



Address by Public Protector Adv Thuli Madonsela during the South African National Editors' Forum (SANEF) council dinner in Cape Town, Western Cape on Saturday, February 12, 2011

**Chairperson of the SANEF Council Mondli Makhanya;
Deputy Chairperson Marry Papayya;
Secretary General Gaye Davis;
Treasurer Juanita Williams;
Executive Director Femida Mehtar;
The rest of the council members;**

I am humbled and heartened by the South African National Editors' Forum's gesture to give me an opportunity to address an occasion of this magnitude.

This is one of the gestures that demonstrate the level of the interest the media has in the work my office does. For this, I would like to express my sincerest gratitude.

I've previously indicated that unlike courts the effectiveness of the Public Protector or National Ombudsman, depends primarily on moral suasion and that the media plays a critical role in this regard.

Truth be told, the media is one of the most influential and important sectors of our society. That is why I feel like a midget among giants today.

With its freedom enshrined in the Constitution of the Republic, the media is one of the critical pillars of constitutional democracy.

Former Chief Justice, Pius Langa, couldn't have highlighted this point better when he addressed the 2009 commemoration of one of the darkest days in our country, aptly called the "Black Wednesday". As we all remember, this is the day on which in 1977 several South African newspapers were banned and their editors thrown in jail by the erstwhile apartheid government.

Justice Langa summed it up as follows:

"Without the media, equality and human dignity would diminish in this democratic state. Independence of both the media and judiciary is very important for our democracy to flourish."

Adding that he would mourn the day when the media was silent, Justice Langa was echoing the sentiments of former President Nelson Mandela, who made the following remarks in December

1997:

“Instrumental in keeping us in touch and informed, in the dissemination of both the good news and the bad, the sensational and the mundane, has been the media. I wish to pay tribute on this occasion to their unflinching, and often ill-appreciated, commitment to their task and their contribution to a more informed and hence a better world.”

Chairperson;

I’ve been asked to briefly outline the role played by the Public Protector in supporting and strengthening constitutional democracy. In fact, there are various similarities between the role I’m constitutionally required to play as the Public Protector and that played by the media.

One of the similarities is the role of giving the people, particularly the voiceless, a voice. A complementary role that we both play is that of giving the state a conscience.

We can never overemphasize the role of the media in making democracy real. As we no longer live in small villages where we all observe what happens in our name as a people and with our resources, the media in all its dimensions be it print, broadcast or electronic, has become our eyes and ears. It also extends our mouth when we seek to be heard.

It is globally accepted that one of the factors that underpin good governance, incorporating an accountable and responsive state, is the existence of an independent, impartial and credible media. This is mainly due to the fact that state accountability and good governance depend on transparency and openness.

This makes the media a powerful institution in society. As we all know, power goes with responsibility. One of the responsibilities that my office shares with the media is to ensure that our integrity and credibility remain beyond reproach. It’s not an easy task because as humans there is always a chance that we will make mistakes. But the pursuit of integrity and credibility in the conduct of our work is not optional if we are to play an effective role in strengthening and supporting constitutional democracy.

This brings me to the mandate and role of my office. What is it really that I’m mandated by the Constitution and the law to do as the Public Protector. I treasure the opportunity to explain the mandate of the Public Protector particularly to clarify the difference between this mandate and that of courts and tribunals.

Hopefully some of the lawyers that mislead organs of state during investigations by my office without bothering to read the enabling provisions in the Constitution and the 16 or so statutes that elaborate on the mandate will get to read this and save all of us a lot of time and money.

The most important thing to appreciate about the mandate of the Public Protector is that this mandate centres on promoting proper conduct and good administration in all state affairs. Section 182 of the Constitution specifically mandates the Public Protector to investigate all allegations of improper or prejudicial conduct in all state affairs at all levels of government, report on that conduct and take appropriate remedial action. The only public sector matters that are insulated by the Constitution from the Public Protector’s scrutiny are decisions of courts. The Public Protector Act clarifies that the mandate includes resolving disputes or grievances against all organs of state through mediation, conciliation, negotiation or any other means.

You will be surprised though when you read a lot of responses that we receive daily from lawyers representing the state. Just recently, I received a response from a reputable law firm

acting for an important tribunal whose responsibility is to promote fairness in the workplace. I was informed that I should allow a court process to be exhausted first then I could engage with the client. This was not too different from a minister who said that I should allow a labour court process first as an internal remedy before I come in. Another common fallacy is the defence that says because the complainant has a remedy under the law and the courts the Public Protector has no jurisdiction.

On the merits of each case it is common to receive a response that says that the action taken was not unlawful. Such responses fail to take into account section 33 of the Constitution and PAJA which already go beyond lawfulness.

Regarding the Public Protector's mandate on improper conduct and maladministration, this clearly transcends mere compliance with the law. European courts have dealt with the difference between proper and lawfulness in numerous cases.

What does this mean? I believe that the drafters of our treasured Constitution wanted state conduct to go beyond lawfulness. In other words the standard of scrutiny to be applied by the Public Protector to an organ of state is higher than that which a judge would apply if you complained against your neighbour.

