



**Address by Public Protector Adv Thuli Madonsela during the South African Revenue Service's National Legal Workshop in Durban, KwaZulu-Natal on Tuesday, September 20, 2011.**

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**Programme Director, Ms Xolisile Maduna;  
Deputy Commissioner Mr Ivan Pillay  
Judges Croome and Hussein;  
Customs Regional Operations Manager, Mr Siphon Bavuma;  
SARS staff members;  
Ladies and gentlemen;**

It is a great honour to address this workshop that brings together the legal minds that constitute the backbone of our revenue services. I've particularly appreciated the privilege of listening to the overview of the Tax Administration Bill.

I've been informed that the aim of the workshop is, among other things, to discuss pertinent operational and strategic issues with a view to enhancing service delivery.

When I perused the programme, I could not help noticing the parallels between the matters you are focusing on during the workshop and the challenges we are grappling with at Public Protector South Africa.

Indeed it is not surprising that we should be grappling with similar challenges such as good governance, automated services, legislative reform and questions on how to deal with certain types of evidence. We share a duty to investigate certain matters. Off course for the Public Protector SA, investigating is our core business whereas for the South African revenue service (SARS) collecting money is your core business and investigation is what you do when the normal revenue collection process fails.

Our Constitution is known the world over for being among those considered to be progressive. To a great extent this is because our Constitution entrenches basic human rights and freedoms for all the people of South Africa, regardless of difference or diversity.

Enshrined in Chapter 2 of this Constitution, the Bill of Rights, guarantees our people basic rights such as the right to adequate housing, healthcare, food, water, social security and education, among other things.

In the main, it is the responsibility of the state through an elected government to ensure that these constitutional guarantees are realized. However, for government to deliver on these, there must be resources and accordingly' revenue collection is essential.

This is where SARS come in. You are at the centre of our financial capacity to deliver the constitutional promises to our people. Someone once said the only two certainties in life are death and taxes. You control one of those. This places enormous power on you. As you know though, enormous power goes enormous responsibilities.

One of the challenges of exercising enormous public power is that it attracts suspicion based on the possibility of abuse. This is one of the parallels between our respective institutions. As we pursue our constitutional and legal responsibilities, there is always someone who will challenge the integrity of our intentions and processes. We cannot stop such challenges but we can reduce the possibility of such suspicions gaining ground by endeavouring to place our process beyond reproach. If our processes are seen to be proper the possibility of wrong doers gaining sympathy among reasonable people is reduced.

As you know my office has a constitutional obligation to investigate, report and take appropriate remediation in respect of all allocated or suspected improper conduct in the management of state affairs and the public administration at all levels of government.

Like yourselves, our decisions and actions have a potential for causing enormous discomfort. That invariably creates fertile ground for suspicion, regarding our motives and compliance with the legal instruments that confer the power we exercise. To maintain credibility and legitimacy, we are accordingly, constantly challenged to operate in a manner that dispels such suspicions.

Because of our status as guardians of right and wrong in our democracy, one of the key areas of possible criticism is our compliance with the principles of good governance. This includes always acting within the confines of the Constitution and the law. It also includes unwavering compliance with regulatory frameworks such as the Public Finance Management Act, procurement prescripts and human resources management prescripts.

Transparency and consistency are important dimensions of good governance. In my office, it is important that investigators always know that the same principles apply to every case and that they don't have to ask what happens now when certain people are involved.

I often say to my team, it is important to lead by example on good governance. The reality we face is that maladministration by a guardian of public principles as ourselves attracts more attention and disapproval than maladministration by ordinary institutions. We are expected to walk our own talk. I suspect that these expectations apply to you too.

Another area that I believe poses a challenge for both of us as we endeavor to place our work beyond reproach is the question of administrative justice. Among other considerations our decisions and actions have to pass the test of just administrative actions as envisaged in Section 33 of the Constitution. We must not only act but also be seen to act fairly, rationally and proportionately. Furthermore, those whose actions we sanction should be given adequate opportunity to present their side of the story.

When my office reviews actions of organs of state in terms of the public protector's constitutional powers to determine proper conduct and in terms of this office's authority to

determine maladministration under the Public Protector Act, the scrutiny transcends lawfulness and just administrative actions. Ultimately the question we ask is, does the action in question constitute good administration which really is the opposite of maladministration or bad administration.

