



**Speaking notes for Public Protector Adv Thuli Madonsela, during the
Helen Suzman Foundation Roundtable Discussion of Corruption in
Johannesburg on Thursday, September 06, 2012**

***Chairperson and Director at Helen Suzman Foundation, Francis Antonie;
Deputy Director General of Integrity and Corruption at the Public Service Commission,
Dovhani Mamphiswana;
Forensic Director at ENS, Steven Powell;
Mr Mzilikazi Wa Afrika of the Sunday Times;
Distinguished guests;
Members of the media;
Ladies and gentlemen;***

I am honoured to participate in this important round table. I thank the Helen Suzman Foundation for the opportunity. I also commend the HSF for the bringing us all together to discuss a matter that has become one of the Achilles heels of our democracy.

My brief address focuses on: ***Corruption in South Africa: Past and Present Challenges.*** When I received the invitation I hesitated for a moment wondering whether it made sense to participate in another anticorruption conference having participated in more that half a dozen this year and witnessed a lot more. I was also concerned that I might not be able to share any more meaningful insights on this matter considering that I have given several talks on it already.

In the end I though I could briefly touch on the following questions?

1. What is corruption?
2. Why should we be concerned about corruption?
3. Who should be concerned about corruption?
4. What challenges has our society faced over the years regarding corruption?
5. What challenges does our nation face today regarding corruption?
6. What is the Role of the Public Protector and what challenges does this office face in playing its part regarding corruption?
7. How do we join hands to present a united front against corruption?

As the topic suggests, we acknowledge that corruption is not something new to our country or a post apartheid phenomenon. In fact corruption is a global phenomenon that democracies have been dealing with from time immemorial.

It was in England many years ago that Lord Aton coined the famous adage:
“All power tends to corrupt and absolute power tends to corrupt absolutely”.

The very notion of separation of powers, with emphasis on diffused state power sought in par to minimize maladies such as corruption. Closer to home the office has been recently asked to look into the CIEX report. The report that focuses on allegations of looting and corruption during the dying days of apartheid.

What is corruption?

Transparency International (TI), a global NGO dedicated to fighting corruption states the following about corruption.

“Corruption is the abuse of entrusted power for private gain. It hurts everyone who depends on the integrity of people in a position of authority”.

If we apply this formula, the test is simple. We will red card you for corrupt action if you are placed in a position of entrusted power and have used your entrusted power for private gain. But the limitations of this definition are many. The key limitation is the fact that the focus is on those who exercise entrusted power. We can think of politicians, civil servants, company boards, executives and employees.

The definition does not seem to take into account the accountability of other parties to corruption. Bribery, the most common form of corruption in all societies, always involves two or more parties. If we limit ourselves to those who exercise entrusted power, there is no accountability for those that offer or pay bribes.

The emphasis on the position of authority, although legitimate, tends to direct us to focus on corruption in the higher echelons of organizations and in many instances, at the political levels of the public sector. The reality is that corruption on a day to day basis happens in frontline service delivery. It also takes place regularly in technical units such as finance, human resources, procurement, regulation, including licensing and enforcement. Stories from the integrity front in the Public Protector office, for example, cover sectors such as social housing, particularly RDP housing services, social grants, Identity Documents (IDs) and related permits. They also include licenses, traffic regulation and law enforcement.

Our own specific legal instrument on corruption is the Prevention and Combating of Corrupt Activities Act 12 of 2004. The PCCAA offers a much more complex formula on corruption. According to the PCCAA, the general offence of corruption involves 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 biases; 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”

The PCCAA anticipates corruption in and provides of specific offences in respect of activities relating to:

1. Foreign public officials;
2. Agents;
3. Legislative authorities;
4. Judicial officers;
5. The prosecuting authority
6. Employment relationships
7. Witnesses and evidential material during certain proceedings
8. Contracts
9. Procuring and withdrawal of tenders
10. Actions
11. Sporting events
12. Gambling games or games of chance
13. Private interest in contract. Agreement or investment of public body
14. Unacceptable conduct relating to witnesses
15. Intentional interference with or obstruction of investigation of an offence
16. Accessory to ort after an offence
17. Attempt, conspiracy and inducing another person to commit an offence

The PCCAA definition also places emphasis on to compromised integrity of decision making or actions of those entrusted with power or authority in the pursuit of gratification for self or another. The difference here is that both the one who acts and the one who causes another to act dishonestly or irregularly are accountable. Application in regard to day to day activities, means both the person that bribes the traffic officer and the traffic officer are culpable. The same applies to a company that gets a tender so that the decision-maker or authority becomes a shareholder within a specified time or the company that gets a tender on the basis that the decision-maker’s trust fund or wife or child or sibling or friend.

Why should we be concerned about corruption?

We have already head from TI that corruption “...hurts everyone who depends on the integrity of people in a position of authority”

Not so long ago I told the story of a young woman from the Eastern Cape who approached my office for a child grant that had been denied by the SASSA. The answer given by SASSA to her was that she already had two children in the system. Her insistence that she only had one child and that her child was one of those in the system, had fallen on deaf ears.

Our investigation discovered that she had been a victim of organized corruption by a syndicate

cutting across three organs of state and a supermarket in civil society. The Department of Home Affairs gave IDs based on identity theft resulting in a phenomenon referred to as a duplicate ID. The local clinic under the Department of Health, gave health cards for fictitious children. SASSA captured the data and adjudicated the applications favourably and a local supermarket was used as a pay point.

