



Speech delivered by Deputy Public Protector Adv. Kevin Malunga at the Night of the Stars –South African Medical and Education Foundation (SAME) event at Melrose Arch on Monday, 11 May 2015

The prevailing inequality and disparity that exists in both the Health & Education sectors in South Africa and the urgent need to do something about the high level of socio-economic deprivation

Introduction

Good evening ladies and gentlemen

I am here on behalf of the entire institution, that is Public Protector South Africa. It's important that the various stakeholders get used to that idea. Let me acknowledge the hospitality of the SAME Foundation. We attended your breakfast engagement two years ago. During our last engagement we had commenced our national systemic investigation inspired by Millennium Development Goals 4 and 5 respectively that is reduction of child mortality and improving maternal health respectively. We are at an advanced stage of drafting the results of our systemic investigation report.

Just so you know I was able to see first the resounding impact of your work when we visited Leratong Hospital's Paediatric Unit. At the time I did not know about your planned involvement, in fact I only got to know about it when I visited your website over the weekend. At the time our team was quite impressed by the impact of collaboration between the public and private sector. Only now did I get to know that SAME has a hand in there. Just to make your work easier we found the following to be requiring urgent attention;

Staffing- vacancy rate of 11 percent. Mostly admin and support staff.

- 1. Need to create more nursing posts. Hospital has to serve a large catchment area. Jabulani hospital might relieve the pressure when it starts operating because clinics do not operate 24 hours, the hospital has to see some of their patients.**
- 2. Flow of patients overwhelms the Resuscitation Unit. Also had 11 but required 16 employees in the Unit.**
- 3. They need a Community health centre in Kagiso. There was a commitment that it would be built the following year.**
- 4. Delays in patients getting files- they need to employ more clerks and automate the system.**

- 5. Equipment- required anesthetic X-ray and ventilators.**
- 6. Limitation of maternity beds.**
- 7. Patients complained that they waited too long for files and medication. CEO indicated they intended to package repeat medication to be collected at nearest clinics.**
- 8. Out Patients have to wait for doctors as they start in wards and there is a shortage.**
- 9. Linen was a challenge. Peoples brought their own bedding.**
- 10. Premature Nursery/ Highcare**
- 11. Have 8 nurses. Need at least 10.**

Neonatal ICU

- 12. Have 10 doctors. Need 5 more.**
- 13. Patient to nurse ratio is 2:1.**
- 14. Needed 1 supervisory nurse. Had 1 vacancy.**

I highlighted this to show that we also on the ground experiencing the challenges you are trying to assist in resolving as the SAME Foundation.

The 21 year period of South African democracy since 1994, and 18 years since the signing of the Constitution offers a range of substantial benchmarks in South Africa's evolution through a relatively wide range of initiatives that introduced multiple levels of engagement between government and citizens that extends democracy into the domain of greater and more continuous popular participation.

Unfortunately the dynamics of poverty, unemployment and inequality in South Africa have continued to manifest themselves in various ways.

Overall, progressive policies by the state in the last 20 years or so have led to the expansion of many services to all South Africans. Nevertheless, recent reports by Statistics South Africa, the SA Human Rights Commission (SAHRC), UNICEF, and various Government agencies still reveal large disparities in access of the poor and vulnerable to “some of the essentials of life”¹.

The above-mentioned report by the SAHRC emphasises that according to the **Gini index**² used by the World Bank to measure the extent to which the distribution of income or consumption expenditure among individuals or households, **South Africa has the worst Gini coefficient in the world, making it one of the most unequal countries in the world.** This translates to the following scenarios:

“In South Africa, compared to a child growing up in the richest income quintile, a child in the poorest quintile is two times less likely to have access to adequate sanitation and water; two times less likely to be exposed to early childhood development programmes; three times less likely to complete secondary education; seventeen times more likely to experience hunger; and twenty-five times less likely to be covered by a medical scheme.”

This inequality is furthermore characterised by strong racial disparities that remain in our society. Statistical reports³ reflect that approximately 65.1 % of the approximately 18.6 million children in South Africa⁴, reside in households with a per capita income of less than R650 a month.

Almost one-third (32, 4%) of South African children lived in households which did not contain a single employed member in 2012.⁵ In 2009, nearly three million children (16%) were living in households where child hunger was reported. Overall, there has been a significant drop in reported child hunger from 30% of children in 2002, to 18% of children in 2007. The 2012 levels reflect that 15,3% of children and 13,1% of the general population lived in households that experienced hunger.

