



Public Protector Address to the Law Society of South Africa during the Annual General Meeting of the Law Society at the Windmill Casino and Entertainment Centre in Bloemfontein on 29 March 2014.

Co-Chairpersons of the Law Society of South Africa Ms Kathleen Matolo-Dlepu and Mr David Bekker;

President of the Namibia Law Society Mr Alwyn Harmse;

President of the Black Lawyers Association Mr Busani Mabunda;

President of the Cape Law Society Mr Koos Alberts;

President of the Law Society of the Free State Mr Joseph Mhlambi;

President of the Law Society of KwaZulu-Natal Mr Poobie Govindasamy;

President of the Law Society of Northern Provinces Dr Llewelyn Curlewis

President of the National Association of Democratic Lawyers Mr Max Boqwana

Chairman of the Board of Control of the Attorneys Fidelity Fund Mr CP Fourie;

Members of the media;

Distinguished guests;

Ladies and gentleman

I am honoured and humbled by the privilege of addressing a gathering of South Africa's legal minds. My team and I are encouraged by the law society's unwavering interest in this constitutional institution's work and the uncomfortable issue of corruption. We are also energized by the support our work continues to receive from you as an important pillar of our legal system and ultimately, constitutional democracy.

In his address to a gathering of the African Ombudsman and Mediators Association (AOMA),

Chief Justice Sandile Ngcobo said:

"The importance of the role of the Public Protector 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 on government administration, is essential."

It so happens that I recently investigated and publicly reported on government administration. My report also touched on the uncomfortable issue of "improper allocation of public resources." Never before has my office had such a reaction to a report. As you may be aware, some of the reaction has come from members of this learned community. I'm told they are from the KwaZulu-Natal province.

I must indicate, at the outset, that fair criticism delivered with civility is more than welcome. As the late Prime Minister of India, Indira Gandhi once said, "the power to question is the basis of all human progress"

In the process of engaging you on our complementary responsibilities in the fight against corruption, I thought it best to first engage you briefly on the nature of my office, the Public Protector South Africa, its mandate and how we operate. The reaction to my last report indicates a need for dialogue on this institution to ensure a common understanding of its role, jurisdiction, powers, operations, status of decisions and some of the key challenges confronting the office today.

I hope to conclude by linking all this to the fight against corruption, the role of the legal profession in that fight and prospects for joining hands.

We've recently heard statements such as the Public Protector is not a court of law. I've never heard anyone say the Competition Commission is not a court of law. The Commission is not even a constitutional body, but we accept its power to adjudicate matters within its remit. Does it matter that the Public Protector is not a court of law? In sociology we say being defined by what you are not negates your being. It means you are being viewed as a shadow of something that is significant while you are not. That is why being referred to as non- white during apartheid was regarded as offensive.

Origins of the Public Protector or Ombudsman and Place in Democracy

Let us track the origins of the Public Protector. At a global level, we know that the institution was introduced in Sweden a little more than two centuries ago. Why? We are told that the king, who modelled the office against something he had observed in the Middle East, introduced the Public Protector or Ombudsman office in response to people's anger over unbridled excesses in the exercise of public power during his absence. We are also told that it had dawned on him that the traditional checks and balances in a democracy had been inadequate to curb some of the excesses.

The senior public office bearer called an Ombudsman or People's Representative, was given the power to exact accountability in the exercise of state power while serving as a buffer of some sort between disgruntled citizens and government, in support of Parliament. Pretty soon

the entire Scandinavian community adopted this administrative public accountability institution. The English world, led by New Zealand, followed about a hundred years ago. Tanzania led Africa by establishing the continent's first Ombudsman office known as the Permanent Commission of Inquiry nearly 50 years ago.

In South Africa the Public Protector entered the constitutional democracy architecture in 1995 with the basis having been laid in the interim Constitution of 1993. Before then the African National Congress (ANC) had said the following in item 7 of its document "*Ready to Govern: Policy Guidelines on a Democratic South Africa*":

"The ANC proposes that a full-time independent office of the Ombud should be created with wide powers to investigate complaints against members of the public service and other holders of public office and to investigate allegations of corruption, abuse of their powers, rudeness and maladministration. The Ombud shall have the power to provide adequate remedies. He shall be appointed by and answerable to Parliament."

