



**Address by Public Protector Adv. Thuli Madonsela at the second Daily Maverick Gathering Conference held on 23 November 2012 at the Victory Theatre, Johannesburg**

**Programme Director;  
Daily Maverick CEO, Mr Styli Charalambous  
Daily Maverick Editor; Mr Branko Brkic  
The panel and team that organised “The Gathering”  
Peers and leaders  
Ladies and gentlemen;**

I particularly wish to congratulate the Daily Maverick for creating and extending this valuable platform to our national dialogue. With the essence of democracy being dialogue, platforms of this nature are essential for facilitating dialogue on matters of national importance. My only regret is that, due to the fact that I was travelling from an engagement outside the country, I was not able to witness and participate in the rest of today’s dialogue. I have noted though that it has been a worthy and rewarding exercise.

My brief dialogue with you will focus on the state of governance in our nation. This is the only area my office is fully competent to comment on as it speaks to the core of the constitutional mandate and purpose of the Public Protector.

**Our Role as the Public Protector**

The Public Protector is a constitutional office specifically established to speak truth to power. We do so by helping the people exact accountability in the exercise of state power by those entrusted with such power. My comments on the state of governance in the public sector are based on experiences of my office in pursuit of this constitutionally entrenched purpose.

I have just returned from a conference where fellow Public Protectors or Ombudsmen which is the common name for an office such as mine, were gathered for the 10th Conference of the International Ombudsman Institute (IOI) under the theme “*Speaking Truth to Power*”. The IOI is the premier umbrella body for Ombudsmen/Public Protectors across the globe. It was empowering to be in a gathering where speaker after speaker affirmed that the key purpose of the Public Protector/Ombudsman is to speak truth to power. While in our country there seems to be a few who treat the phrase “*Speaking Truth to Power*” as a swear word, in reality, speaking truth to power is an act of true friendship. An integrity oversight body that tells public authorities they are on the right track when they are headed for a cliff is not an act of true friendship.

Oversight bodies would be telling lies to those who exercise state power if they said things are okay while those in power were systematically treating people badly, abusing power and state resources.

Speaking Truth to Power was at the core of the establishment of the first Ombudsman by the King of Sweden about two centuries ago. On return from a long overseas trip to the middle-east the King returned to find his people frustrated and angry over excesses in the exercise of state power. He realised that traditional checks and balances such as courts and parliamentary accountability had not been enough to curb excesses in the exercise of state power, including control over public resources. He immediately introduced the Ombudsman meant to be a very senior public officer serving as a buffer between the people and the mighty state with a view to augmenting checks and balances to curb excesses in the exercise of state power. It is important to note that political stability was at the core of the king's move.

Our research has revealed that having an informal institution of power is not a foreign concept to our part of the world. Within traditional communities, there were buffer institutions that spoke truth to power. Among those was the *Makhadzi* within the Venda community in this country. Typically an aunt within the royal family, the *Makhadzi* has historically served as the voice of the people and the ears and conscience of the king. That is the essence of the Public Protector/Ombudsman. It is to amplify the voices of the people while stretching the ears and conscience of the state. If the *Makhadzi* were to tell lies to the king, instability would ensue as excesses in the exercise of public power would remain undetected and unattended to.

### **What exactly do we do as the Public Protector?**

Established under section 181 of the South African Constitution 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. Let us note that the Constitution says "*take appropriate remedial action*". As the Public Protector Team we maintain the view that the constitution expects effective remedies from the Public Protector and not a gate to nowhere.

It may interest you to note that our view is supported by historical documents leading to the establishment of the office. Including the Certification Judgement, in which the Constitutional Court was called upon to confirm the adequacy of provisions in the draft constitution, including those relating to the Public Protector.

The constitution's section 182(4) states that the Public Protector must be accessible to all persons and communities. We believe this gives people a right to the services of the public protector as an alternative forum for redressing administrative injustices of the state and other administrative wrongs, including integrity violations regarding control over state resources and opportunities.

The Constitution anticipates amplification or extension of the powers of the Public Protector through legislation. Indeed over the last 17 years, several statutes have added additional powers and roles to the constitutional mandate. Key among these is the Public Protector Act that affirms the constitutional mandate to investigate and also adds the power to resolve

administrative disputes in the public sector through Appropriate Dispute Resolution (ADR) Measures such as conciliation, mediation and negotiation.

The Office is further assigned by the Executive Members' Ethics Act (EMEA) as the sole agency for the enforcement of the Executive Ethics Code. Incidentally, there is a growing worrying tendency to immediately assign another body to investigate an alleged Executive Ethics Code violation despite the provisions of the Act. Interestingly, the Auditor-General, who is not an investigating office, is increasingly approached as soon as a matter has been reported to the Public Protector under the EMEA. This causes unnecessary duplication and has a potential of setting the integrity oversight bodies against each other. My team and I have decided to engage our counterparts as part of our quest to strengthen synergies among integrity oversight bodies in pursuit of stronger checks and balances to promote good governance.

