



**Address by Public Protector Adv Thuli Madonsela at the Fourth National Anti-corruption Summit convened by the National Anti-corruption Forum on Friday, December 9, 2011.**

**Programme Director;  
Chairperson of the National Anti Corruption Forum: Ms Ntombifuthi Mtoba and Other Leaders of the NACF;  
Chairperson of the Public Service Commission;  
Regional Representative of the United Nations Organisations of Drugs and Crime: Mr Mandiaye Niang; The Acting Vice President of Transparency International in Zambia: Mr Lee Habasanda  
Other distinguished leaders and guests;  
Representatives of the media;  
Ladies and gentlemen**

I am sincerely grateful for the privilege to address this august gathering, the fourth National Anti-Corruption Summit.

The National Anti-Corruption Forum (NACF) and its leadership, which includes the chairperson, Ms Futhi Mtoba deserves our applause and gratitude as a nation for maintaining focussed attention on corruption.

For my part, I am deeply grateful to the NACF, specifically the organisers of the National Summit, for the opportunity to engage with today's audience. I understand that we have among us the leadership of virtually all sectors of society, including senior government officials, senior business executives, NGOs, academia and the media.

Opportunities such as this one are valuable to my team as they bring my office one step closer to the constitutional imperative of being accessible to all persons and communities. Such opportunities further contribute meaningfully to a good governance initiative we introduced in October last year. The initiative involves a national dialogue on good governance. Annually, we coordinate a national good governance week, which includes a good governance conference. The aim is to achieve a common understanding of the notion of good governance in the public sector and to strengthen synergies as we play our respective roles in ensuring good governance in the management of all state affairs.

Anti-corruption efforts constitute one of the key elements of the good governance initiative. We've also identified anticorruption efforts as one of the areas where we need to strengthen

synergies to avoid duplication of efforts and also to ensure that nothing falls through the cracks.

I believe that since yesterday the parties gathered at this summit have spared no effort in exploring ways and means to sharpen action against corruption, including the strengthening of synergies.

I've been asked to talk briefly about weaknesses in organs of state that enable corruption and on how we may improve the effectiveness of our efforts against corruption in the public sector.

Drawing from our experiences as the Public Protector SA team, we've come to the conclusion that ending maladministration is one of the essential keys to effectively deal with corruption. Our experience in helping organs of state in the area of maladministration, including abuse of state power and resources, shows that corruption thrives where there is systemic maladministration and abuse of power.

I thought it would be ideal that I share with you our observations on the key governance gaps in the public sector that enable corruption while undermining government's delivery on its anti-corruption undertakings.

Will firstly list the weaknesses identified by my office and then briefly discuss each of them. The following ten stand out:

- Systems and controls
- Capacity
- Accountability and impunity
- Leadership
- Service standards
- Openness and transparency, particularly with respect to reasons for decisions
- Discretionary power
- Seamless enforcement efforts
- Rule of law, incorporating access to justice
- Values and empowered citizens

### ***Systems and controls***

The country has a sound legal and policy framework supported by strong administrative instruments such as treasury regulations. However, many organs of state do not have strong systems and controls to support effective implementation. The situation is particularly acute at local government level, particularly the smaller municipalities and in some of the provincial departments.

The provision of social (RDP) housing has been particularly hard hit by such maladies, particularly acute in procurement management with systemic maladies including overpriced goods and services and poor quality control often leading to the double procurement of goods and services that have been paid for but delivered in poor quality. Some of the glaring examples include settlements built and finalised without sewerage piping forcing people to resort to *pit latrines* when there are bathrooms in the new homes.

Where systems and controls are weak maladministration thrives and this provides an enabling environment for corruption.

In the same vein, organisations with strong systems and controls tend not to be vulnerable to corruption and related serious maladies. Alternatively, when such maladies are detected, there are dealt with swiftly and firmly.

### ***Capacity***

In most instances, the weak systems and controls are due to capacity deficits in the form of skills, knowledge, institutional memory among and, to a limited extent, inadequate numbers of technical support people. The skills shortages include lack of understanding of the regulatory framework, with special reference to the Public Finance management Act, the Municipal Finance Management Act and treasury regulations. Skills shortages also include the paucity management skills and related controls.