What we ended up with is virtually the same as that which was wished for in the Ready to Govern document. There are two key deviations. The first is that we provided for He or She and currently the incumbent is a "she". The other deviation is that Parliament elects the person but the administrative appointment is executed by the President of the country. Everything else is exactly as per the wish expressed in the "*Ready to Govern*" document.

Constitutional Foundations of the Public Protector

The Public Protector is established by section 181 of the Constitution, alongside five other institutions, to strengthen constitutional democracy.

Section 181 (2-5) of the Constitution states that:

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

The powers of the Public Protector are outlined in section 182, which states that:

"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 the national legislation, require that a report be kept confidential.

Clearly a Public Protector is not a court of law. If it were, it would have been part of Chapter 8 of the Constitution, which is dedicated to courts.

These institutions are meant to be effective by functioning in their own way, not in the shadow of courts but complementing courts and other classical accountability mechanisms.

Chapter 9 as you all know is dedicated to institutions that you as lawyers refer to as *sui generis* entities. Should they be defined in terms of courts? That would be missing the point. Let us take the Independent Electoral Commission (IEC). It is up to the IEC to decide that elections have been free and fair. The IEC also has the power to decide that a party cannot participate in the elections for having failed to comply with whatever rules that have been set. That is the IEC's decision, it does not need to be a court to do so. It has just decided to exclude parties that could not pay the R600000.00, from the list of parties to contest elects.

It also has the power to impose sanctions for electoral violations. When it does so it does so as itself and not as a court of law. If a person is unhappy, they may take such decision to a court of law on review. Why is so difficult to understand the powers of the Public Protector.

A Civil Law Oddity in the Midst of a Common Law Legal System

Perhaps part of the answer lies in its institutional architecture. The Public Protector presents a civil law oddity in the middle of a common law legal system. Having been borrowed from Sweden the Public Protector operates on the basis of inquisitorial justice while our mainstream legal system is principally anchored in adversarial justice.

It is interesting to note that the institutional architecture is confusing lawyers more than it is to ordinary people. I must indicate though that it is not that ordinary people are smarter than lawyers. I suspect the problem lies in the fact that as lawyers were steeped in the tradition of the common law system with its adversarial justice foundations. Indigenous people are the least confused due to familiarity with traditional justice avenues, which are steeped in inquisitorial justice. With lawyers, being steeped in adversarial justice, even commissions of inquiry virtually tend to go the adversarial route.

I was accordingly not surprised when I heard that some lawyers were asking, in relation to my last report, why the Public Protector acts as investigator and judge. That is the way of inquisitorial justice. But the inquisitorial system still ensures that there is a fair opportunity to be understood and to understand.

2.1.2 Statutory Mandate Areas

The Public Protector's mandate is to strengthen constitutional democracy through the pursuit of the following key statutory mandate areas:

1. **Maladministration Investigations and Dispute Resolution**

We have the power to investigate and redress maladministration involving service failure and conduct failure in all state affairs. Service failure involves service delayed, denied or offered in improper quality or quantity. Conduct failure involves abuse of power, abuse of state resources, unethical conduct and corruption.

2. **Executive Ethics Enforcement**

We are the sole agency with the power to enforce the Executive Members Ethics code as mandated by the Executive Members' Ethics Act 82 of 1998.

3. **Corruption Investigations**

Investigate allegations of corruption as mandated by section 64 of the Public Protector Act, read with the Prevention and Combating of Corrupt Activities Act 12 of 2004.

4. **Protected Disclosures**

Receive protected disclosures from whistle blowers as mandated by the Protected Disclosures Act 26 of 2000.

5. **Review of decisions of the National Home Builders Registration Council (NHBC)**

Review decisions of the National Home Builders Registration Council as mandated by the Housing Protection Measures Act 95 of 1998.

