



**Address by Public Protector Adv. Thuli Madonsela during the South African Women Lawyers Association's (SAWLA) Community Outreach event in Kwa Mzizi, Bizana in the Eastern Cape on Wednesday, 24 September 2014**

***“Overcoming the barriers- Access to justice by women and for women”***

**Programme Director;**

**Hon Judge Buyiswa Majikiba**

**Deputy President and the entire leadership of SAWLA Eastern Cape;**

**Councillor Mafumbatha and community leadership of KwaMzizi Administrative area in Mbizana;**

**SAWLA Elder, Ms Nosidima Ndlovu**

**Members of SAWLA and the public at large;**

Happy National Heritage Day to you all!

It is a privilege to address you today on avenues for access to justice for women under the broad theme of ***“Overcoming the Barriers: Access to Justice by Women and for Women.”***

I applaud the leadership of the South African Women Lawyers Association (SAWLA) for placing the conversation on Access to Justice in the National Heritage Agenda. Heritage refers to the things we have cherished things we have inherited from our past. In isiZulu we refer to such things as *Amagugu*.

SAWLA'S gesture awakens us to the reality that our national heritage transcends artefacts, historical knowledge, traditional clothes, music, language, the environment, and other beautiful legacies from our past. Heritage includes the values that serve as

the glue that binds us together as a people. Heritage also gives group and national identities.

As we commemorate heritage day we are reminded that the Constitution is our greatest heritage. It's the roadmap to the South Africa we yearn for and the glue that binds us as a nation.

I must add that for all our sakes, it's important that we all understand, promote and defend our Constitution and the freedoms we have as a legacy of the struggle for justice and democracy in our land.

The Constitution clearly maps up the vision of the South Africa we want to become.

What does the Constitution say about the South Africa we want to become?

The Constitution says we want to be a South Africa where we are all equal, all our lives are improved and our potentials are freed. It is a just and equitable South Africa, where all equally enjoy all human rights and freedoms, including access to food, social security, health services, housing and education. It is a South Africa, where those in government put people and the Constitution, including constitutional obligations, first. What a remarkable vision!

Many of the rights promised by the Constitution are often violated. When that happens there must be avenues for vindicating those rights. You will agree with me that without meaningful avenues for vindicating rights when violated, such rights are nothing but empty promises.

One of the entitlements for all provided for by the Constitution is the right to access to justice for all. Addressing the Law Society of the Transkei, in October 1993, President Nelson Mandela said:

***“Access to justice to legal services is a basic necessity. If people are not able to enforce their rights, those rights become meaningless. If the wealthy have privileged access to justice, that brings the whole legal system into disrepute rightly so.”***

I would like to also add that when people are unable to enforce their rights, democracy is threatened as some may resort to taking the law into their own hands. It is for this reason that I am encouraged that a few weeks ago, during the, last week of August the country observed the 2014 National Access to Justice Week. As I prepared for this address I recalled with gratification that it was us as the South African Women Lawyer's Association (SAWLA) that started the Access to Justice Week initiative. The pioneers of this initiative included Judge Majiki, who later became the first President of SAWLA, Adv Joyce Maluleke, Ms Jasmin Sooka and Adv Nomvula Mokhatla. In fact we called the inaugural one in 2007, the SAWLA Access to Justice Week.

The idea of women lawyers using their skills to lift their communities and others follows in the footsteps of pioneer women lawyers such as Victoria Mxenge, Priscilla Jana and Shullamith Muller, among others. None lawyers such as Charlotte Maxeke, and all women that SAWLA has honoured, also used their knowledge of the law to lift others, particularly women.

Even more gratifying is noting how big and institutionalized the access to Justice Initiative has become. I'm also encouraged by the awareness it brings on the centrality of access to justice and the relief it brings to many who need justice.

SAWLA and the Department of Justice and Correctional Services deserve to be applauded for providing sustained leadership on the Access to Justice Week Initiative, thus keeping the matter of access to justice in our national justice radar while bringing relief to many who need information about their rights, avenues for enforcing their rights and legal assistance to effectively pursue such avenues.

