



Address by Public Protector Adv. Thuli Madonsela at the Durban Chamber of Commerce and Industry Power Connection event in Durban on Wednesday, November 07, 2012

“The Role of Business in Promoting Ethical Governance”

**Programme Director;
Executive Mayor of the City of EThekweni, Cllr James Nxumalo;
President of the Durban Chamber of Commerce and Industry, Mr Thato Tsautse;
Chief Executive Officer of the Chamber, Mr AJ Layman;
The entire leadership of the chamber;
Members of the chamber;
Distinguished guests;
Members of the media;
Ladies and gentlemen**

It is an honour and privilege to address you this afternoon and I am grateful to the Durban Chamber of Commerce for the opportunity. The business community is an important partner in the pursuit of good governance in the public sector and concomitantly, the work of my office, the Public Protector.

For me and my team, interactions of this nature help fulfill my office’s constitutional imperative of being accessible to all persons and communities. They also present a platform for engaging all partners with a stake in supporting and strengthening constitutional democracy through promoting good governance, on a range of issues of national importance.

My engagements with the business community particularly help me to engage this sector on worrying trends that are emerging in business dealings between the state and the private sector that I believe have adverse consequences for constitutional democracy, economic advancement and public confidence.

Centering on *“The Role of Business in Promoting Ethical Governance”*, my address will seek to highlight some of the worrying trends that I believe you have a role in arresting in the interest of our shared destiny as a nation. Incidentally, the focus of this year’s good governance week and conference, which took place in October 2012, was also on ethical leadership and governance.

Perhaps we should start by posing the question: What is ethical governance and why is it important for good governance, particularly where state affairs are concerned? For me, ethical

governance transcends the requirement that those exercising entrusted power be honest with the resources they control on the basis of trust. I strongly believe that at the core of ethical governance is treating people fairly and with integrity. Treating people well is, for me, one of the things that earn ethical governance an important position as the nucleus of good governance or clean administration.

For ethical governance to thrive we need ethical leadership. Ethical leadership is an inside out job. As a leader at whatever level you know at the core of your being what is right and what is wrong. You do not need the Public Protector, Auditor General, Special Investigating Unit or the Public Service Commission to tell you you've crossed the line. When you cross the line, which is possible as human beings do make mistakes, you correct those mistakes on your own and if an oversight body red cards you, you accept accountability without being grumpy or vilifying the oversight body concerned.

You will agree with me that our country has several challenges with regard to ethical leadership and governance. In line with the scope of my office, my main concern is ethical governance in the public sector.

Let us briefly look at challenges bedeviling the RDP housing programme, an important initiative of the post-apartheid state which seeks to not only comply with the constitutional promise on the right to adequate housing as entrenched under section 26 of the Constitution but also to redress economic disparities relating ownership of immovable property. *Our Voices and Views Report* suggests that the number and quality of houses delivered under the programme have been undermined by various maladies such as slow or never ending construction projects, shoddily built houses and payment for work not done or false billing. Allegations are that state contracts have become a get-rich-quick scheme, where "tenderpreneurs" feed on overcharging and short-changing the state by delivering inferior quality than contracted for so as to maximize profits and downright invoicing and collecting payment for services and/or goods that have not been delivered.

Clearly, to the extent that these allegations may be true, we are dealing with a case of ethical challenges for the state emanating from the interface between government and unethical elements within the business community.

You will also agree with me that such acts erode public trust. This cannot be good for constitutional democracy, particularly the rule of law. It also cannot be good for business particularly if we focus on an affirming investment climate and sustainable economic growth.

More importantly, unethical leadership and governance are anathema to the provisions of our globally acclaimed Constitution. When the Constitution promises the people of South Africa an improved quality of life and freed potential of every person, it counts on ethical leadership of those exercising entrusted power regardless of whether they are in the public or private sectors, to make things happen. Our Constitution has gone further to define the character of the state, the fundamental rights of the people, responsibilities of those entrusted with public power and a network of public accountability mechanisms, which include the Public Protector.

What is the Public Protector's role in ensuring ethical governance as a core element of good governance?