In this case a right protected under section 27 of the Constitution could not be enjoyed due to corruption. It is globally said that corruption undermines human rights and has a particularly marked impact on socio-economic rights and the justice system. While on the issue of socio-economic rights, the RDP housing programme provides a good example of corruption undermining expeditious realization of socio-economic rights. Although we have not yet investigated allegations made during our recent public hearings, information gathered already points to corruption being a huge factor slamming breaks on the progressive realization of the right to adequate housing as envisaged in section 26 of the Constitution. Let me tell you the story of Ms N. Ms N approached me at the airport sometime last year alleging that she was homeless due to corruption. She alleged that after an RDP house was allocated to her, no one informed her until a municipal office whistle-blower advised her that her name was on the list of houses released a while ago. The whistle-blower provided her with evidence. Her attempts to get the house from the municipality were unsuccessful until a councilor she turned to for assistance threatened to sue. Incidentally, the allegation was that another councilor had corruptly given her house away. The house was subsequently restored to her amid threats and constant harassment leading to the burning down of her house and daughter's car. As we go around with our systemic investigation on RDP housing, we have discovered that there are many persons in Mrs N's position.

Who should be concerned about corruption?

Everybody should be concerned about corruption. Not only does it rob, primarily the poor of services they deserve, corruption is increasingly associated with serious risks such as fatalities. This is the case in regard to buildings, stadia, the very RDP housing programme and regulatory failures in areas such as approval of townships beyond RDP human settlements and other areas of life. My office is currently dealing with alleged regulatory failure resulting in illegal conversion of panel vans into taxis and keeping these on the road long after the problem was discovered and expensively discussed. Corruption has been fingered as a key factor. It is said that the cost of redoing the shoddy work of contractors under the RDP housing programme, is currently estimated at about R4.5 Billion. This excludes structurally defective sewerage systems such as found in Braamfischerville, Nala and virtually all the provinces.

We have not calculated the cost to the poor such as the Braamfischerville man who only escaped with the clothes on his back when his house sank and a young man we met in Mpumalanga whose furniture, bought by relatives, was ruined when the shoddily built roof fell off in the middle of a heavy rain. In other countries they have associated the extent of devastation left by natural disasters such as tsunamis to structurally defective buildings approved through corruption. The possibility that this may be the case in many disaster hit areas in our country is not remote. Indeed as we've been going around the country people have said over and over again that it is not the natural disasters that caused their loss but shoddily built foundations, walls and roofing.

What challenges has our society faced over the years regarding corruption?

Corruption has evolved over the years. While previously, corruption mostly took the form of

bribery; today gratification is far more complex. The vehicles for executing the gratification are also far more complex. Today we talk of javelin arrangements and warehousing. An example of a javelin arrangement is a case where a huge tender is given to a company that a public authority joins soon thereafter. Another common javelin involves privatization of public entities with the effect of authorities involved ending up having shares in the private entity or having someone hold the shares for them. The holding of the shares by someone has come to be referred to as warehousing. Even where gratification is in the form of cash, cheques and EFT transactions are not used. Bags of cash are used despite FICA. In auctions again cash is not usually involved. It is said that a batter system is preferred. Complaints currently being handled by my office for example, include allegations that a sheriff in one area would buy in another and that scams involve multiple actors, including bank agents and attorneys.

What challenges does our nation face today regarding corruption?

Some of the challenges are outlined above already. One of these challenges is the complexity of modern corruption. Another is the complexity of the law. I recently had a three hour discussion with two senior lawyers on the elements of corruption as envisaged in the PCCAA. It is very difficult to prove gratification. It is also not easy to prove the connections. At the most we can end up with conflict of interest as we did in my *It Can't be Right* report or abuse of power and state resources among other PFMA violations, in the Against the Rules reports.

What is the Role of the Public Protector and what challenges does this office face in playing its part regarding corruption?

The Public Protector's constitutional mandate to investigate conduct in state affairs that is alleged or suspected to be improper or prejudicial, report on that conduct and take appropriate remedial action, includes an anticorruption mandate. So does the Public Protector's mandate under the Public Protector Act, which includes investigating and redressing maladministration, abuse of power and abuse of state resources. The Public Protector's mandate under the Protected Disclosures Act, also has key implications for combating corruption. The same applies to the information regulation mandate under the Promotion of Access to Information Act. The Public Protector's review Mandate under the Housing Protection Measures Act, also has implications for combating corruption.

The Constitutional injunction that the Public Protector be accessible to all persons and communities allows a broader section in society to use the Public Protector as the voice on issues of maladministration, including corruption. An important part of the Public Protector's mandate is the constitutional power as entrenched in section 182(1)(c), to take appropriate remedial action. While this still leaves the Public Protector's powers at the level of non judicial enforcement, the provision is unarguably stronger than the power to make recommendations as is the case with other constitutional institutions.

But there are challenges. The first challenge relates to inadequate resources. The second key challenge relates to lack of understanding of the mandate in some quarters. Another key challenge relates to lack of synergies in the work of integrity institutions such as the Public Protector and the Auditor General. There also isn't enough collaboration between the Public Sector and civil society actors such as Corruption Watch. I must indicate that the question of strengthening of synergies is being addressed as part of a national good governance movement kick-started 3 years ago under the Public Protector. In October this year, we will be having the third Annual Good Governance Week and Conference focusing of service excellence through ethical governance. Consensus on ethical governance is another challenge. We need to build

national consensus on dos and don'ts with regard to integrity and the sanctions thereafter. For example, loss of face is a powerful deterrent in many societies, including countries such as Singapore. The media plays a key role in this regard. The media also has a key role in the moral suasion necessary for swift compliance with Public Protector processes and findings.

How do we join hands to present a united front against corruption?

Building a united front against corruption is paramount. This includes strengthening synergies among bodies and actors involved in promoting good governance and combating corruption. A common understanding of corruption is important. It is also important that we promote shared values and unwavering commitment regarding ensuring that wrongdoers are accountable regardless of who they are.

Adv. Thuli Madonsela

Public Protector of the Republic of South Africa