



Address by Public Protector Adv. Thuli Madonsela at the dinner of the Federation of Swaziland Employers and Chamber of Commerce in Zulwini, Swaziland on Thursday, November 22, 2012

“The Role of the Public Protector in ensuring Good Governance in State Affairs – Lessons for Swaziland”

**Programme Director;
His Excellency the Deputy/Acting Prime Minister of Swaziland, Mr Themba Masuku;
His Excellency the South African High Commissioner Dr RJM Mampane;
President of the Federation of Swaziland Employers and Chamber of Commerce, Ms. Fikile Nkosi;
Vice President of the Federation responsible for Trade and Commerce, Mr. Sandile Simelane;
Chief Executive Officer of the Federation, Ms. Zodwa Mabuza;
Members of the Federation;
Members of the media;
Ladies, gentlemen and friends;**

It is a great honour and privilege to address this important gathering of the business community of Swaziland. I'm sincerely grateful to the Federation of Swaziland Employers and Chamber of Commerce for the Privilege.

Earlier on today, the deputy Prime Minister, HE Mr Themba Masuku reminded me that this country contributed immensely not only to who I became as a person. I was happy to agree with him as it is true that I spent a huge chunk of my formative years in this beautiful country. My first law degree was acquired from the University of Swaziland. It's there that I met academics such as Pat Mcfadden, Nomthetho Simelane and Thandabantu Nhlapo, who shaped my social consciousness.

As I arrived in Ezulwini I had a flashback to my first ever conference paper here, at Conference of the International Planned Parenthood Federation. Under the mentorship of Prof Thandabantu Nhlapo, who has remained a good friend, I delivered a paper on Customary Law and Women's Rights. Amazingly, the two of us ended in the same theme committee when we were appointed as part of 11 constitutional experts to help the National Assembly draft South Africa current Constitution.

I also recalled an assignment we were given by Nomthetho Simelane to explore different socio-political scenarios regarding the possible release of Nelson Mandela, who was still in prison then. Little did we know that about four years later, the possible but improbable scenario of Mandela's release would become a reality.

I am one of many South Africans that were nurtured by this country and many of whom today occupy positions of authority. Among them are some of the Sisulu children, including Zwelakhe Sisulu whom we sadly lost about a month ago. Swaziland also contributed immensely to the liberation struggle. Many of South Africa's key decision makers, including the current President, his predecessor and the current chairperson of the African Union Commission, spent some time in this country.

My dialogue with you today focuses on the Role of the Public Protector in ensuring Good Governance and lessons for Swaziland.

The Historical Foundations of the Ombudsman Institution

Incidentally the Ombudsman, which is the global name for institutions such as the Public Protector is the product of a wise king of Sweden. About two centuries ago, the King of Sweden returned to his country from a long trip to the East only to find his people angry and agitated due to excesses in the exercise of state power. This included unjust treatment of the people and abuse of public resources. The traditional checks and balances such as the courts and parliamentary accountability were there but had seemingly not stopped the excesses that the public was angry about. He immediately introduced the Ombudsman as a senior public officer to serve as a buffer between public authorities and the people.

Some historical accounts suggest that he borrowed the idea from a traditional institution in Turkey. Our own research has shown that many of the traditional cultures in South Africa had some institution that operated to curb excesses in the exercise of public power. Among these is the Makhadzi among the Venda tribal group. She is an aunt who serves as the people's voice and the Kings's ears and conscience. It is said that a wise king takes the Makhadzi's counsel seriously and mends his treatment of the people accordingly.

The people of South Africa -16 years ago- also came to the conclusion that the traditional checks and balances were not enough to ensure that the new democratic dispensation was always governed in the interest of its people and public resources deployed in accordance with the Constitution, the law and people's needs. This led to the establishment of the Public Protector.

I must mention that I have learned with great delight that you too here in Swaziland have an institution of this nature, called the Commission on Human Rights and Public Administration Integrity, and parallels can be drawn between it and the Public Protector. In fact I can say without fear of contradiction that that institution qualifies to be referred to as the Ombudsman or Public Protector. Let us talk very briefly about the Public Protector SA.

The Public Protector

Section 181 of the South African Constitution mandates the Public Protector is established to support and strengthen constitutional democracy through investigating, reporting on and redressing improper conduct in state affairs.

Section 182 gives the Public Protector the power to investigate 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, to report on that conduct and to take appropriate remedial action. In addition, the constitution's section 182(4) states that the Public Protector must be accessible to all persons and communities.