The Promotion of Equality Act, which recognises the Public Protector as an Alternative Forum as envisaged in section 34 of the Constitution, to resolve administrative disputes that have an unfair discrimination impact, is one of the laws that acknowledge the transversal powers of the Public Protector.

Quietly whispering truth to power like the Makhadzi

Turning back to how we discharge our responsibilities, we can agree that the Public Protector helps the people exact accountability on those they've entrusted with public power and control over public resources. For the majority of the thousands of cases, being 40 000 this year and over 33 000 last year, we pursue our mandate through a quiet conversation with relevant organs of state. You can refer to it as ""***whispering truth to power***".

This is particularly so in cases of service failure, whether delayed, denied or offered in poor quality. But even in conduct failure, we start with whispering truth to power. If the message is accepted by the time we report, we also report on the concessions and the transformation that has quietly taken place as well.

In this regard you are advised to check for example, my report titled "*Glimmer of Hope*", where we held the hand of the Dipaleseng Municipality to clean its house before reporting after coming

in following violent public protest. In "*Pipes to Nowhere*" we helped the Nala Municipality put its affairs back in order following protest action and systemic failure involving sewage spillage and toilets with sewage piping ending in front of the toilets.

In "*They Called It Justice*" we whispered to and settled with the Department of Justice and Constitutional Development on the basis of shared values and resolved a whistle-blowers injustice experience before issuing the report.

In "*The Ethics of Staying in Comfort*", we whispered to the Minister who had already whispered to himself and started dealing with excesses in the use of executive privileges relating to accommodation. The first investigation against the President went along the same lines.

We call the whispering truth to power, the Makhadzi Way. We draw lessons from an ancient local Ombudsman like institution, called the *Makhadzi*. The Venda Makhadzi, is an aunt whose duty is to be the eyes and ears of the King or Chief while acting as the voice of the people. She serves as a buffer between the people and their leader. It is said that a wise Chief or King listens to Makhadzi's counsel and that ignoring Makhadzi is done at that leader's peril. We have since adopted the Makhadzi as the symbol of the Public Protector.

This office continues to evolve as our democracy matures. In 1995, with a modest budget of just over R1.6m, the office under the capable leadership of Adv. Selby Baqwa, dealt with just 1989 matters. 18 years later, unaudited figures show that we had a caseload of more than 40 000 matters in the financial year ending early next week. In those quiet conversations the lives of persons such as baba Dlamini (***not his real name***) and Sisi Connie Dlamini (***not her real name***) are changed. A few weeks back we helped to get Baba Dlamini, a small business person, paid money owed by a municipality since 1997. By then his business had eventually folded and his assets taken by creditors. Connie Dlamini is a Grade R teacher taken back to work after having her contract terminated unjustly.

Tackling corruption

Although the bulk of our 40 000 cases involve assisting Gogo Dlamini exact accountability for administrative wrongs such as Identity Documents, SASSA grants, billing problems, RDP houses, workers compensation and government pensions pay outs, our work increasingly involves administrative enforcement of the Prevention and Combatting of Corrupt activities Act.

When playing a part in combatting corruption we go as far as the police could go and then hand over to the prosecution. We have subpoena powers, search and seizure powers

The power to investigate is derived from the Public Protector Act supported by the Protected Disclosures Act.

Cases start from small ones to tender fraud involving huge amounts of money. An example of a small scale matter is one where a Municipal Manager and councillors stole change from an overseas trip. Nala is an example of tender fraud, which includes paying a company for work not done, which included toilets with a piping system that goes nowhere. On abuse of state funds, we recently issued a report where a provincial department spent R15m on an internal disciplinary process for three persons.

Challenges and possible assistance from the Law Society

The key challenges include the following:

- Being misunderstood and more recently politicisation of cases.