Again municipalities are most hard hit in this regard. Some of the provinces have indicated that the problem is exacerbated by difficulties in finding and retaining skilled professionals such as managers and Chief Financial Officers due to the unattractiveness of rural lives and the low scale salaries in small municipalities. Capacity inadequacies also affect the oversight capacity of Municipal Councils.

One of the proposed solutions in regard to the capacity deficit is a call for the professionalization of the public service through more long term contracts and depoliticised appointments.

### ***Accountability and impunity***

One of the recurring concerns in maladministration investigations is the question of selective enforcement of prescripts. In organisations where there is systemic maladministration there tends to be laxity in enforcing accountability for compliance with laws, policies and prescripts. Even where there is accountability, enforcement is often selective with some managers or employees being treated as holy cows.

Weakness in accountability coexists with impunity. Often processes to ensure accountability are started but when remedial action has to be taken nothing is done in respect of certain individuals. In a case<sup>3</sup> where my office uncovered suspected corruption and fraud in a case where an intern's salary was paid to a ghost worker for two years, we are yet to see action. Where lack of accountability and impunity abound corruption finds an enabling environment.

### ***Leadership***

The issue of accountability is closely linked to the question of leadership. In organisations where there is firm and committed leadership that walks the talk on issues of maladministration, abuse of state resources and corruption, these maladies rarely occur. When they do occur firm action is swiftly take regardless of who is involved.

The Auditor General always stresses the importance of strong and unwavering leadership among the keys to clean governance and, consequently, a clean audit opinion.

One of the leadership weaknesses that unwittingly enable corruption is what I refer to as misguided brand protection. Often when whistle-blowers expose maladministration the leadership steps in to sweep matters under the carpet in an effort to maintain a clean reputation or image. In the long run this damages the brand as maladministration and, ultimately, fraud and

corruption are unwittingly cushioned. Needless to say that in such circumstances the culprits enjoy impunity while the whistle-blowers suffer occupational and other detriments despite their protection under the Protected Disclosures Act.

Another key leadership weakness is that of abuse of political power. One of the cases I'm currently dealing with centres on allegations that a company that failed to deliver social housing according to specifications avoided the Municipal Managers (MM) sanctions by invoking a political solution. It is alleged that this left the MM jobless while the company that had delivered defective foundations for houses not only got paid but was reinstated in the project and allowed to complete the houses on the defective foundations. If this is proved to be true the municipality will later pay twice as these houses will soon show structural damages.

### ***Service standards***

One of the provisions of *Batho Pele: White Paper on Transforming Public Service Delivery* is that customers need to know the standards of service they are entitled to. This is to empower the people to demand the service quality and quantity they deserve. This transparency is also the key to ending maladministration, including corruption.

When you know exactly what's required for you to get a service and what the timelines are for delivery your vulnerability to abuse, including bribery is significantly reduced. This is particularly the case in areas such as life documents such as Identity Documents, Birth Certificates and permits for non-nationals. Business licenses are also insulated from bribery when standards are transparent.

*Batho Pele* requires that these standards be posted at service centres yet most organs of state do not do so.

### ***Openness and Transparency***

Publishing service standards for the people to hold those who exercise public power accountable is also a matter of openness and transparency.

Openness and transparency are two factors that constitute part of the key to ending maladministration and corruption.

Openness and transparency in regard to reasons for an administrator's decision provide an essential check against maladministration and corruption. If reasons for a decision do not add up, a citizen or resident is automatically empowered to search for maladministration that may have corrupted the decision.

During my dialogue with the nation earlier this year, one of the key recommendations from the people was that lists for RDP houses should be made transparent. People said that the list of applicants with dates of application and lists of recipients and justifications should be available online and at community halls for people to scrutinise at will. They also said that the criteria for awarding such houses, including the basis for jumping the queue, should be made transparent.

Here it's also important that openness and transparency are key to public accountability which in turn is essential in the fight against maladministration and corruption. I must also point out that in modern states the media plays an indispensable role in ensuring openness and public

accountability. A free and independent media is accordingly is one of the keys to ending maladministration and corruption.

### ***Discretionary power***

Linked to the issue of openness about service standards is the issue of constrained discretionary power. In China, the use of automation to narrow discretionary power in the public sector is seen as a key element of the key to combating corruption. When there's an open checklist covering all factors to be taken into account in determining a person's entitlement, maladministration, including bribery, are reduced.