We must also applaud the Law Society for having embraced the concept from the very beginning and sustained participation in the programme over the years. I understand that SAWLA continues to execute the Access to Justice Week initiative as a legal outreach initiative involving the dissemination of information about the law, rights and avenues for vindicating rights and resolving legal disputes involving an array of issues, including domestic violence, divorce, child maintenance, wills, intestate estates, guardianship and fostering, among others things.

I understand that that our conversation today is part of the SAWLA outreach clinic. I'm particularly pleased that SAWLA continues to give priority to women as a particularly disadvantaged group when it comes to resources for accessing justice on family law, administration of estates and violent crime. These were the matters we also prioritized at the beginning. Our activities then included the development of a Legal Handbook on these matters.

I must say I was particularly excited when the SAWLA leadership advised me to speak on avenues for accessing justice, because I felt that this would give me an opportunity to engage you about the Public Protector as an avenue for accessing justice on matters that involve state action or wrongs.

The Public Protector is one of the greatest innovations of our Constitution. It transforms both our access to justice and public accountability frameworks beyond the classical mechanisms. Traditionally we know that we needed to go to court to have a dispute resolved no matter whether it involved government or a private person.

You will agree with me that when an ordinary *Gogo Dlamini* considers taking government to court she would have known that the odds favoured government as it had better access to resources, including money, people and time.

And then came the Constitution. It introduced access to justice avenues that transcend the courts. These include the Public Protector, an independent constitutional body given power by the Constitution to support constitutional democracy by investigating, reporting on and remedying improper conduct in state affairs.

Other constitutionally recognized avenues for access to justice, mostly found in Chapter 9 of the Constitution, include the South African Human Rights Commission, Commission for Gender Equality, Commission for Rights of Cultural, Religious and Linguistic Communities and the Electoral Commission. These institutions focus on the regulation and vindication of specific rights such as human rights, gender equality, cultural, religious and language rights, and electoral rights.

The Constitution also envisages statutory avenues for vindicating rights that transcend courts. These include the Commission for Conciliation, Mediation and Arbitration (CCMA), Bargaining Councils, the Competition Commission, Competition Tribunal, Consumer Commission and the Consumer Tribunal. Many of these seek to provide informal and affordable access to justice avenues.

Going back to the Public Protector, its role is primarily in the area of administrative law and related rights and proscriptions. The Public Protector protects your right to proper conduct, including good administration, in state affairs. The power and responsibility of the Public Protector to protect you as the people against improper conduct, including bad administration or maladministration in government, comes from Section 182 of the Constitution, which states that:

***“182 (1) The Public Protector has the power, as regulated by national legislation –***

***(a) 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;***

***(b) To report on that conduct; and***

***(c) To take appropriate remedial action***

***(2) The Public Protector has the additional powers and functions prescribed by national legislation.***

***(3) The Public Protector may not investigate court decisions.***

***(4) The Public Protector must be accessible to all persons and communities.***

***(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.”***

I am certain you will agree with me that the establishment of such an institution is a ground-breaking invention in so far as levelling the playing field between you as an ordinary citizen or resident and those who have the mighty resources and power of the state behind them.

It is one of the levers of constitutional democracy that enable the people as the owners of public power and resources to exact accountability from those entrusted with public power when the traditional public accountability mechanisms fail or encounter limitations. In many circumstances, that accountability involves seeking answers regarding service failure impacting on the rights you are given by the Constitution as citizens.

It could be the right to access to food, health services, social security (pensions and grants), education and housing. The Public Protector also steps in to help you vindicate your rights as citizens against excesses in the exercise of public power that involve conduct failure such as abusing resources meant for delivering services to you through incompetence, negligence, malfeasance, self-interest and corruption.

The beauty of an avenue such as the Public Protector is the ability to mediate power and resource imbalances between the people and government. Naturally there is a massive power imbalance between an ordinary Gogo Dlamini and state actors, whoever they may be.

