



**Address by Public Protector Adv Thuli Madonsela at the International
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SESSIONC: HOLDING LEADERS TO ACCOUNT

***The Ombudsman's Role in Promoting Ethical Governance and
Integrity in the Public Sector: Lessons from the Public Protector South
Africa***

Greetings from South Africa, a beautiful country at the southern tip of the African continent with a national population of about 52 million people, 11 official languages, a constitutional democracy that has been in place for about 18 years and an Ombudsman (Public Protector) that has been operational for 16 years.

I am delighted and honoured to engage you on the important theme of ***“Holding Leaders to Account”*** as part of the broader theme for this conference, which is Speaking Truth to Power. My specific input focuses on ***“The Ombudsman's Role in Promoting Ethical Governance and Integrity in the Public Sector: Lessons from the Public Protector South Africa”***

The modern Ombudsman institution is an important pillar of constitutional democracy with enormous potential for promoting ethical governance and optimising public accountability through enhancing people's voices and the state's conscience. As global leaders battle to come to terms with increasing and often violent people's demands for listening, responsive and accountable states, a credible Ombudsman office is one of the pillars of democracy that can add value in the quest for public confidence in democratic institutions.

The Ombudsman office can also make a significant contribution towards ensuring that the use of state power and resources is always informed by public interest and fairness thus contributing to the protection and promotion of human rights and ultimately, peace and stability.

When the Ombudsman was conceived and eventually established in South Africa under the name Public Protector, the vision was primarily to provide a mechanism for swift justice for ordinary people to exact accountability for administrative wrongs in state affairs. There was also a conscious understanding that the office would play a central role in promoting ethical governance and combating corruption.

The paper provides a brief account of the place of the Public Protector in South Africa's constitutional democracy, the role that this office has played in enforcing public accountability, particularly in the area of executive ethics and the challenges faced in this regard, including the proposed Protection of State Information Bill. The story is told through case studies, where appropriate.

During the Constitution certification judgement, the Constitutional Court was called upon to determine if the Constitutional provisions on the Public Protector adequately captured the spirit of Constitutional Principle XXIX. Constitutional Principle XXIX provides for the independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector which shall be safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

The Constitutional Court found these to be inadequate and ordered amendments to improve safeguards. The Constitutional Court's reasoning is revealed in the following extract from the Certification Judgement:

"The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The Office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing removal of the Public Protector from office do not meet the standard demanded by Constitutional Principle XXIX."

The provisions were subsequently amended and approved by the Constitutional Court. As it stands, the Public Protector is appointed at the level of a Supreme Court of Appeal Judge. The procedure includes public nominations and an open parliamentary selection process culminating in a 60 % vote in Parliament and an administrative appointment by the President. The removal process is similar to judicial impeachment and requires a two thirds majority in Parliament.

Mandate of the Public Protector

The Public Protector is established under section 181 of the Constitution of the Republic of South Africa with powers defined under section 182 of the Constitution. The Constitutional mandate of the Public Protector is to strengthen constitutional democracy through investigating any conduct in state affairs 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 gives a broad mandate which has been interpreted to incorporate oversight over service failure and conduct failure. This primarily incorporates exacting public accountability with regard administrative justice, ethical conduct and control over state resources.

In a provision that may be interpreted as entrenching the right to access to the services of the Public Protector, section 182(4) of the Constitution provides that:

"The Public Protector must be accessible to all persons and communities."

The Constitution anticipates mandate expansion through legislation, with section 182(5) stating that:

"The Public Protector has additional power as regulated by legislation."

Sixteen years on, the Public Protector has made an impact in helping the people of South Africa exact public accountability, particularly regarding administrative justice, ethical governance and stewardship over state resources.

There are sixteen statutes that have since been passed and which either recognise the inherent constitutional jurisdiction of the office or expressly accord additional power to it. Key among these is the Public Protector Act 23 of 1994 (PPA). The PPA primarily sees the Public Protector's role as being that of investigating and redressing maladministration, incorporating abuse of power, abuse of state resources and corruption. The Act expands the oversight powers to include resolving administrative disputes through Appropriate Dispute Resolution measures such as conciliation, mediation, negotiation and any other means deemed appropriate by the Public Protector.

Indeed most complaints or matters before the Public Protector are resolved through ADR. For example in the fiscal year 2011/12, 20 000 cases were received while about 6 000 had been carried over from the previous year. Only 15 of the 16 000 cases that were resolved during this period resulted in formal reports while more than 50% of the over 16 000 concluded complaints culminated in adverse findings against organs of state involved.