The Constitution further states that additional powers are given to the Public Protector by several pieces of legislation. These include the Public Protector Act (PPA), the Executive Members Ethics Act (EMEA), the Prevention and Combating of Corrupt Activities Act (PCCAA), the Protected Disclosures Act (PDA), the Promotion of Access to Information Act (PAIA) and Housing Protection Measures Act (HPMA).

The PPA gives the Public Protector jurisdiction over maladministration in state affairs, abuse of power and abuse of state resources. This legislation also empowers the Public Protector to resolve complaints through Alternative Dispute Resolution (ADR) mechanisms or through any other means. The EMEA on the other hand gives the Public Protector the powers to look into the conduct of the executive, including the cabinet members at both national and provincial level.

The PCCAA gives me an anti-corruption mandate while the PDA lists my office and the Auditor General, among others, as agencies where whistle-blowers can lift the lid on wrongdoing without suffering occupational detriment.

Members of the public can also approach my office to access information within the state under PAIA and, in terms of the HPMA, members of the public can request us to review the decisions of the Home Builders' Registration Council in the event they are not happy with such decisions.

The only matters that the Public Protector is barred from investigation are decisions of the courts. I also do not have jurisdiction on matters outside state affairs.

We investigate both upon receipt of complaints and on own-initiative. Once a matter is lodged with us, it is subjected to an assessment process, which seeks to ascertain jurisdiction and merit on the claims. Our Intake, Assessment and Customer Services Branch handles this task. Once jurisdiction and merit of the allegations have been confirmed, I have the discretion to decide whether to investigate or not, especially on complaints that concern actions that took place more than two years earlier.

We have divided our investigation team into three branches; namely, Early Resolution, Service Delivery and, Good Governance and Integrity. Early Resolution deals with what we call "bread and butter" matters. These are cases such as those where people are about to lose their houses or sources of income. We strive to resolve them within a shortest time possible and mainly employing ADR mechanisms. Service Delivery deals with services denied or delayed and systemic investigation that ought to go beyond just settling individual complaints by paying attention to the structural deficiencies that give rise to recurring problems. The idea is to ensure that such problems never rear their ugly heads again. Matters of integrity and governance are dealt with by our Good Governance and Integrity Branch. These include cases involving the conduct of the Executive.

Case studies

Since inception, the Public Protector has contributed to the transformation of the South African

state from an insular apartheid to one more responsive to the people's needs. Successes have been recorded in many fronts; including service delivery matters and conduct failure cases.

In a report entitled ***In Breach of Good Faith***, we dealt with 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. In the end, the complainant was reinstated. He was further paid full benefits, including a conciliatory compensation to his estate. The beauty of this story was that the Minister immediately admitted unintentional wrongdoing and offered to fix the problem.

In ***It Can't Be Right: Self Interest in Midvaal*** my report dealt with gross injustice suffered through an improper debt collecting arrangement in one of the municipalities. For small debts as little as 2-5 thousand Rands people lost their property. The worst part is that the property did not go to the municipality but was siphoned into a company co-owned by the lawyer who encouraged the donation in his capacity as the debt collector and whose duty it was to transfer the property to the municipality as its conveyance.

We are currently conducting a systemic investigation into a social housing scheme referred to as the RDP, which combines bread and butter matters with a complex investigation into administrative maladies that include integrity violations such as irregular contracting, false billing and corruption. We have compiled a report dubbed ***Voices and Views***, which just details such observations rather than findings since the investigation is still in full swing.

The ***On the Point of Tenders*** report revealed shocking details of the state failing to perform the necessary due diligence when outsourcing services to the tune of millions in taxpayers' money. It opened our eyes to the existence of companies that only exist on paper purely as vehicles for state tenders. A company that had existed as a shelf company for about 5 months and bought as a tender sourcing vehicle a month before the tender was advertised, got the tender. My concern was that there was no due diligence thus the state took a huge risk. There was also overcharging and double billing. You will also recall that on top of this the company concerned entered into contracts with contractors it was engaged to supervise as a Project Management Unit (PMU) and on the basis of those contracts, was the one doing the work and paid to do the work by the contractors that the organ of state engaged to do the work. The double billing happened in this context where both On-point and the contractors billed and were paid for the same designs.

Another report is ***Against the Rules***. This report laid bare the fact that the state, for some feeble reason, pays more than any person or entity for goods and services. The general rule is that the state is supposed to pay less through leveraging its bulk buying power. It is supposed to leverage its bulk buying power to get discounted goods. My office has since discovered that state leases for offices and domestic accommodation and construction projects are also subject to the "the state pays more syndrome". We first confirmed this during the SAPS office lease investigation that led to this report and its sequel.