This brings me to your role as state lawyers. I have previously complained about the lack of depth in some of the advice given to organs of state when their actions or omissions are challenged under my office's jurisdiction on proper conduct or maladministration jurisdiction. Today, you have an opportunity to review an article that highlights the shoddy advice I usually have in mind when I complain about bad advice given top administrators after my office has pronounced in terms of its powers under section 182(1)(c) of the Constitution. How do you go to criminal law when you are advising your principal on the properness of his or her administrative action? I am totally perplexed.

The global view and my office's understanding is that an investigation into proper conduct goes beyond lawfulness and covers just administrative action. It covers lawfulness, just administrative action and principles of good administration. These problems primarily arise due to the fact that the Ombudsman is a relatively new avenue for administrative justice. Established in Sweden about 202 years ago, the institution has only been part of our access to justice architecture for 15 years. However, it is still important that lawyers conduct thorough research before they advise.

I was accordingly intrigued by the comment by the speaker just before me regarding the status of the findings of the proposed Tax Ombud. The global jurisprudence that my office relies on takes the view that an administrator must implement the findings of an ombudsman unless the administrator can show that the ombudsman's findings are irrational. However, the scrutiny on the rationality of the decision cannot be undertaken by some administrator alone in some little corner. A court of law is the competent forum to test the decision of the Ombudsman for rationality. Surely that is what is envisaged under section 181(3) of the Constitution which says that the institutions established under chapter 9 are independent impartial and subject only to the Constitution and the law. This provision, I must add, is similar to the provision in Chapter 8 regarding courts.

When seized with this matter courts in different jurisdictions have generally said that the ombudsman's decision would be irrational if no reasonable ombudsman would have arrived on the same decision when faced with the same facts and circumstances. A key proponent of this view is Lord Denning a renowned English judge.

I must hasten to say that my office has never had the same challenges in its dealings with SARS lawyers. Judging by the content of this workshop and the depth you are traversing during these few days, there is no need to guess where your professionalism comes from.

Going back to the question of credibility and legitimacy, we have already established that one of the challenges for both our institutions is compliance with the principles of administrative justice and good administration. However, we also need to ensure that our actions exhibit grounding on sound values such as the values of equality, human dignity, integrity and consistency. We also need to be seen to be accountable and responsive to those we serve or deal with.

Commenting on access to justice, the late Dullar Ommah, former Minister of Justice, once pointed out that the legitimacy of courts would be strengthened if the majority of people felt that the courts were fair and embraced their human dignity, regardless of status. He said it was

important that people felt that court outcomes did not depend on who you are. Both of our institutions face the same challenge. It is important that people trust our processes to be impartial. In my office we say that we tell the truth as we see it. But finding the truth in a credible manner is as important as telling that truth.

This brings me to the issue of the possibility for collaboration between our two institutions. The first area that my office has identified is that of systems. Your systems are reputed to be among the best in the world. My office is exploring the possibility of benchmarking with your office particularly, in the area of automated case management.

We have also been exploring the possibility of approaching you for assistance in the difficult issue of investigations into abuse of funds through irregular practices such as fraud, abuse of power and corruption. You probably know that some of our investigations deal with conduct failure involving these matters. Questionable relationships usually lie at the core of irregular tenders and other financial irregularities. As you know, CIPRO records mean nothing these days.

Sophisticated ways are designed every day to channel the proceeds of inflated and improperly awarded tenders. Perhaps you could help us. Of course this has to be done within the confines of the law, including the proposed Tax Administration Bill.

You may want to ask the question, why should you help us? You work hard to get the revenue. It is therefore in your interests to ensure that public funds are spent in accordance with the law and the needs of the people. One of my office's aims is to use our power to exact accountability in the exercise of state power to claw back all public monies wasted through incompetence, abuse of power, fraud and corruption.

I'm deeply encouraged by your efforts, including the establishment of the Tax Ombud. Of course my office will retain ultimate jurisdiction on maladministration in terms of section 182 of the Constitution. However, having a sector specific Ombud makes it easier for tax payers. We have encouraged the same for the Department of Defence.

We've always seen SARS as a leader on professionalism. Off course there's always room for improvement. For us the key principles of accountability, integrity and responsiveness are the focus of our efforts not only to improve our own operations but also to promote good governance in the management of all state affairs.

I wish you success as you grapple with the strategic operational and governance issues that constitute the focus of the workshop.

Thank you.

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