Administrative Justice

Most of the cases investigated or resolved through ADR under the Public Protector Act involve administrative justice. Pitched at the level of the ideal complainant referred to as Gogo Dlamini (Grandma Dlamini), administrative justice matters involving bread and butter matters such as social services, including welfare grants and other socio-economic rights, are given priority. We have two investigation branches dedicated to service failure with one called Early Resolution dedicated to fast-tracked case resolution through ADR and another called Service Delivery which focuses on complex, including system service failure investigations.

One of the complex service failure investigations I dealt with shortly after assuming office involved a young girl who was gang raped while still a minor and whose case was only finalised 8 years later after 48 postponements and an attempt by the prosecution to close the case on account of "insufficient evidence". The finding was that the conduct of organs of state constituting the criminal justice value chain amounted to maladministration. I further found that the maladministration had caused prejudice and that the young woman had to be compensated for disbursements and pain and suffering. This was an own initiative investigation.

Another case study is *In Breach of Good Faith*, a report that involved an employee dismissed on early retirement by the Department of Correctional Services when he should have been medically boarded. Having agreed to the deal believing he would not suffer prejudice, the complainant, soon found that he had received a raw deal. His pension benefits were calculated in a manner that caused him a huge financial loss contrary to what had been agreed. My finding was that the conduct of the Minister in question constituted maladministration, which had prejudiced the complainant. Remedial action included reinstatement and recalculation of the benefits. The Minister reacted positively to the provisional report, pointing out that it had not been her intention to prejudice the complainant and accepting both findings and remedial action wholesale. In the end, the complainant was reinstated. He was further paid full benefits, including a conciliatory compensation to his estate.

A systemic investigation we are currently conducting into a social housing scheme referred to as Reconstruction and Development (RDP) Housing, combines bread and butter matters with a complex investigation into administrative maladies that include integrity violations such as irregular contracting, false billing and corruption.

It is important to note that the view taken by the Public Protector SA team on integrity is that it transcends honesty in dealing with money and incorporates treating people appropriately. The remedies are informed by an attempt to place the complainant as close as possible to where she or he would have been had the state acted properly.

Five of the remaining 16 statutes are considered key to the core mandate of the Public Protector. Among these is the *Executive Members' Ethics Act of 1998* (EMEA), to which I will return shortly. The others are the following:

- The *Protected Disclosures Act of 2000* (PDA), which assigns the Public Protector and the Auditor General as safe harbours, so to speak, for whistle-blowers wishing to report suspected wrongdoing.
- The *Prevention and Combating of Corrupt Activities Act of 2004* recognises the inherent jurisdiction of the Public Protector as incorporating investigating allegations of corrupt activities. This mandate is shared with other integrity bodies, which include the Public Service Commission and the Hawks.
- The Housing Consumers Protection Measures Act specifically authorises the Public Protector to review decisions of the Home Builders Registration Council. It's worth noting that this mandate is clearly quasi-judicial and not investigative.
- The *Promotion of Access to Information Act of 2000* (PAIA) recognises the Public Protector as one of current information regulators responsible for resolving disputes regarding access to information within organs of state. Parliament is in the process of finalising legislation establishing a single information regulator.

Other laws, including the National Environmental Act (NEMA), Promotion of Equality and Prevention of Unfair Discrimination Act and the National Energy Act also recognise the transversal jurisdiction of the Public Protector and related investigative powers.

Fostering Good Stewardship over Public Resources

An increasing number of investigations conducted by my office deal with abuse of state resources, abuse of power and corruption.

A number of these have dealt with state contracting practices. Should you be interested, you may visit our website and view the cases, which include *Against the Rules*, *Against the Rules Too*, *It Can't be Right: Self Interest in the Midvaal*, *Touting for Donations* and *On the Point of Tenders*. The systemic issues dealt with include irregular issuing of state contracts, overpricing, false and double billing. The reports titled *Self Interest in the Midvaal* and *Touting for Donations* further deal with ethical issues such as conflict of interest and using state or entrusted power for personal gratification.

Enforcing Executive Ethics

A key instrument that has informed my office's work with regard to holding leaders accountable, particularly in the area of ethical conduct is the EMEA. The Public Protector is the sole agency for enforcing the EMEA, which is the only legislation where members of the public do not have direct access to the Public Protector. Only members of Parliament and provincial legislatures, the President and Premiers in provinces may approach the Public Protector to request an investigation under the EMEA.