Locally we have noticed a decrease in complaints regarding unjust service denial or delay in the area of social grants such as child, disability and foster grants, with the advent of check lists backed by a largely automated qualification test.

### ***Seamless enforcement efforts***

While as a country we have an elaborate legal and policy framework for promoting good governance and combating corruption. Things often fall through the cracks as the system is not seamless. For example, the Public Protector is one of several institutions that are charged with enforcing the Prevention and Combating of Corrupt Activities Act but there isn't a seamless transition from its work to the Prosecution and courts. All depends on bilateral agreements voluntarily entered into by the various oversight agencies.

From the Public Protector SA, the strengthening of synergies among oversight bodies is one of the challenges sought to be addressed through the good governance dialogue we initiated two years ago.

Some have called for the streamlining of the Prevention and Combating of Corrupt Activities Act and reinforcing the enforcement mechanisms with a single integrated enforcement agency. Part of the reason for such a call is that such agency should have both investigative and prosecutorial powers and should cover both the public and private sectors. Should this take place, institutions such as the Public Protector, Public Service Commission, Special Investigation Unit and the Auditor General will retain a residual role while the thrust of the fight against corruption would be borne by such an agency.

### ***Rule of law, incorporating access to justice***

Unwavering adherence to the rule of law is one of the keys to ending both maladministration and corruption. One of the essential elements of the rule of law is the idea that no body is above the law regardless of who they are.

The rule of law is not a major weakness in this country's fight against corruption. But where detection of corrupt activities is low, some do end by default as being beyond the reach of the law. Part of the problem is that some of the investigations take unduly long periods leading to loss of evidence and depletion or hiding of assets.

However, a weakness in the rule of law lies in access to justice for disadvantaged groups and communities. Many victims of fraud and corruption end up being unable to pursue their matters leading to impunity due to lack of access to justice. The legal empowerment of the poor is seen

as a key element of the pursuit of the rule of law and the promotion of good and clean governance by organisations such as the World Justice Forum.

Lord Aton once said power tends to corrupt and absolute power tends to corrupt absolutely. Absolute power is enabled by weak controls or checks and balances. Empowered and active citizens are an important part of a democracy that is anchored in sound checks and balances that are to check excesses in the exercise of state or public power.

### ***Values and empowered citizens***

It is often said that people get the government they deserve. Indeed if there is endemic corruption in the public sector this should be seen as a reflection of the society we've become. In other words it can't be that people automatically become corruptible when they move into government when the communities they come from are ethical. If our values do not clearly spell out what corruption is and reject it without reservation, corruption will thrive. One of the changes that could be made could be the streamlining of the current truncated definition of corruption which leaves even lawyers scratching their heads regarding what corruption really is.

The worst thing is that the beneficiaries of corruption are increasingly seizing the gap and appealing to the very people, particularly the very poor they are robbing to defend them against the oversight agencies they cast as persecutors.

To illustrate this point I recently drew parallels between some of our corruption challenges and the challenges of the citizens' of George Orwell's fictitious Animal Farm. When the pigs, who championed the animal's struggle against exploitative and oppressive humans at the Animal Farm, started to exploit and overfeed themselves, were called to account, they told the overworked and malnourished animals, "We are eating for you". It is painful to see masses of our unemployed people who are yet to benefit from the fruits of democracy being called upon to defend people who through tender rigging and overcharging are part of the cause of the non delivery on the fruits of democracy.

Of course we are better off than the citizens of George Orwell's animal farm as we have numerous checks and balances in the way of the maladies that afflicted that community. One of our defences is transparency in the manner in which laws and policies are made, including a bill of rights that guarantees fundamental human rights.

### ***NACF Stand on Corruption***

One of the things that I particularly find encouraging about the NACF's approach to corruption is being candid about the fact that corruption is a challenge for both our public and private sectors. This takes me to the bilateral nature of crime. In the public sector we often see those who exercise public power as corrupt whereas for corruption to occur, it primarily takes two to tango.

Accordingly, if we speak about public sector corruption, we are talking about corruption that straddles the public and private sectors since those that offer or give bribes and other forms of gratification are in the private sector. If we want clean governance in the public sector then we need ethical business players as much as ethical persons who exercise public power.