1 A Review of Equity and Child Rights - South African Human rights Commission, UNICEF and DWCPD

2 <http://data.worldbank.org/indicator/SI.POV.GINI>

3 *Social profile of vulnerable groups in South Africa, 2002-2012*, Stats SA

4 (38% of the population in South Africa)

5 **Social profile of vulnerable groups in South Africa, 2002–2012** / Statistics South Africa. Pretoria: Statistics South Africa, 2012

Hunger is unfortunately not the only consequence of the poor environment in which many of our children find themselves, as most experts are in agreement that the causes of preventable deaths are exacerbated by a lack of access to basic services such as water and sanitation, good health services for children including comprehensive HIV and AIDS interventions, and high levels of trauma and violence.

According to the Child Rights Manual published by Parliament in 2012, over 100 000 children (under 18 years) die annually as a result of communicable diseases, intentional and unintentional injuries. The main causes of child deaths were due to AIDS, diseases of poverty (e.g. diarrhoeal disease, malnutrition, pneumonia); neonatal causes of deaths (i.e. related to maternal care and obstetrics) and trauma.

It is a well-known fact that South Africa currently has the largest number of people living with in HIV in the world (4.9-5.7 million) of which an estimated quarter of a million are children below the age of 15 years infected before and during the birth process and some later through breastfeeding. An estimated 350 000 children and adults died in South Africa of AIDS in 2007 alone. This situation has a direct bearing on the country's ability to attain progress with respect to Millennium Development Goal 4, namely, to reduce child mortality.

In 2008, over 95% of children between 12 and 15 years old were attending school. However, of these children, many are at grades below the ones corresponding to their ages.⁶ The percentage of children of school-going age (between the ages of 7 and 17 years) who attended any kind of educational institution increased substantially between 2002 and 2012, particularly for the younger ages. While more than 98% of children in the age group 8 to 14 years attended school, lower participation rates were observed for children in the older age groups and by the age of 17 years, less than 91% of males and females were still attending school.⁷

The Constitution as the foundation of an equal society

The Constitution obliges the South African Government to protect and promote the rights of every individual. It stipulates particularly under the Bill of rights that

⁶ Statistics South Africa (2009) General Household Survey (2009). Pretoria, Cape Town: Statistics South Africa. Analysis by Chennells and Hall, Children's Institute, University of Cape Town (2011)

⁷ **Social profile of vulnerable groups in South Africa, 2002–2012** / Statistics South Africa. Pretoria: Statistics South Africa, 2012

everyone is equal before the law and has the rights to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms, including social economic rights like a right of access to housing, a right of access to healthcare, a right to education, and a right to a healthy environment. To promote the achievement of equality, legislative and other measures may be taken to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

But the Constitution is not only about rights and systems of legitimate enforceable rules. It is concerned with the property of the relations among human beings in this country and how the institutions of a just society treat its citizens, not only politically but also economically and socially. Essentially, the Constitutional promise of a better life for all means bringing to an end all manifestations of injustice and gross unfairness and synonyms such as prejudice, inequity, unlawfulness, inhumanity, maltreatment, inequality, malpractice and misuse.

FACTORS AFFECTING EQUAL DISTRIBUTION OF HEALTH AND EDUCATION SERVICES

Poor governance

“Democratic reforms do not necessarily help the poor unless the institutions of government are improved, in terms of being mechanisms for popular participation, the administration of justice, and bureaucracies stimulated by incentives and held accountable by performance measures.”⁸

Good governance alone will not end poverty, but we cannot significantly reduce poverty, especially within a human rights approach, without good governance.”⁹

While past disparities and backlogs with service delivery based on racial divides obviously contributed to the country’s socio-economic problems, the Public Service Accountability Monitor (PSAM) believes that a major cause of inequality in South Africa is poor governance, which includes not only corruption, but also poor performance of government officials in their management of public resources and a

⁸ <http://www.polity.org.za/polity/govdocs/reports/poverty2.html>

⁹ *Governance, Accountability and Poverty Alleviation in South Africa* Paper delivered by Mr Derek Luyt, Media and Advocacy Head of the Public Service, Accountability Monitor (PSAM), at the United Nations Social Forum on 2 September 2008 in Geneva, Switzerland.

lack of political will to act against underperforming officials. The poor management of public resources translates directly into poor public service delivery implementation, and thus obviously undermines poverty alleviation policies and other initiatives to address inequality.

Good governance entails *“an administration that is sensitive and responsive to the needs of the people and is effective in coping with emerging challenges in society by framing and implementing appropriate laws and measures. It includes strict rules of accountability”*.