I must indicate that a lion's share of our finalised cases do not result in formal reports as we rely heavily on negotiated settlements through ADR means. For example, in the fiscal year 2011/12 only 15 of the 16 000 cases that were resolved resulted in formal reports. That year we received

20 000 cases but handled 26 000 due to cases carried over from the previous year.

Lessons for Swaziland

I was excited when I was asked to draw some lessons for Swaziland because beyond my role as the Public Protector of the Republic of South Africa, I am also the General (Executive) Secretary of the African Ombudsman and Mediators Association (AOMA).

AOMA is a continental body that brings together Ombudsman institutions, such as my office, from all over Africa to support and protect the independence and development of such institutions. One of our goals is to entrench the Ombudsman institution as part of the good governance and democracy strengthening architecture of the African continent. We are already accredited by the AU and are supported in our efforts by the Department of International Relations and Cooperation (DIRCO) in South Africa. DIRCO funds the African Ombudsman Research Centre, which opened its doors with the blessing of the current South African President, Mr Jacob Zuma in April 2011.

I am also a member of the International Ombudsman Institute, which has similar goals. We have just returned from New Zealand, where we had a successful 10th World Conference of the International Ombudsman Institute, which took place in Wellington last week.

Ombudsmen from around the globe emerged from that four-yearly, week-long conference, declaring among other things that:

“Ombudsman institutions form an integral part of constitutional realities and make an important contribution to the rule of law, transparency, good governance, democracy and human rights ... The work of the work of the Ombudsman institution constitute an essential necessary element in the development of a transparent and accountable democracy.”

But what was perhaps more reassuring was when delegates resolved that:

“It is an expression of democratic maturity and the rule of law that government and parliamentary majorities shall allow criticism voiced by independent Ombudsman institutions. As a consequence, an Ombudsman diligently fulfilling his or her mandate shall not be subject to any form of physical, mental or unjustified coercion.”

As the institution of the ombudsman continues to evolve, it was interesting and enlightening to be exposed to the insights and experiences of my peers from around the globe, especially in so far as upholding the rule of law, promoting human rights and ensuring good governance in the affairs of the state. The conference reminded us of the mammoth task that rest on our shoulders as Ombudsmen.

In order for institutions such as my office to function effectively in fulfilment of their constitutional mandates, a lot needs to happen.

First and foremost, support from the state is a non-negotiable. In fact, for the Public Protector, section 181(3) of the Constitution calls on organs of state to ***“assist and protect these institutions [such as the Public Protector] to ensure the independence, impartiality, dignity and effectiveness of these institutions”***.

It is of paramount importance that the state realises that we are not a foe, but more of the

opposite because our efforts ensure that there is public confidence in the government. This is because we save the state millions of rand that would have otherwise went to swell the pockets of some in society; we restore the dignity of distressed members of the public and prevent recurrences of systemic problems.

Non-compliance with investigations and non-implementation of remedial action needs to be things of the past. We investigate in a very transparent manner. Once we reach the final stages of an investigation, we furnish the people against whom we are considering making adverse findings with a provisional report so that they can point us towards factual inaccuracies, if any. To an extent possible and where there is merit, we incorporate representations made during this process into the report. It therefore makes no sense that at a later stage people refuse to implement, citing things such as unfairness. We have been quite vocal in saying that where people are of the view that our findings are irrational, they should not just decide among themselves that they are not implementing, they should rather take us on review because failing to implement and not taking me to court is tantamount to being in contempt of the Public Protector.

Though through our own outreach activities, we do have educational programmes tailor-made for state actors, we are of the view that officials, particularly, state law advisers, need to make an effort to understand the mandate of these institutions. In responding to our queries or findings, the default position for state law advisers and political principals alike should not be to defend the indefensible. Engage the issues we raise and take criticism constructively. It will make you a better leader.

The state needs to realise the value-add of these institutions to the work-in-progress that is democracy and fund them accordingly. There needs to be political will on this front to invest in such institution because, if truth be told, they assist government live up to expectations. Their successes are the successes of government.

More than anything leaders in government need to say what they mean and mean what they say on issues of good governance and the rule of law. From AOMA we are determined to work with the AU to position the Ombudsman institution among the pillars of good governance, peace and democracy in the continent. Through administrative justice, they will invariably contribute to human rights, even those not established specifically for human rights.

For the institutions themselves to succeed they must speak truth to power. They must be fair, swift and firm. Partnership at all levels of society is also important. I am accordingly encouraged by what i see today where business takes an interest in public accountability and good governance and the state responds positively. The people in general and the media are equally indispensable.

Let us all play our respective roles to ensure states that are accountable, that operate with the highest order of integrity and that are responsive to the needs of all their citizens and residents.

Adv Thuli Madonsela

Public Protector South Africa