The Constitution mandates the Public Protector to support and strengthen constitutional democracy through investigating 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. This mandate comes from section 182 of the Constitution, read with section 181.

The Constitution further states that additional powers are given to the Public Protector by several pieces of legislation. These include the Public Protector Act (PPA), the Executive Members Ethics Act (EMEA), the Prevention and Combating of Corrupt Activities Act (PCCAA), the Protected Disclosures Act (PDA), the Promotion of Access to Information Act (PAIA) and Housing Protection Measures Act (HPMA).

The PPA gives the Public Protector jurisdiction over maladministration in state affairs, abuse of power and abuse of state resources while the EMEA gives the Public Protector the powers to look into the conduct of the executive, including the cabinet members at both national and provincial level. The PCCAA gives me an anti-corruption mandate while the PDA lists me and the Auditor General as agencies where whistleblowers can lift the lid on wrongdoing without suffering occupational detriment. Members of the public can also approach my office to access information within the state under PAIA and, in terms of the HPMA, members of the public can request us to review the decisions of the Home Builders' Registration Council in the event they are not happy with such decisions.

When the Constitutional Court was called upon to certify during the Certification Judgment, that provisions on the Public Protector were faithful to the Constitutional Principles, it said the following:

“The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsive government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government.”

During the course of implementing this vast mandate, my team and I have come across various worrying trends relating to instances where the state does business with the private sector. I must hasten to say that the majority of business people don't only hanker for a level playing field marked by clean state contracting practices, they work hard to earn what they have and to add value to people's lives. I do however believe that the disturbing trends are worth your attention and possible action as this not only impairs the good name of South African business, it is eroding public confidence. When public confidence is eroded, taking to the streets as we have seen in the Arab spring and public protests locally, becomes attractive to sections of the population, particularly the socio-economically marginalized and downtrodden.

Let us examine a few case studies from our integrity front

On the Point of Tenders

This report revealed shocking details of the state failing to perform the necessary due diligence when outsourcing services to the tune of millions in taxpayers' money. It opened our eyes to the existence of companies that only exist on paper purely as vehicles for state tenders. A company that had existed as a shelf company for about 5 months and bought as a tender sourcing vehicle a month before the tender was advertised, got the tender. My concern was that there was no due diligence thus the state took a huge risk. There was also overcharging and double billing. You will also recall that on top of this the company concerned entered into contracts with contractors it was engaged to supervise as a Project Management Unit (PMU) and on the basis of those contracts, was the one doing the work and paid to do the work by the contractors that

the organ of state engaged to do the work. The double billing happened in this context where both On-point and the contractors billed and were paid for the same designs.

Against the Rules and Against the Rules Too

It is a well-known fact that the state pays more for basic goods such as stationery, computers and furniture in this country. The general rule is that the state is supposed to pay less through leveraging its bulk buying power. As people in business, I'm confident that you leverage your bulk buying power to get discounted goods. My office has since discovered that state leases for offices and domestic accommodation and construction projects are also subject to the "the state pays more syndrome". We first confirmed this during the SAPS office lease investigation that led to the Against the Rules Reports. We discovered the same in the leasing of office accommodation for the Department of Health in the North West province and are currently dealing with various similar patterns.

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

This case was more about robbing poor people than simple administrative irregularities. As we speak many families lost properties worth thousands of Rand over miniscule municipal debts as small as R2000. The case we investigated conclusively, involved a family that owned the municipality about R5000 for rates and taxes. The municipality's lawyer, who for nearly 30 years had been in charge of virtually all legal services, policy development, contract drafting, debt collection, conveyancing and serving as an auctioneer for the municipality, ended up co-owning the property donated to the municipality through him as the debt collector to settle the miniscule debts. The Henley on Clip property donated to the municipality to settle a R5000 debt was never transferred to the municipality even though the debt was written off on account of the donation. Instead the property was bought by a company co-owned by the debt collector/auctioneer and immediately sold at the open market for about R120 000.