The Constitution is the cornerstone of the country’s governance system. It stipulates where power lies within the state, what the institutions of government are, and how they are intended to operate. Good governance emerges from its structural provisions, such as separation of powers and statement of explicit rights that guard against authoritarian control. *“As the highest legal norm within the hierarchy of norms, the constitution also becomes a reference point for the legality of administrative and legislative actions. In sum, constitutional reform ultimately embodies governance reform.”*¹⁰

In a Constitutional democracy, the framework of Constitution and law exemplifies essential elements of good governance and accountability by, inter alia -

- a) **Prescribing the powers of government and the procedure of exercising powers.**
- b) **Ensuring equal treatment and equal protection of law.**
- c) **Guaranteeing protection against arbitrariness of government and excess of administrative powers.**
- d) **Creating accountability mechanisms for the exercise of powers and formulation of policies to the people/ representatives of the people**
- e) **Ensuring procedural transparency of exercising all administrative powers.**

¹⁰ *Strengthening Governance through Constitutional Reform* By Björn Dressel, the Governance Brief, Issue 13- 2005

f) Providing remedies against any kind of mal-administration and injustice done to the aggrieved citizens, as well as institutional mechanisms to redress grievances.

While other processes are equally important, such as a culture of human rights, the rule of law, gender equality and open electoral processes, effective governance can take place only if state institutions function properly and are responsive to the needs of individuals in society, especially the poor and marginalised.

In South Africa, accountability is especially important at provincial and local municipal level, since it is at these levels that the major part of the national budget aimed at alleviating poverty through the provision of housing, health and education services, is spent.

Lack of faith in democratic systems: Protests

For the majority of South Africans, access to basic public services continues to be a struggle.

Those who can afford it have basically opted out of almost every public service, particularly in respect of healthcare and education. They buy private healthcare, use private transport, send their children to private schools and have an array of private security devices.

For those who do not have the means and resources to seek alternative ways of getting the level of healthcare and education they desperately seek and need to meet their expectations of a better life, it is very easy for frustration to escalate into levels of anger.

When people lose faith in the state to provide these essential but basic public services, the risk increases that they would be tempted to take such taken matters into their own hands, albeit with very different means¹¹.

Consequently, the rise of social movements and protest actions has characterized socio-political life in post-apartheid South Africa. The report by Jain (2010)¹² shows

11 Sriskandarajah D (2014, 19 December 2014), Both rich and poor are losing faith in the state, *The Mail & Guardian*. Accessed on 11 March 2015 at <http://mg.co.za/article/2014-12-19-00-both-rich-and-poor-are-losing-faith-in-the-state>

that the number of protests in South Africa over service delivery increased by over 100% between 2007 and 2009, from an average of about 9 per month in 2007 to 19 per month in 2009.

The behaviour of both rich and poor undermines democracy and good governance, but in different ways. When poor people are fed up with political institutions they usually stop engaging with the mechanisms that underpin democracy, from talking to ward councillors to complaining to public protectors.

When rich people opt out of public services, they have little interest in driving the quality of public services or holding governments to account. Left unchecked, the South African state will simply become the bastion of rent-seeking elites trying to rig regulations or win contracts

In many ways, while the focus has been on dismantling South Africa's racial divides, little has been done to promote solidarity across classes.

Tender Fraud and Corruption

Public Protector South Africa deals with a substantial number of cases relating to the procurement activities of Government Departments and Agencies.

The complaints and enquiries vary in nature and cover virtually all aspects of the procurement process; from the decision to go out on tender or not, the tender advertisement, the submission and acceptance of tender documents, the adjudication process, the award of the tender and communication of decisions, as well as the cancellation of contracts.

In South Africa, a recent report of the Auditor-General found that unauthorised expenditure of public funds amounted overall to R2.9-billion (per year), irregular expenditure a staggering R28.3-billion, while fruitless and wasteful expenditure rose to almost R1.8-billion.

The consequences are obviously immense. The SA Institute of Race Relations calculated what could have been paid for by the state with the wasted money:

¹² Jain, H. (2010). *Community Protests in South Africa: Trends, Analysis and Explanations*. Cape Town: Community Law Centre UWC.