Since the coming into operation of the EMEA in 1998, the Public Protector has handled more

than a dozen cases involving allegations of violations of the EMEA. Such cases have included the conduct of the President, Deputy Presidents, Premiers, Deputy Ministers, and Members of Provincial Executive Councils (MECs). Issues dealt with have included the following:

- **Conflict of Interest:** Former Deputy President, Two Ministers and one MEC
- **Financial Disclosures:** Current President and One Minister
- **Corruption Allegations:** Deputy President's Spouse
- **Tender Irregularities:** Two Premiers
- **Abuse of Power:** One Premier and an MEC
- **Abuse of Executive Privileges:** Various Ministers and the current President.

Again specific reports are available on our website at www.publicproter.org

Challenges

Expeditious access to information

A dialogue that recently gripped the South African nation as Parliament reviewed various drafts of a proposed Protection of State Information Act, highlighted the importance of free flow of information in the quest for clean governance, including ethical conduct of members of the Executive. Key concerns, including from the Public Protector Team and others, mainly civil society, focused on the possibility of further restrictions on access to important information during investigations, particularly those dealing with alleged integrity violations, including corruption. Key concerns related to access to classified information, classification of information and criminal provisions attached to possession and publication of classified information. The Bill has since been amended extensively, although there are still areas of concern.

But there already are problems with access to information. For example, my office often battles to get information during investigations, particularly those relating to ethical or integrity violations. This is despite extensive information sourcing powers that include subpoena powers against any person in the republic, search and seizure and contempt of the Public Protector orders. Certain organs of state initially resist requests for information. In a few instances, security legislation is used as an excuse. We have resolved to issue rules under the Public Protector Act to remedy this situation. The rules include time lines for compliance with requests and red-carding circumstances.

Implementation of Remedial action

The implementation of remedial action is a challenge in respect of a few of the investigations. The offenders are a few that we see as stuck in a "Before the Constitution" paradigm. While the majority of public authorities accept findings and implement remedial action without question, a few resist. I am not concerned about those that reject the findings and take me on review as that is in line with the rule of law and constitutionalism. Those that concern me are those that simply do not implement or drag their feet when it comes to implementation. Some of these are often heard saying, the Public Protector is "not a court of law". But it certainly is "not a gate to nowhere".

The Deputy Minister of Justice, Mr Andries Nel, reminded us during the 2012 annual Good Governance Conference that the current national Governing Party never meant for the Public Protector to be "a gate to nowhere" when it conceived this institution as an important pillar of democracy. Moaning the amnesia that appears to have gripped some, he quoted the following

paragraph from his party, the African National Congress' publication, just before the dawn of democracy:

*"The ANC proposes that a full-time independent office of the Ombud should be created, **with wide powers** to investigate complaints against members of the public service and other holders of public office and **to investigate allegations of corruption, abuse of their powers, rudeness and maladministration**. The Ombud shall have **power to provide adequate remedies**. He shall be appointed by and answerable to parliament."* (Ready to Govern, 1992)

In conduct failure investigations, the immediate damage caused by ignoring remedial action includes the perception of impunity and consequent weakened public trust. Organs of state also miss the opportunity to arrest systemic administrative deficiencies that enabled the maladministration in question thus opening their systems up to a possible recurrence or even a deterioration of the fault lines in question.

The Backlash

When I took office, my predecessors advised me about the perils of making adverse findings against senior persons in government. But nothing really prepared me for some of the things I have since encountered. I had been told that the worse that could happen would be someone ignoring you at the VIP Lounge or your name disappearing from invitation lists to public events.

I must hasten to indicate that the overwhelming majority of key public figures I've made adverse findings against accept their fate ethically. Some, including the President and two Ministers have been the first to admit they crossed the line. The Deputy President went a step further to refer his own case to my office.

I see the backlash as a Naked Emperor paradigm. A few parochial leaders prefer that my office looks the other way and pretends there are no problems. If I did so public confidence in my office and subsequently democratic processes would be eroded and something similar to the Arab spring could be our fate.

Some of the parochial minded leaders have decided to retaliate by trying to foster a perception that my office is not above reproach and accordingly has no right to judge others. A journalist told me, not so long ago, that a member of Parliament informed him that their quest is to get the Public Protector to focus on governance in her office and stop pretending there are no problems. Here in lies the problem. Firstly, my office has an outward mandate and corporate governance is meant to be an enabler rather than the office's focus. Secondly, how would this MP know there are problems if he was not meddling and prejudging. This is not to say that my office is not answerable for its own governance and administrative arrangements. No person or office is above the law or the dictates of accountability for entrusted power.

