



**Address by Public Protector Adv. Thuli Madonsela during the
SwissCham Business Dinner on Wednesday, 16 October 2013 at the
Johannesburg Country Club.**

**President of SwissCham Southern Africa, South African Chapter, Mr Thomas Hippele;
SwissCham SAC Board of Directors;
Member companies of SwissCham;
Members of the media;
Distinguished guests;
Ladies and Gentlemen**

Good evening!

This event takes place a day after the 18th anniversary of the Public Protector, it has been a special day for us, and given us an opportunity to reflect on 18 years of this office. It was also yesterday the anniversary of my appointment to the office as Public Protector.

Four years ago I walked for the first time into the office on the 15th of October. It is a great honour to stand here before you. It tells us that you are interested in what is happening in this country, and for that reason I applaud you for your interest in the country's governance issues. This suggests that you are not apathetic to your environment. It also suggests that you subscribe to the idea of the interconnectedness of our fate as humanity.

Today is also special to me; or rather the event is special to me and many other South Africans. We all know that in a few months we will be reaching our 20 years anniversary as a constitutional democracy. The 27th of April 2013 is around the corner and we will be celebrating 20 years of democracy. We are, accordingly, presently in a celebrative and reflective mood as a nation but we are also in the mood to reflect, reflecting on the journey we have undertaken as a country on what we have achieved.

I believe that people from all walks of life in this country have a stake in good governance and its impact on democracy. They accordingly should also be afforded the platform and space to interrogate these issues and make their voices heard in an unmediated fashion. There are many platforms in this regard and tonight is one such occasion.

I would, therefore, like to express my office's gratitude to the domestic chapter of SwissCham Southern Africa, a key player in the facilitation of trade relations between South African business and its counterparts in Switzerland, for inviting me to speak here this evening.

Without any further ado, let me get on with the business of tonight.

Ladies and gentlemen;

The movie *Invictus* talks, among other things, about former President Nelson Mandela's fondness of William Ernest Henley's poem, *Invictus*. The last stanza in the poem says:

***"It matters not how strait the gate,
How charged with punishments the scroll.
I am the master of my fate:
I am the captain of my soul."***

While it talks about a person, I believe that applies to us as a nation. As we reflect on 20 years of democracy, we are proud of our achievements. We have weathered many storms primarily because we believed that we deserve a better nation, partly because of our indomitable spirited optimism and partly because of our nation is built on a strong foundation, a Constitution respected and emulated by many nations.

One of the pillars of our Constitution is the rule of law. Good governance is also a subtext of our foundational values that include public accountability, transparency and integrity. The pillars of public accountability include institutions established under Chapter 9 of the Constitution. One of these is my office, the Public Protector.

Former Chief Justice, Sandile Ngcobo , said the following:

"The importance of the role of the Public Protector or Ombudsman is especially clear in many countries throughout Africa, where there is often a desperate need for basic human needs such as food, drinking water, health care, housing, education and social security. Our countries cannot bear the improper allocation of government resources. Having a Public Protector, or Ombudsman, with a mandate to investigate and publicly report in government administration is essential."

And lastly, former Deputy Minister of Justice Mr Andries Nel said the following:

"One of the decisions that we made as a nation at the dawn of our democracy, during the Multi-Party Negotiating Process in 1993, was to accept a package of thirty-four Constitutional Principles with which the transitional Constitution and all subsequent Constitutions would have to comply. Constitutional principle XXIX provides for the independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector which shall be safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service."

For purposes of providing context to the issues I will raise later in this address, allow me to lay the foundation by an outline of the Public Protector's constitutional mandate.

The Public Protector is established under Chapter 9 of the Constitution by Sections 181 and 182. Section 181, which I will paraphrase in order to single out the Public Protector out of the six institutions covered thereunder to support constitutional democracy, states the following about the Public Protector:

1. ***The Public Protector is independent, and subject only to the Constitution and law, and must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice;***
2. ***Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of the institution;***
3. ***No person or organ of state may interfere with the functioning of the institution;***
4. ***This institution is accountable to the National Assembly, and must report on its activities and the performance of its functions to the Assembly at least once a year.***

Section 182 (1) zooms-in on the Public Protector mandate as follows:

1. ***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.***
2. ***The Public Protector has the additional powers and functions prescribed by national legislation.***
3. ***The Public Protector may not investigate court decisions.***
4. ***The Public Protector must be accessible to all persons and communities***
5. ***Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."***

Six out of a total of 16 pieces of legislation from which the Public Protector draws additional powers and functions as referred to in section 182(2) of the Constitution, are as follows:

- **Maladministration Mandate under the public Protector Act 23 of 1994. It includes abuse or unjustifiable exercise of power, capricious, discourteous conduct, improper or unlawful enrichment or receipt of any advantage; acts and omissions that result in improper prejudice. It also includes power to make findings**
- **Enforcement of the Executive Ethics Code in terms of the Executive Members' Ethics Act 82 of 1998**
- **Shared Enforcement of the Prevention and Combating of Corrupt Activities Act 12 of 2000**
- **Safe Harbour for Whistle-blowers under the Protected Disclosures Act 26 of 2000**
- **Review decisions of the NHRBC in terms of Housing Protection Measures Act 95 of 1998**
- **Resolve access Disputes under the Protection of Access to Information Act 2 of 2000**

The Public Protector is one of our country's multiple avenues set up to help members of the public gain access to justice, in particular when their complaints involves the conduct of the state. Other avenues may include the courts and tribunals.