- a) **Child-support grants could have been paid for 7.4 million children – 70% of those currently being paid out;**
- b) **More than 400 schools could have been built;**
- c) **At least 550 new prisons could have been built;**
- d) **The country's total water and sanitation infrastructure for one year could have been covered;**

THE ROLE OF THE PUBLIC PROTECTOR

Constitutional mandate of the Public Protector

Established under chapter 9 of the Constitution, the Public Protector has the power under section 182 of the Constitution to strengthen and support constitutional democracy by:

- a) **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;**
- b) **to report on that conduct; and**
- c) **to take appropriate remedial action.**

The Public Protector's mandate covers all organs of state at national, provincial and local levels, including local government and extends to state owned enterprises, statutory bodies and public institutions. Court decisions are excluded.

Section 182(4) enjoins the Public Protector to be accessible to all persons and communities

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

- a) **Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and**

includes investigating without a complaint and redressing public wrongs(Core);

- b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):**
- c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);**
- d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;**
- e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and**
- f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.**

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs translates to a multi-pronged approach to handling complaints to ensure;

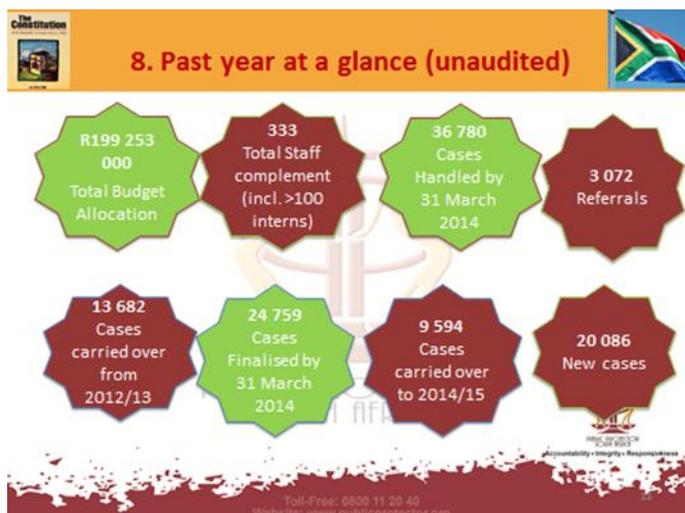
- a) correction of transgressions by organs of State,**
- b) a proper diagnosis and correction of any administrative inadequacies, including systemic failures**
- c) that proper redress is provided in cases requiring remedial action.**

The Public Protector understands its mandate as involving righting administrative wrongs of the state by redressing service and conduct failure.

- **Service failure** usually involves general maladministration in the form of service delayed or service denied. The case load covers the entire span of the classical

definition of maladministration which includes: undue delay; abuse of power; unfair, capricious or discourteous behaviour and the violation of a human right.

- **Conduct failure** includes integrity issues such as unethical behaviour; dishonesty or improper dealings in respect of public money; improper enrichment and receipt of improper advantage; abuse of power; abuse of resources and ultimately; **fraud; and corruption**
- Section 182(4) of the Constitution requires the Public Protector to be accessible to all persons and communities.
- The Public Protector has 20 offices, which include the National Office, 9 Provincial Offices and 10 Regional Offices.
- In pursuit of our strategic goal to be accessible to and trusted by all persons and communities the Public Protector has been embarking on a comprehensive outreach and advocacy programme through, clinics, MOPP clinics, information sessions and radio. The goal of reaching 30 million persons has been achieved in fact, performance statistics show that we reached more than 51 million people, which is up by over 17 million from the previous year. Various platforms, including the news media and our own outreach activities such as the annual Stakeholder Consultation Dialogue and Good Governance Week made it possible for us to reach this milestone



Public Protector's role in promoting good governance

Public Protector's relationship with the promotion good governance has a number of dimensions:

- a) **Providing information:** making information and analysis available to a wide range of stakeholders, in order to stimulate reflection on a situation to which society and government may have got used to. A simple, yet potentially powerful catalyst for building accountability relations is the provision of relevant and accessible information, as that builds the capacity of citizens to have the knowledge and be aware of their rights. This is essential to build accountability relationships.
- b) **Reconciling citizens with the State**, especially in situations in which government – citizen relations are weak, broken down or even non-existent. A more ambitious role, beyond brokering, is where changed institutional practices are promoted and facilitated, reflecting sustainable mechanisms and practices for channelling relations between state and citizens.
- c) **Support change processes:** beyond brokering, external actors can promote those institutional practices, which create space for the development of accountability relations.
- d) **Monitoring compliance with and respect for the Rule of law.** From a rule of law perspective, complaint handling by the Public Protector bolsters the notion that government is bound by rules, and that there can be an independent evaluation of whether there has been compliance with the rules. Government accountability and the right to complain go hand in hand.
- e) **Holding the State accountable for unlawful conduct.** The outcome of most investigations is also concerned with whether there is legal compliance by government. For the Public Protector it is in fact the starting point for an evaluation of the proper approach to administrative justice as envisaged in section 33 of the Constitution, as well as PAJA, which give legislative expression to the fundamental right to administrative action “that is lawful, reasonable and procedurally fair”.

f) **Remedying injustice suffered at the hands of the State**

The Public Protector often acts as mediator between aggrieved individual and public institutions to ensure fairness and legality in public administration. The Public Protector has an important role in remedying government's administrative injustices or failures and reconciling the people with the state, which helps to divert, dilute and mitigate the anger and extreme frustration.

