lawyer abused his position as the municipality's debt collector, auctioneer and conveyance to benefit a company he had shares at the expense of people and the municipality. The property was donated to the municipality through the lawyer to settle a debt for R500. Although the municipality cancelled the debt on account of the donation the municipality never received the property. I found that the property had been bought by a company co-owned by the lawyer/debt collector. I deferred a finding on corruption as the Special Investigation Unit is looking into that aspect on various cases involved. My office has since received more cases some involving even smaller amounts.

RDP Housing

My office is currently conducting a massive investigation into alleged irregularities, including corruption in the procurement and allocation of a social housing scheme referred to as RDP Housing. This involves the provision of free housing to persons earning below a specified threshold, which is currently R 3500.00. In 2012 we held public hearings in all nine provinces. Corruption is one of key irregularities that have been alleged with some substantiated or conceded. One of the cases where corruption was substantiated involved Ms N. After applying for a house and not receiving one after a long wait she continued to dwell in a shack until a municipal whistle-blower advised her that her name had been on a list of houses allocated a while earlier. Armed with the list, she confronted the municipality, initially without success until assisted by a councillor. It emerged that a councillor had corruptly allocated her house to

someone else. Under pressure Ms N was given her house but not without threats. Not long thereafter, her house and daughter's car were set on fire and severely damaged.

In another case a municipal manager approached my office with an allegation that he had been suspended from work to make way for the reinstatement of the contract of a service provider who had done shoddy work. The Municipal Manager had refused to pay the service provider after several standard regulating bodies, including the National Home Builder Regulation Council declared the foundations built by the contractor to be substandard thus needing to be demolished to avoid structurally damaged houses. The service provider refused to demolish the faulty structures and when the Municipal Manager then cancelled the contract with the consent of council . The contractor allegedly told him that he was going to resolve the matter through a political solution. On a Friday preceding a court hearing that was to take place on Monday, the Municipal Manager was suspended and council changed its own decision, which until then was to defend its position in court.

Bribery of Foreign Public Officials

We have had two cases involving the bribery of public officials.

Costly Letters involved the conduct of actors in Iran and our country. It was alleged that money was solicited and offered to pay public officials in South Africa to influence support for a company wishing to do business in Iran. In the end it proved difficult to establish all the elements of corruption as envisaged in the Prevention and Combatting of Corrupt Activities Act.

We are currently investigating an allegation of bribery relating to the award of a multibillion Rand contract for the payment of social grants. The allegation, which is apparently also being investigated by the FBI, is that an American company paid bribes to get the contract.

Corrupt Acts Transcending Bribery or Gratification

Many incidences of corruption that are reported to my office and other agencies transcend bribery or gratification involving two parties. For example, according to the TI definition someone who siphons public monies into a private bank account is guilty of corruption as the act involves using entrusted power for private gain.

WHISTLE-BLOWERS

A discussion on bribery and other forms of corruption would be incomplete without the mention of whistle-blowers. Whistle-blowers constitute an essential part of an effective anticorruption strategy. In South Africa, they are specifically protected by various laws , the key ones being the Protected Disclosures Act and the Witness Protection Act.

My office's role is two- fold. The Public Protector is one of the safe harbours where whistle-blowers may bring protected discloser. The Public Protector is also empowered to investigate allegations of improper conduct involving the infliction of occupational detriments on whistle-blowers. My office's efforts include ensuring that a whistle-blower gets their job back or is reinstated to functions performed before whistle-blowing where dismissed or removed from functions unfairly and in retaliation for whistle-blowing.

I must indicate though that we are battling to tighten the legal protection for whistle-blowers. As you may all know, you are never dismissed for whistle-blowing but for transgressions that are

short of being accused of using too much toilet paper. One Chief Financial office was suspended because she could not locate a box of the applicants for her PA position she had rejected two years earlier. Her boss now needed the box to search for his own potential PA. The reality is that she had refused to inflate a contract amount by an additional R10m at the instruction of that boss.

THE IMPACT OF CORRUPTION

The impact of corruption is felt in many aspects of society beyond the places where the transactions are made.

Fiscal Drain: In the RDP housing sector one of the consequences of corruption and other forms of maladministration is that billions of Rand are lost. Most of the money is lost through a rectification programme seeking to fix shoddily built houses where the contractors that pocketed the money are unable to do so or protected by law from being held accountable. The latter occurs in cases where the contacts are unhelpful such as those that say a defect must be reported in six months. Needless to say that money that should go to basic needs such as medicines, school infrastructure, etc, is taken away by corruption

Overcharging, overbilling and false billing: Financial loss through corruption increasingly includes overcharging overbilling and false billing. When there are questionable relationships, fiscal prudence tends to be compromised. Financial impropriety is further compounded by the need to finance kick backs.