For example: **Being told the Public Protector is not a court of law** and therefore there is no need for consequences based on her reports. I have heard that there is a group of lawyers that says I should not have corrected any maladministration or improper conduct I found and handed over to a (constitutional) section 34 structure. But we are a section 34 structure. Check the **Promotion of Equality and Prevention of Unfair Discrimination Act** as an example.

- **Jurisdictional challenges.** For example, the IEC Chairperson and ESKOM contending that this office has no jurisdiction despite clear constitutional provisions on state affairs and organs of state. ESKOM is an interesting case given the fact that in the Mail and Guardian versus The Public Protector case, not only was Petro SA regarded by the Supreme Court of Appeal as being in jurisdiction, my office was red carded for not following the money right into private pockets.
- Despite the Mail and Guardian case, some private citizens involved in state affairs, argue they should not be touched as they are not state employees.
- **Initiating parallel / competing investigations**, including asking the Auditor-General to investigate after it has been announced that my office is involved in an investigation
- **Criticism of media use** yet moral suasion is key to our strengthening of democracy.
- **Attempts to direct operations.** For example insisting that reports must be given to Parliament ignoring the provisions of section 8 of the **Public Protector Act, which states that:**

The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendations in respect of a matter investigated by him or her.

(a) The Public Protector shall report in writing on the activities of his or her office to the National Assembly at least once every year: Provided that any report shall also be tabled in the National Council of Provinces.

(b) The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if-

(i) He or she deems it necessary;

(ii) He or she deems it in the public interest;

(iii) It requires the urgent attention of, or an intervention by, the National Assembly;

(iv) He or she is requested to do so by the Speaker of the National Assembly; or

(v) He or she is requested to do so by the Chairperson of the National of Provinces.

- **Personal insults despite section 9**, which provides for contempt of the Public Protector. But Adv Baqwa was called a “twit” by a Minister he found against and I’m certain Adv Mushwana was called something too. Section 9 of the Public Protector act

states that:

(1) No person shall-

a. insult the Public Protector or the Deputy Public Protector; [Para. (a) substituted by s9 of Act of 2003.]

b. in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court.

(2) Nothing contained in this Act shall prohibit the discussion in Parliament of a matter being investigated or which has been investigated in terms of this Act by the Public Protector.

- **Attempts to interfere with independence** and being shocked at operations and impact yet during the certification judgement it was known that the office would have far reaching powers. Arguing that the Protection then was inadequate, the CC said the following:

“The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The Office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing removal of the Public Protector from office do not meet the standard demanded by Constitutional Principle XXIX.”

- **Increasing delays in sourcing information**
- **Discrepancy between the Public Protector Act and the Constitution regarding the taking of appropriate remedial action** as envisaged in section 182(1)(c).
- **Capacity.** We do not have enough investigators. We are also constantly having to reskill the team in the area of conduct failure, particularly forensic investigations

The Role of lawyers and Prospects for Partnership

- Lawyers are already playing an important role in advising the state and in the process we gain insight on a wide range of legal instruments and questions to be considered.
- Prospects for the future include sharing training experiences with my team, participating in selected investigations, pro bono work for the Gogo Dlamini when a matter goes on review and referrals to law society of matters involving alleged improper conduct by lawyers. Lawyers can also report wrongdoing if not in breach of client attorney privilege.

Thank you again for your continued interest in my office’s work and the issue of corruption. We all have a duty to ensure a state that is **accountable**, operates with **integrity** and is **responsive** to the needs of its entire people.

In conclusion, I am reminded of the words of Chief Justice Mogoeng Mogoeng, addressing a summit of African Ombudsmen and Mediators in Kempton Park last month. He said the following:

“The publication of the Public Protector’s reports and the huge media coverage they enjoy, have probably discouraged multitudes from allowing greed to drive them down the wasteful expenditure or corruption lane.”

Former President Nelson Mandela on the other hand, once said:

“Let it never be said by future generations that indifference, cynicism or selfishness made us fail to live up to the ideals of humanism which the Nobel Prize encapsulates”

Thank you.

Adv. Thuli Madonsela

Public Protector of South Africa