RDP systemic investigation

Our preliminary observations following public hearings we have conducted on RDP housing delivery challenges point to corruption as a key factor behind service failure. Although we have not yet investigated many of the allegations, some of the authorities at local government, provincial government and local government have already conceded that some of the allegations of corruption in the procurement, and allocation of RDP houses are true. The allegations include approval of projects without or contrary to geo-technical reports, appointment of contractors with no track record or capacity and through non-competitive processes, price inflation, false billing and payment for shoddy work. In this province we have the fire wall project, among others.

Abuse of Executive Privileges

Our investigations have also dealt with ethical violations relating to the abusive of executive privileges which are primarily regulated under the Executive Code of Ethics and the Ministerial handbook. The general rule in the public sector is that if there is no instrument that entitles you to a privilege then you do not have that privilege. It is amazing though the difference in ethical standards between those who are first to say "***sorry I crossed the line by mistake***" and those that say "***it's my right to be pampered***". I've compared the attitude of the latter to the "***we are eating for you***" attitude in George Orwell's animal farm. You will recall that when the pigs that were entrusted with the affairs and collective resources of the animals after the humans had

been deposed was that they need to be pampered in order to serve the people well. It didn't matter to them that the animals were working harder than before and yet poorer and hungrier.

Failure to Implement Investigation Findings

One of the worrying trends relates to the failure to implement findings of expensively sourced forensic reports. The same is also often extended to the Auditor General, Special Investigating Unit and Public Protector Reports. That too erodes public confidence while missing an opportunity to exact accountability and restore controls. The key factor eroding public confidence is a sense of impunity, particularly for so called "untouchables".

It is encouraging to note though that the majority of people in government do the right thing. They work hard to make the constitutional promise possible. The same applies to the business sector. Most business people do not involve themselves in shady dealings when engaging in trade with the state. In May this year, I addressed the 44th International Convention and Property Exhibition of the South African Property Owners Association (SAPOA) in this city. The gathering brought under one roof over a thousand delegates from various sections of the commercial property sector and overseas guests from countries such as the United Kingdom, Ghana and Australia. In my interactions with the local ones, there was a genuine pledge to be pro good governance.

Business lobby groups such as Business Unity South Africa are some of the bodies that have also committed themselves to anti-corruption. So are the many individual members of the business community that I have engaged with on a one-on-one basis.

What then should be the role of business in promoting ethical governance?

Firstly, it is important to mention that business is strategically positioned to influence conduct in state affairs, particularly where there is trade between public and the private sectors. When there are traces of unethical governance in that relationship, an impression is created that there was collusion between representatives of the two sectors because maladies that define bad governance including corruption are often bilateral affairs.

It then becomes important for business to play fair when bidding for government contracts. It is not only important to get jobs on merit and not on the basis of questionable relationships, it also the right way of doing things.

When you have landed the contract, it is important that you put the resources to good use so that at the end you deliver a quality service that you will also be proud to be associated with. It is important that you deliver according to specifications and on schedule so that the quality of life of citizens is indeed improved.

When it is time to charge the state for work done, honesty must dictate terms. Bill for work done and do not inflate charges because the state does not have a lot of money to satisfy every poor person's needs. But if we save the state some money, government will be in a position to stretch the resources left to improve someone's life.

One other way the business community can contribute to promoting ethical governance is by reporting any suspected wrongdoing. Some of you may be aware of fellow business men and women who pay kickbacks in order to score more lucrative tenders. If you are one of those, why are you keeping quiet? Report the culprits and save the country the much needed resources to

uplift the poor.

Lastly, business should strengthen its efforts that are aimed at uprooting corruption everywhere to promote ethical governance. In this regard business can also support initiatives such as Corruption Watch and Lead SA to help these perform to their full potential because they lack resources. Business should fund such projects. The little you throw into the kitty will go a long way in helping to secure a better future for our country.

At 18, our country is at cross roads. The future depends on the actions we take today in pursuit of our collective destiny. Don't sit on the side or moan the darkness. The key to combatting corruption does not lie in lone crusades by integrity institutions such as the Public Protector; it lies in a national quest for ethical governance by all of us.

It is important that all of us find and play our role in ensuring a state that is accountable and operates with the highest order of integrity while being responsive to the needs of its citizens and residents.

Thank you.

Adv. Thuli Madonsela

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