A related malady is that of overbilling and false billing. This differs from overcharging. In overcharging the contract is entered into at a cost higher than market value. In overbilling, service providers invoice for more than what was contracted for or supplied. In false billing invoicing is done for services not rendered.

Anecdotal evidence indicates that the state is losing billions of Rands through overcharging, overbilling and false billing. These are said to contribute significantly to the escalation of costs out of control, which on its own is another emerging serious malady in state tenders.

Service Failure: In addition to poor quality service, the delivery of projects is often interrupted due to incapacity by service providers. Sometimes the interruption is due to litigation.

Negative Impact on Society and Development: It is globally recognized that the poor bear the brunt of corruption. As indicated earlier, corruption takes away vast sums of money that could be used to advance development, including Millenium Development Goals such as eradicating poverty, advancing health and advancing education.

It is also globally accepted that corruption impacts negatively on the investment climate. Capital flight has a negative impact on economic growth and general societal development.

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The rule of law is also impacted negatively by corruption, particularly if such corruption is endemic in law enforcement and policy making.

Violation of Human Rights: Human rights, particularly administrative justice suffers where there

is corruption.

Discouragement of True Entrepreneurship: True entrepreneurs are discouraged by corruption. Many have approached my office claiming that they refused to pay bribes which resulted in them being shunned by corrupt decision-makers, including being removed from projects where contracts had already awarded.

A NOTE ON THE PRIVATE SECTOR

The National Federated Chamber of Commerce (NSAFCC): is one of a few private sector corruption allegations that occasionally reach my office. The allegation was that directors appointed to NSAFCC's investment entity that was meant to advance the NSAFCC community as a whole used their position to line their own pockets at the expense of the organization. The matter was brought to my office on allegation of failure by relevant organs of state to take action. We refer to such as regulatory failure.

The Road Accident Fund is another usual source of complaints, mostly against lawyers alleged to have pocketed the funds of motor vehicle accident victims paid through them. In a recent case where an attorney paid nothing to the victim, we were able to get the Law Society and the Road Accident fund to hold the attorney accountable.

Price collusion: is an issue that other agencies, principally the Competition Commission and the Consumer Commission, have dealt with. Notable cases include the bread scandal, the auction industry scandal and, more recently, allegations regarding the construction of stadia during the 2010 World Cup preparations.

HOW DO WE ROOT OUT BRIBERY AND OTHER FORMS OF CORRUPTION?

There are several do's and don'ts for mounting an effective onslaught against bribery and other forms of corruption:

1. *Maximize transparency and accountability* by those entrusted with power. This includes openness about service standards and about tenders or contracts and incorporates empowerment of citizens to exact accountability and optimal independence of the media.
2. *Individuals to take a stand against bribery* and other forms of corruption. Do not solicit, offer or accept bribes. Action to include reporting bribery and other forms of corruption to all relevant bodies including the anti-corruption hotline.
3. *Management of Conflict of interest:* Understand, declare and manage conflicts of interest. Entrusted power must be exercised for the beneficiary.
4. *Strengthen and respect internal controls.* Strictly enforce controls, particularly in the areas of procurement, financial management and human resources management.
5. *End Impunity:* Ensure that action against who are alleged or found to have acted corruptly is taken without fear or favour. This includes the implementation of findings of bodies such as the Public Protector, Public Service Commission, Hawks, SIU and Auditor General.
6. *Strengthen synergies between oversight agencies* to ensure a seamless onslaught against corruption. This includes strengthening the role of internal structures such as audit committees, financial officers and risk or integrity managers and supporting external oversight bodies.
7. *The rule of law* to be strengthened and upheld with emphasis placed on an independent and effective judiciary backed by universal access to justice.

8. *Strengthen societal values*, including through values education given to children at the commencement of and throughout schooling.
9. *Strengthen international collaboration*, particularly in the area of bribery of foreign public officials and the siphoning of entrusted funds to foreign banks.
10. *Leaders to walk the talk*, including leading by example in ensuring that public power is not used for personal gain but to advance the frontiers of human development and human rights. Peer review to be used effectively by fellow leaders.

The fight against corruption, including bribery, is every body's business. Earlier I alluded to the fact that some do not see what is often referred to as retail corruption as a big issue. I'm referring to seemingly innocuous acts such as bribing traffic officers or inspectors from regulatory bodies. The truth is retail corruption is the root of serious and organized corruption.

We will only succeed in rooting out corruption if we all find and play our role in ensuring that those entrusted with power are accountable, operate with the highest level of integrity while being responsive to people's needs.

Thank you.

Adv Thuli Madonsela

Public Protector of the Republic of South Africa