First, it must be emphasised that South Africa is a constitutional democracy. As highlighted by the constitutional Court¹, this has two clear implications: as the preamble to our Constitution asserts, government should be based on the "will of the people"; and secondly, the powers of government are delineated by the terms of the Constitution. The Constitution therefore provides the basis for the character of the state that is envisaged for the realisation of the constitutional vision of the country, to the extent of dictating that the state must be democratic, uphold the rule of law and operate on the basis of openness, transparency and accountability ethical standards which the executive should uphold and which include acting in the public interest.

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- e) **Ensuring procedural transparency of exercising all administrative powers., and**
- f) **Providing remedies against any kind of maladministration and injustice done to the aggrieve**

Responding to allegations, enquiries, complaints

Whatever findings and remedies may be forthcoming at the end of an investigation, they should not just provide redress for the individual but should also provide redress for others who may be affected but may not have complained to the Public Protector. In line with the Public Protector's mandate to improve the effectiveness of the State administration we would also consider measures to prevent a recurrence of similar problems in future. Remedies might include guidance or close supervision of the individual concerned, etc.

In cases where information or evidence is found that would *prima facie* implicate officials in criminal activities, our office would involve the SA Police Services and the Director of Public Prosecutions to proceed with the criminal investigation and the institution of criminal proceedings. We would similarly involve the Office of the Auditor-General in cases of non-compliance with tender procedures, which may render the expenditure irregular or unauthorised.

Where procedural maladministration is found, the Public Protector would normally consider remedial action that would seek to place the complainant in the position where he/ she would have been, if it was not for the improper actions by the state. Where a tender has already been awarded, however, finding an attainable solution might prove to be difficult. The acceptance of the tender has brought about a legally binding contract between the relevant Government agency and the tenderer, which cannot be unilaterally set aside by the State, at least not without exposing the State to the risk of facing a claim for damages resulting from a breach of contract. By law the State can consider the cancellation of the contract and putting out the matter on tender again, if circumstances would exist which would render the awarding of the tender or contract void, in other words where the contract was obtained fraudulently or by means of corruption or any other criminal conduct. Unfortunately tenders in the education sector are not immune-here I am referring to school feeding schemes and medical supplies. We handle disputes everyday involving this or that malady or corruption etc. Why does someone sign off overpriced meals-a supplier charges R35 for a loaf of bread and you pay for it? A pack of injections is overpriced etc. We need to deal with the mindset that when people transact with Government they make a killing?

CONCLUSION

Our test of whether or not we are effectively discharging our Constitutional mandates, lies in the assessment of the impact and difference that we make in the lives of ordinary South Africans in their aspirations to experience the Constitutional promise of a better life for all.

In approaching our Constitutional and statutory mandates we endeavour to balance the values of accessibility, promptitude, responsiveness and effectiveness.

While all the Constitutional checks and balances are important, it is critical to mention that it should not be left to the state to ensure that we have a living Constitution capable of accommodating our collective dreams and aspirations as a Nation. It must also be understood that development should be the pursuit of everyone with the state primarily acting as an enabler and regulator. However, as a developmental state our state must directly engage in the delivery of basic needs such as water, health, education, infrastructure and to a limited extent, housing."

Where do you come in?

Quite a few politicians and business people have received flak for saying that South Africans are fond of handouts. Their assertion is partially true but we have to acknowledge that there are those whom Franz Fanon labelled the wretched of the earth, those who have nothing, who were born at the back of the line, who need that extra help to stand a chance. That is where you come in and in this regard I want to laud the stated objectives of the SAME Foundation. We have seen with our own eyes what Public Private partnerships can do and in this regard. I can only say keep doing all that you're doing right. We will continue to do our work to ensure that government works and works efficiently. You do yours in holding its hand. Contrary to widespread opinion it is not all doom and gloom. Some doom here and there.

Deputy Public Protector

Adv. Kevin Malunga

¹ Kaunda and Others v President of the Republic of South Africa (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004)