In my dialogue opportunities with those entrusted with public power, I always highlight the fact that my office would be a foe rather than a friend if it let those who exercise entrusted power think they were on the right track while they were actually headed for a cliff. As an institution we have modeled our work against a traditional institution among the Vha-Venda traditional community known as the *Makhadzi*. The *Makhadzi* who is an aunt, is a highly respected non-political figure who serves as a buffer between the king and the people. She enhances the voice of the people while serving as the king's eyes, ears and conscience.

A young lady I met during one of my keynote addresses compared my office to Prophet Nathan.

She opined that sustained value add by my office required that it continues to be the kind of friend and advisor that Prophet Nathan was to King David. Some of you may recall that Nathan is the Prophet who told King David about the excesses of a rich and powerful man who had taken from a poor and destitute neighbor. When King David asked who the evil man was, making it clear that such man needed to be held to account, Prophet Nathan bravely told him *"It is you My Lord"*. That is what an effective Ombudsman ought to do. The "Naked Emperor" paradigm is not an option for a credible Ombudsman or good governance.

But the biggest backlash problem my office has faced to date is something I would like to compare to the movie *300*. That's not because our staff compliment is about three hundred. It is the parallels in terms of strength, betrayal and motivation for betrayal that fascinate me. In *300*, King Leonidas of Sparta deploys 300 of his most courageous and skilled warriors to stop the ambitious King Xerxes of Persia's invasion with an army that is said to have boasted over 10 000 men. They use strategy to gain advantage over numbers by confining the battle to the mountain pass of Thermopylae, the only way to reach Sparta by land. Through skill and courage they successfully defend the pass until a hunchbacked local shepherd, Ephialtes, defects and advises the Persians about a secret goat passage leading to the back of the Spartan army. The motivation for Ephialtes is the fascinating part. He resents the fact that he was never allowed to become a warrior himself. This is his revenge.

The Future

Considering that not only is the Public Protector a novelty in the South African legal and governance landscape, the Ombudsman institution itself is a relative new comer in the global sphere, progress made by South Africa in tapping into the value adding potential of the Public Protector has been encouraging.

It was never going to be easy. From the very beginning, there was an understanding that this office was going to play a role in the transformation of the then insular South African state. The state had never been transparent or accountable. Speaking truth to power invariably incurred loss of employment, a prison term, banishment, exile or death. Former President Mandela had the following vision for the Public Protector as one of the anchors of public accountability in the new constitutional democracy.

"We were mindful from the very start of the importance of accountability to democracy. Our experience had made us acutely aware of the possible dangers of a government that is neither transparent nor accountable. To this end our Constitution contains several mechanisms to ensure that government will not be part of the problem; but part of the solution.

Public awareness and participation in maintaining efficiency in government within the context of human rights are vital to making a reality of democracy. Many South Africans can still recall a time when the face of the Public Service was hostile, and a complaint could lead to victimization or harassment; when access to justice seemed an unrealistic dream. In the new South Africa the face of the Public Service is changing radically.

However, we are not yet out of the woods; much still needs to be done in terms of transformation. In this sense, therefore, our Public Protector's Office is not only a critical instrument for good governance. It also occupies a central place in the transformation of the public service by, among other means, rooting out the arrogance, secrecy and corruption so rampant during the apartheid years."

Constitutional provisions on the vision of society, people's fundamental rights, the character of the state and public accountability mechanisms have made the journey easier. The Constitution makes it clear that South Africa wants to be an inclusive society based on human solidarity, social justice and equal enjoyment of entrenched fundamental rights and freedoms. Worth noting is the promise of an improved quality of life and freed potential of all. The rights include human dignity and social and economic rights such as access to housing (section 26), education (section 28) and access to health care, food and social security (section 27). The character of the state includes a state that is, transparent, democratic and founded on the rule of law and supremacy of the Constitution (Founding Values). Section 237 of the Constitution goes further to require that constitutional obligations must be implemented diligently and without delay. The Public accountability mechanisms include innovative structures such as the Public Protector, Auditor General and the Public Service Commission in addition to traditional checks and balances that include an independent judiciary and parliamentary oversight.

The right to freedom of expression, incorporating freedom of the media has been an important factor. Independence of the media has proven invaluable. The impact of my office would not have been possible without an independent, conscientious and active media. My office depends a lot on the media to facilitate the dialogue necessary for moral suasion as the hallmark of effective Ombudsmanship. Speaking truth to power means nothing without an engaged public that fosters loss of face for unethical conduct, including corruption. The media in all its forms ensures that the public remains engaged with matters of public sector governance and accountability.

It is my team's sincere belief that speaking truth to power is essential to ensuring ethical leadership which in turn is an essential element of a state that is accountable, operates with integrity at all times and is responsive to all its people. I look forward to your views and experiences.

Thank you

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