Of all these avenues, the Public Protector unique in that, unlike courts, for example, people do not need financial muscle and a time-consuming, sophisticated process to vindicate their rights

against the state. And if what my colleague in Namibia says is anything to go by, Section 182(4) of the Constitution, which I referred to earlier, gives people the right to the Public Protector's services.

Any person in the country is eligible to receive our services, which come free of charge.

Contrary to popular belief, over 95 percent of the cases we deal with concern ordinary members of the public. This means that an overwhelming majority of the 37 770 matters that were on our caseload last year were complaints from "Gogo Dalmini", who is our ideal complainant. The cases include but are not limited to RDP housing, SASSA grants, IDs and birth certificates and basic service delivery matters.

We also deal with conduct failure issues, including corruption and abuse of power and state resources, among other things.

We do not have jurisdiction over private entities and individuals. We also do not have the powers to review court decisions, nor to dabble in judicial functions.

a. Challenges facing the Public Protector

i. Resources

Resources are our biggest challenge as I reminded Parliament again yesterday. When I put forward a request for additional funding to the tune of R35.3 million to the parliamentarians, I highlighted this problem of a bloated mandate that is disproportionate to the resources.

My office is funded to the tune of R199 million for this financial year. To be fair to authorities, our requests for an increase in the size of the slice of the national budget pie have over the years not fallen on deaf ears. We have come a long way since the office was allocated R16 million back in 1995. Obviously, the case load was not massive at the time as awareness about the service was still low.

To a simple person, R199 million looks like a substantial amount to enable my office to operate optimally. But in reality, this is small change for an institution that has jurisdiction over more than 1000 organs of state, including government departments at national and provincial levels, municipalities, parastatals and state institutions.

Interestingly, one organ of state (SAPS) recently informed Parliament that it spent R204 million just on civil claims in the past financial year alone. That is over R4 million more than our annual budget!

We have 556 posts in our organisational structure. About 261 of the posts, or 47 percent, are not funded. We have a permanent staff complement on about 284, including investigation personnel, and a 100 trainee investigators, who do a good job but require closer supervision. The hardest-hit component of my office in relation to understaffing is the investigative wing, where the point I made earlier about resources not being commensurate with the mandate is clearly demonstrated.

For example, the average Public Protector investigator carried the burden of up to 200 different cases last year alone. The situation was dire in Gauteng, Free State and Eastern Cape provincial offices, where each investigator juggled between 400 and 500 matters. This means,

even if my staff, which works really hard, treating their jobs as a calling, were to finalise one case a day, including weekends and public holidays, they would still not finalise their caseload in a year.

ii. Interpretation of the mandate

The Ombudsman as an institution is only 204 years. In Africa, it's about 50 years old. In the country it is 18 years old. It is not surprising that we are having an uncomfortable conversation about mandate. As with the judiciary, and the other three arms of government, public accountability entails shared space. Where space is shared, contestation is not unexpected. The challenge is to manage the dialogue in a civil and matured way. I believe that is what I did in Parliament yesterday. Another issue is the status of decisions. The Constitution clearly says "take appropriate remedial action."

iii. Occasional non-cooperation with investigations and non-compliance with remedial action

This is, in some ways, linked to the issue of interpretation of the mandate and jurisdictional issues. Often the few organs of state that give us a run-around when we ask questions tell us from an extremely ill-informed position that we don't have jurisdiction over them. Some have even told us to get lost and let institution of their preference look into the allegations against them.

We strongly believe these challenges can be resolved and that the power of dialogue with the appropriate stakeholders is key in that regard. From our side, we will continue engaging with Parliament, the National Treasury and all organs of state in order to find a common ground on all these issues. However, it is equally important for civil society and the public at large to air their views on these important issues.

Ladies and gentlemen;

As I reflected on my first four years in office yesterday, I noted the achievements that we have registered to date. Between 2010/11 and 2012/13, we handled a caseload of about 84 749, finalising 53 311 cases in the process.

I also noted the amount of work we have done to reveal maladministration trends that formed recurring themes in our investigations and findings. These include indifference, systemic service failure, non-compliance, corruption, overbilling, overcharging, false billing and scope creep in state contracts or tenders.

There has also been a significant increase in the number and complexity of complaints. There have been systemic administrative deficiencies, mostly relating to lapses in compliance. Indifference and systemic failures in services such as the RDP housing programme, administration of estates and municipal services have also been rife. In addition, there have been growing reports of corruption and tender-rigging.

There were, however, improvements in some service areas such as SASSA and ID matters, even though the issues surrounding the problem of duplicate IDs still persisted, posing a poverty threat to victims.

Going forward, we have identified the need to assist local government with policy development and training; the need for tightening the ethics regulatory framework and training; and the need for consistency in the application of disciplinary action. We must also deal with impunity. Without ending this phenomenon, no difference can be made.

Regarding matters that affect my office internally, there has been a spike in the reach of services. There were increased productivity levels amid continuing challenges regarding balancing swiftness.

As Mr Henley says on *Invictus*, it should not matter how strait the gate, how charged with punishments the scroll. We should be the masters of our fate and the captains of our souls. As I have already indicated, we have weathered many storms and will make it through stronger storms as a nation.

As I close, Mr Hippele, ensuring a state that is accountable, operates with the highest level of integrity while being responsive to the needs of its people is a united front. No single institution will win this battle.

This is why all of us, the state, the public, business, civil society and all other sectors of society must all play our part.

Thank you.

Adv. Thuli Madonsela

Public Protector South Africa