A related understanding is that corruption is a societal problem that permeates all areas of society where people exercise borrowed power or power given to them by an authorising body. In the public sector the power owners and givers are the people while in the private sector,

shareholders are the power givers. Accordingly, you need not be a politician or a public servant to commit the crime of corruption.

The Prevention and Combating of Corrupt Activities Act clearly casts corruption as a bilateral crime that basically involves acting in an improper, illegal or dishonest act. The Act further anticipates and prohibits corruption in both the public and private sectors.

Corruption primarily occurs when a person accepts or agrees to accept or offers to accept gratification from any other person gratification for his or her own benefit or another's benefit with a view to influencing that person to act in a manner that is illegal, dishonest, unauthorised, incomplete or biased. As a bilateral crime, giving, agreeing to accept or offering gratification for yours or another's benefit also constitutes corruption.

Corruption may also involve the misuse or selling of information or material acquired in the course of a performing statutory or contractual duties or obligations or powers.

Corruption may also influence a person to abuse authority, achieve an unjustified result or induce a person to act or not to act.

Transparency International simplifies the definition of public sector corruption to *“active or passive misuse of the powers of Public officials (appointed or elected) for private financial or other benefits”*.

Bribery is the common form of corruption, although many acts are far more sophisticated. We recently read about a study that found that A significant percentage of the people in this country have bribed a traffic officer. Another study showed that the areas where there was a high incidence of bribe solicitation were those where the poor are most vulnerable namely:

- Job seekers;
- Social welfare;
- IDs and permits; and
- Social housing

Driver's licences are also a prime scene for bribery and so is the criminal justice system. What is encouraging though is that corruption is significantly diminishing in some of these areas.

Corruption is as old as old as democracy. Incidentally, corruption was one of the key reasons for the quest for diffused state power through the separation of powers. Who hasn't heard Lord Acton's famous remark that *“Power tends to corrupt and absolute power tends to corrupt absolutely”*.

Corruption also served as a catalyst for the speedy progress in the concretisation of efforts by Montesque and others that sought to safeguard the independence of the judiciary. It was in response to corruption in the English judiciary that the notion of separation of powers and independence of the judiciary gained ground. It also appears that one of the reasons the king of Sweden's establishment of the Ombudsman institution (Public Protector), following his prolonged visit to Turkey, was corruption.

Already this suggests that corruption is a global challenge. However, it is more of a challenge in some democracies than others.

In Transparency International's 2011 Corruption Perceptions Index released at the beginning of this month, South Africa ranks number 64 out of a total of 183 countries surveyed.

This annual index, which rates countries based on perceived levels of public sector corruption, warns government against failure to protect citizens from corruption.

Countries are scored on a scale of zero to 10, with zero representing "highly corrupt" and 10 referring to "very clean." On this index, which I must emphasise is based on perceptions and has been widely criticised with some calling for its abandonment, South Africa scored 4.1.

At position 64 out of 183 countries, it means we are perceived better than some 119 countries in so far as public sector corruption is concerned. But if these perceptions are anything to go by, we have a lot of work to do and can therefore not afford to rest on our laurels.

Transparency International's Chairperson, Huguette Labelle, was quoted by Creamer Media as having said the following, shortly after the release of the index:

***"This year, we have seen corruption on protesters' banners, be they rich or poor. Whether in Europe hit by debt crisis or an Arab world starting a new political era, leaders must heed the demands for better governments."***

Like in many African states, many South Africans are still longing for basic needs such as housing, quality health care, education, food, clean drinking water and jobs. Our government acknowledges this.

The Public Protector's mandate regarding the combating of corruption derives directly from the Constitution. Section 182 of the Constitution gives the Public Protector power to investigate any conduct in state affairs and the public administration at any level of government that is alleged or suspected to be improper; to report on that conduct and to take appropriate remedial action. This mandate stems from the overriding mandate of supporting and strengthening constitutional democracy that the Public Protector shares with other constitutional institutions, established under chapter 9 of the Constitution.

The Constitution states that the Public Protector has additional powers as prescribed by law. There are currently 16 national statutes that elaborate on the Public Protector's Powers. It has recently come to our attention that there are also provincial statutes.