The Public Protector is recognised as one of the bodies that may investigate and refer for prosecution, alleged corrupt practices in the public sector under the Prevention and Combating of Corrupt Activities Act (PCCAA). It is a safe harbour for whistle-blowers under the Protected Disclosures Act (PDA) and currently serves as one of the information regulators under the Promotion of Access to Information Act (PAIA). The office has a unique review mandate under the Housing Protection Measures Act (HPMA), an act that mandates the Public Protector to review the decisions of the National Home Builders Registration Council (NHBRC). It is an alternative forum under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the office's transversal investigative powers are recognised by various other laws, including the National Environmental Management Act (NEMA) and the National Archives Act.

### **How do we Approach our Mandate**

Our approach to the mandate is simple. We ask: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened and if so, does that discrepancy amount to maladministration? If the answer on maladministration is affirmative we then ask what should we do about it, in other words how do we remedy the wrong.

Our approach to remedies is a two-pronged one involving fixing the injustice at hand if we found one and fixing the system to prevent a recurrence. It is important to us that those that opt for the Public Protector to vindicate their rights or exact accountability regarding control over state resources are not misled into a gate to nowhere. Accordingly, when a rape victim who had been gang-raped as a minor at 14 was sent from pillar to post with her case postponed 48 times over a period of 8 years, my finding was that the organs of state involved in the justice system were responsible for maladministration. The next question was what then? I decided that she had to be compensated for both disbursements and general damages relating to pain and suffering.

Where wrong doing relates to conduct failure, including integrity violations such as unethical conduct or corrupt practices, it is important to us that there is no impunity. We also seek to help public authorities identify and remedy systemic administrative deficiencies that enable maladministration and related injustices.

Our approach incorporates constant organisational change in pursuit of organisational excellence anchored in our quest to be a purpose driven organisation. The idea is for every person to experience the *Public Protector Way* regardless of whom they interact with and what part of our office.

Our observations regarding the state of good governance in our nation derive from investigations we have conducted over the years. From these we can tell that our nation is in trouble with regard to good governance and consequently democracy. I must say upfront that the worrying trends have implications for peace and stability in our country. We are competent to observe in this regard as our very existence as an office was conceived as a measure to strengthen constitutional democracy through public accountability.

I have chosen to engage you on worrying trends in

- Administrative Injustices in the Course of Service to individuals
- Service Failure Affecting Groups and Communities
- Integrity Violations Relating to Corruption
- Ethical Violations by Members of The Executive
- General Concerns Regarding State Responsiveness

I will end by talking briefly about where to from here and in the context making observations on what is right within current trends.

### **Administrative Injustices in the Course of Public Services to Individuals**

The Public Protector received 20 000 and resolved 16 000 cases in the year ended on 31 March 2012. The majority of alleged excesses in the exercise of state power in these cases involved unfair or unjust treatment of individuals seeking service from organs of state. We resolved most of these through ADR with the majority of complaints/allegations upheld. Most of the allegations related to delays and irregularities in the processing of cases in the justice system; social security benefits such as government pensions, Worker's Compensation and Unemployment Insurance Fund benefits; Documents sought from the Department of Home Affairs; and administration of estates by the Master's Office. Local government service failures, particularly relating to billing disputes also consistently top the list. Social housing, particularly what is referred to as RDP housing, has elicited a lot of complaints. During the Public Hearings that formed part of our Stakeholder Dialogue for 2012, Gauteng alone yielded nearly 2000 RDP complaints. Low rental social housing, including a model called rent to buy has also become a source of many complaints.

My specific concern is that the state seems to be oblivious to the cost of indifference and arrogance in the interface between the people and front line service providers in the public services.

Case studies from the service failure front include the perilous journey of the child who was gang-raped and only got justice 8 years later and even then after the intervention of the *Sowetan* Newspaper and NGOs focusing on gender based violence and children's rights. Today she is an illiterate unemployed mother of two. You will agree with me that she was failed as a child, a woman and a human being. There is also the young man who fought to get an ID for over 5 years and ended up losing a university scholarship and matric results in the process. He only got his matric results 7 years later and now has to rebuild his life. That again is the cost of indifference. Our records have many more similar costs of maladministration. All of this happens in the context of a country that has committed itself to half poverty by 2015 as part of its Millennium Development Goals.

## **Service Failure Affecting Groups and Communities**

Service failure matters affecting groups and communities are at the core of many sporadic protests in our country. Most of these relate to local government performance inadequacies. We are currently conducting a systemic investigation into social housing. Other key service failure that should concern us regarding the state of governance in our nation relate to infrastructural concerns. Every province has recorded community complaints regarding infrastructural services such as clean and accessible drinking water, sanitation facilities and electricity.

Lack of access roads issue is a major concern for rural communities. In parts of KwaZulu-Natal, Northern Cape and Eastern Cape there are rural areas where learners have “No School Days” due to bad roads and lack of bridges. During the 2012 Stakeholder Dialogue we were told that on rainy days rural children have to choose between risking death by drowning and staying at home until the rains and river flooding have subsided. We were told that some of the children who took the risk died. You will agree with me that this can't be right.