Other issues that trouble me are allegations that my office allows itself to be a political football in tackling matters involving executive ethics, corruption and tender irregularities. Such criticism is again based on lack of appreciation of the full mandate of my office. The conduct mandate as conferred by the Constitution already transcends service failure and incorporates conduct failure. If the Constitution does not provide adequate clarity then the Public Protector Act should be of assistance. This clearly grants powers that include investigating and resolving disputes that go beyond classical maladministration. These include abuse of power, abuse of state resources and contravention of the provisions of the Prevention and Combating of Corrupt activities Act.

Another common misunderstanding is that my office can only get involved if there is a complaint and/or that the complaint was directly affected by the service or conduct failure I seek to investigate or resolve. I recently received a letter prepared for an organ of state by yet another reputable law firm. They wanted a copy of the complaint and challenged my powers to investigate a matter involving someone who is currently involved in criminal proceedings and who had not personally complained.

There are numerous reasons why organs of state get it wrong on the question of the mandate of my office. One of the explanations is that Ombudsman studies are not part of the mandatory curriculum for law students. The few that take Administrative law as an elective get exposed to brief reference to the Ombudsman as one of three alternative avenues for challenging administrative actions of the state, the other two being courts and tribunals.

The media can and already does play a critical role in educating both the state and potential complainants. One of my dreams though is the arrival of the day when the media will give equal attention to the bread and butter matters that occupy 90% of our time as it gives to matters involving executive ethics, tender irregularities, corruption and matters that generally involve high personal stakes in the world of politics.

You will note in our newsletter that we try to give such balance. For example the lead stories in our newsletter involve a young man we helped after his life had come to a standstill for five years as he waited for the Department of Home Affairs to resolve a duplicate ID or shared

problem that appeared in the Department's system. Another involves a mother we helped after being robbed of a SASSA grant through corruption that cut across SASSA, the Department of Health and the Department of Home Affairs.

Our newsletter also mentions a young person we helped after being robbed of an opportunity to earn an income and skills in a provincial Department of Health while her contract and salary went to a ghost worker. We also talk about a community that had no birth certificates and IDs for years until my office teamed with the Department of Home Affairs to address the problem in response to a frustrated NGO that had been trying to get help for years.

One of the matters covered in our own internal newsletter involves an investigation that had a systemic impact of transforming the medical waste management system of a whole region in one of the provinces.

I'm not in any way regretting or diminishing the importance of the matters you cover. Those too help my office to play its role in supporting and strengthening democracy. Many of the cases that my office has investigated involving violations of the executive Members Ethics Act and tender irregularities originated from media stories. Even some of our own investigations on service failure originated from media exposes. Examples in this regard include Dipaleseng(Balfour) and some of the investigations we have done in response to schools without infrastructure and service failure
The other aspect on which we will really appreciate the assistance of the media is that of the enforcement of our remedial action.

As indicated earlier, the Public Protector or Ombudsman relies primarily on moral suasion to make the state do what is right. The media is crucial in this regard. Public education and the promotion of stakeholder relations also benefited immensely from the role of the media in covering the activities of my office.

Ladies and gentlemen;

I will say without fear of contradiction that my office enjoys good and mutually beneficial relations with the media.

Of course, you will experience a minor misunderstanding once in a while but it is always nothing that cannot be resolved in a small meeting. We have previously sat with the Mail and Guardian, the City Press and recently The New Age to iron out issues and have never looked back.

Good relations do not mean that you don't oversee my work and criticize where you deem fit. Fair criticism is always welcome as it encourages growth from my office and helps us to maintain our integrity.

We will accordingly continue to engage with the media through stakeholder consultations, quarterly media briefings and collaborations with bodies such as the National Press Club. We are also considering quarterly courtesy visits to newsrooms to learn how you do your jobs, build contacts and further strengthen relations.

As I draw towards my conclusion, Chairperson, I wish to underline that my office's key role in supporting and strengthening constitutional democracy is through mediating power between the state and the people and reconciling the state with its people.

This is achieved through two-pronged approach. We resolve each complaint promptly and ensure remedial action in deserving cases. We also take systemic measures to help the state to

improve its systems so that it gets things right most of the time and recurrence is prevented. This we regard as our key role in promoting good governance. We also seek to ensure that when service fails, there's prompt accountability in organs of state without people having to resort to my office or the courts.

As indicated earlier my office's role in holding the state accountable goes beyond assessing the lawfulness of the conduct of organs of state or state actors and incorporates ensuring that conduct in question was proper. An inquiry into propriety includes considerations of lawfulness, fairness, reasonableness and other dimensions of good administration and good governance. The standard is higher than when you expect from a person on the street. In conclusion, I would like to emphasise the point that for us to do our bit towards the ideal of a strong constitutional democracy, a partnership with a free media is of paramount importance.

Let us work together to ensure an accountable and responsive state that conducts its affairs with the highest level of integrity while upholding the rule of law and human rights.

Thank you.

**Adv TN Madonsela
Public Protector of the Republic of South Africa**