The anticorruption mandate also derives from the maladministration mandate under the Public Protector Act. Section 6(4)(a)(iii) of the Public Protector Act further specifically provides that the Public Protector shall be competent to investigate-

(iii) any improper or dishonest act or omission or offences referred to in Part 1 to 4 or sections 17, 20 or 21 (in so far as relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to Public money.

The Public Protector's anticorruption mandate is shared with other institutions. These include the Public Service Commission whose mandate is restricted to Public Servants, the Special Investigating Unit (SIU) whose mandate is restricted to a proclamation by the President; and the Asset Forfeiture Unit. The SIU, the police, including the Hawks and the National Prosecuting Authority, incorporating the Asset Forfeiture Unit, currently carry the primary workload in regard

to fighting corruption as a crime in both the public and private sectors.

In addition to the Prevention and Combating of Corrupt Activities Act, the Prevention of Organised Crime Act and the Protected Disclosures Act, are part of the legal framework that supports efforts aimed at combating corruption. In some way the Promotion of Access to Information Act (PAIA) also contributes to anti-corruption efforts by promoting public accountability, primarily regarding reasons for decisions, through access to information.

A significant part of the national anticorruption framework is the National Anticorruption Forum whose interventions include a national Anticorruption Hotline and a regular National Anti-Corruption Summit.

I thought I might also share the following key challenges that my office encounters in pursuit of its anti-corruption mandate:

- Definition of corruption. The definition in the Act is too dispersed to entrench a common understanding of the meaning of corruption.
- A multi-agency approach without a clear framework for collaboration. We do minimise this challenge by entering into Memoranda of Understanding with structures such as the SIU, PSC, Hawks and the Auditor General.
- Lack of a common understanding of the responsibility of organs of state once the Public Protector has made his/her findings and pronounced on appropriate remedial action as envisaged in section 182(1)(c) of the Constitution.
- Brand protection efforts by organs of state and other state which has unintended consequences of insulating wrong-doers.
- Inadequate protection of whistle-blowers. The story of the MM who refused to pay.
- Late reporting of matters making it difficult to reverse consequences of dishonest acts or contracts.
- Sophisticated ways of hiding improper relationships. For example most people involved in improper company relationships hide such relationships. Moneys are also no longer deposited directly in bank accounts. Various money laundering schemes have been invented.
- Inadequate financial and human resources, particularly in the area of forensic expertise in the Public Protector SA as an institution.
- Poor accountability Inconsistency leading to impunity.
- Lack of understanding of multiple forms of accountability, including vertical accountability.
- Poor understanding and management of conflict of interest.
- Lack of a common understanding of the impact of corruption on the people as a whole particularly the poor. We need to expose the villains that have looted from the people and derail their appeal to the same people as victims of “persecutors”
- An improper perception that my office serves the interest of the opposition parties.

Many have said corruption is a cancer, which if left unattended has the potential not only to squander not only our resources but also our moral fibre and sense of justice.

Our Constitution promises the people of South Africa a better deal than the raw arrangement they had under the apartheid regime. Enshrined in the Bill of Rights, found in Chapter 2 of this Constitution, are rights to housing, health care, food, water and social security, among other things.

Where corruption prevails it is not possible to deliver effectively and efficiently on these and other constitutional promises.

In a bid to protect the people from such opportunists, the architects of our Constitution saw it befitting to establish institutions such as the Public Protector, among others, to safeguard the interests of the masses. This would be done by way of exacting accountability in the exercise of public power and control over state resources.

Highlighting the critical role played by institutions such as the Public Protector in such instances earlier this year, former Chief Justice Sandile Ngcobo had the following to say:

***“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.”***

Despite the problems I've outlined, I believe we are getting there. Efforts such as today's event are a testimony to that. Together we can put brakes on practices that tell our people: *“We are eating for you”*. We can say that *“it stops right now and it stops with me”*.

My team and I have however been amazed by the consciousness of our people and support to my office. Efforts such as yours are part of this. The media's role has been critical as it is impossible to fight corruption and other forms of maladministration in an opaque environment.

You and other inspirational leaders and persons at all levels of our society strengthen our resolve to act without fear or favour as we pursue our constitutional mandate. Together we will achieve the ideal of an accountable state that operates with the highest level of integrity at all times while being responsive to the needs of its entire people.

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