Other infrastructural challenges that have been reported to my office include lack of school infrastructure characterised by maladies such as mud schools, shared class rooms and lack of infrastructure for science and technology studies. Health care services, including lack of medicines, have also been highlighted. Another concern raised relates to communities defined as poverty nodes yet no development has taken place for more than five and up to 10 years. Of concern to my team is the state's listening ability. When some of the leaders within the state are informed about these concerns they blame it on whiners informed by political infighting.

## **Integrity Violations Relating to Corruption**

It is common cause that my office has uncovered worrying trends regarding integrity violations in the control of state resources and opportunities. The state procurement system has emerged as a key source of concern in this regard. Debt collection by the state emerged as a concern in one municipality in this province. Regarding the state procurement system, you will recall the *Against the Rules* reports that alerted us to systematic ignoring of tender regulations regarding open, fair and competitive bidding and to overpricing. *On the Point of Tenders*, a report I released more recently alerted us to more worrying state contract practices. Key among these was the award of contracts to shelf companies with no track record or functionality. We were also alerted to overbilling and false billing.

*It Can't be Right* alerted us to ruthless debt collection by a municipality in a scheme that involved the encouraging of state debtors with miniscule debts to donate their priced property to settle those debts. In the end the state never got the property as the conveyance process was not concluded by the municipality's lawyer who also happened to be the debt collector, auctioneer and conveyance.

The response of the state to my office's revelations has been extremely positive. Already measures have been implemented by Treasury to address the fault lines. Action has also been taken against relevant persons.

## **Ethical Violations by Members of the Executive**

The reports issued by my office from the time of the founding Public Protector Advocate Baqwa to date have primarily dealt with the issue of conflict of interest and the appropriate use of benefits such as hotel and travelling privileges.

Most of you should be familiar with *In the Extreme* which dealt with excesses in the use of ministerial privileges relating to hotel accommodation and travelling. We have also dealt with a number of cases which have helped us advise government on understanding and managing conflict of interest, particularly as envisaged under section 96 of the Constitution.

### **General Concerns Regarding State Responsiveness**

Our interaction with the public has revealed that communities are increasingly frustrated and even angry not only over systemic service failure but also what is seen as lack of responsiveness from the state. One call that keeps being made during our stakeholder dialogues is the need for a listening state. An attitude that says the complainant is always wrong is neither right nor sustainable. I can say without fear of contradiction that *Batho Pele* principles are not institutionalised in the governance systems within the state. The same applies to administrative justice considerations. If it were so people seeking service would not be routinely treated as beggars in some of the states' service points.

This brings me to the role of integrity oversight institutions such as my office. These are some of the mirrors the state has. They should not tell lies to those in power nor be expected to do so. They should be expected and encouraged to speak truth to power. That is what a good mirror does. This presents an opportunity for organs of state to mend their ways and thus gain public trust.

Systemic service failure combined with indifference when the people complain erodes public confidence in institutions of governance and ultimately democracy. Failure to cooperate with, including failure to implement the findings of integrity bodies such as the Public Protector and the Auditor-General also risks eroding public confidence in these institutions and again in democratic processes. Earlier on I mentioned that democracy is an ongoing dialogue. When channels of dialogue are perceived to be blocked or ineffective, the people seek alternatives such as has been seen in the Arab Spring. Again when integrity institutions tell lies to those entrusted with public power public confidence is eroded opening the door to possibilities such as the Arab Spring.

### **Where to from Here**

I do not believe we are at the point of the Arab Spring. However, our public sector governance is in trouble. We need ethical leadership to raise the bar regarding integrity in public sector service delivery. Integrity applies with respect to both the manner in which people are treated and control over public resources and opportunities is exercised.

The answers lie within the state itself. There are many centres of service excellence and clean administration within the state. These should be studied and emulated. With regard optimal value add by integrity institutions, particularly those established under the Constitution, these institutions must consistently speak truth to power without fear or favour. They should not tell lies to those in power nor be expected to do so. When they hold the mirror to organs of state regarding wrongdoing, the right response is to use that feedback to advance good governance rather than vilifying the integrity institutions. Else I have said that to ensure integrity within state affairs, government must say what it means and mean what it says. If this happens there would be no challenges regarding the implementation of my office's findings and those of other integrity agencies. We would also not have these offices vilified in retaliation to adverse findings.

Civil society has a major role in ensuring good governance and thus deepening and strengthening democracy. Events such as today promote dialogue which is the essence of democracy. They specifically foster engaged citizenship, which is essential for public accountability. This is possible through constitutionally entrenched freedom of expression, including freedom of the media. The combination of an engaged and fair media with an engaged citizen is important for public accountability, the promotion of good governance and the consolidation of democracy.

In conclusion, let us accept that there are very real concerns that we must address urgently though to avoid further wrong turns in public governance that have a potential to undermine good governance, democracy and consequently, peace and stability. Let us all continue to play our part in promoting effective public accountability, integrity and responsiveness and as former President Nelson Mandela stated at the IOI workshop in 1996, *“We are mindful from the very start of the importance of accountability to democracy, our experience has 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”*.

**Adv Thuli Madonsela**

**Public Protector of the Republic of South Africa**