I thought I would share with you a few case studies, where using the Public Protector for access to justice has successfully mediated power and resources between state actors and ordinary people. This was done through whispering truth to power the same way traditional structures such as a Makhadzi or Mafungwase has always served as a buffer between the people and the king.

Ms M from this region had been denied a social grant for a child due to corruption involving identity theft and organized crime cutting across Health, Home Affairs and Social Development Departments. A Public Protector intervention uncovered the corruption and got her access to her deserved grant.

Grandmother Erasmus' wall had been damaged by a municipal truck and the municipality refused to pay. A Public Protector intervention got the municipality to pay her about R40, 000, 00 towards the repair of the wall.

Ms X from this province had her business placed under sequestration and was about to lose her house to an auction in a few days because a public entity under the Department of Education in this province was refusing to pay her business for services rendered. A mediation process involving the national and provincial Departments of Education saw to it that she was paid her money within hours of the mediation meeting.

Grandfather X whose money was stolen from a government owned bank due to negligence on the Bank's part got his money back following a mediation process under the Public Protector.

A former member of the Executive in this province was short-changed in the payment of her gratuity and denied answers when she asked about the formula for calculating the gratuity. An intervention by the Public Protector not only got the Department concerned to provide the formula but uncovered that she had indeed been short-changed and ensured she was paid outstanding amounts.

Ms D from KwaZulu-Natal had been trying to get her Unemployment Insurance Fund (UIF) benefits for years without success, with authorities telling her that she applied late for the benefits. This was until an intervention from the Public Protector uncovered proof that she had applied on time and got UIF to pay the amount owed, with interest.

Mr M, a former Umkhontwesizwe and South African National Defence Force soldier lost his home because the Department had failed to pay the amount owed to him on time despite many promises. A Public Protector intervention ensured that the Department concerned provided him and his family with accommodation.

Most recently, we intervened as the Public Protector, at OR Tambo municipality to get the municipality and province to respond properly to the plight of a family that became homeless after maladministration involving a double allocation of its house to them and a municipal employee who used the court to evict that family.

Sadly most of the cases we deal with concern “bread and butter” matters involving undue delay in the payment pensions, social grants and workers’ compensation. Undue delay and improper allocation of RDP housing and allocation of shoddily built houses are also some of the common access to justice matters we deal with daily as the Public Protector. We also get complaints on irregularities in the administration of estates, particularly relating to the inheritance of houses.

We also provide access to justice in respect of systemic service failure affecting whole communities, usually involving school facilities, roads, electricity, water and sanitation and health services.

The amazing thing about the operations of the Public Protector is that we are able to mediate power imbalances. You need not be skilled on the law to approach us. We will frame your complaint and decide which laws are applicable. You also do not need legal representation at the conciliation or mediation (Alternative Dispute Resolution) meetings. In most of the meetings government brings their entire legal services team, state attorney or private attorneys, private senior councils and top persons, including Mayors, MECs Ministers and occasionally a Premier while the

compliant is alone or accompanied by one or more other simple, usually not much educated person.

In Public Protector processes that does not matter as we conduct our own legal research and mediate the communication process through inquisitorial proceedings to avoid bullying and any other unhealthy power play.

The intervention of the Public Protector therefore makes it possible for regular persons, who would ordinarily not afford a lawyer and lacks the knowledge of the sophisticated court system, to exact accountability on others, where state affairs are involved. You can also come to the Public Protector if there is undue delay in the courts or irregularities such as files or dockets going missing or forgery of documents such as divorce decrees.

The Public Protector, accordingly, provides a unique access to justice avenue that enables ordinary folk to seek answers from the most powerful in the country, where state affairs are concerned, without spending a cent. The only things we do not touch are decisions of judges.

The other advantage of the Public Protector is its ability to follow up on the implementation of the remedies to ensure that the complainant gets justice. This is part of taking appropriate remedial action. Incidentally even in countries where Public Protector-like institutions, usually called Ombudsman, only have the power to make recommendations as is the case in Sweden, Finland, Canada and England, these offices follow up on the implementation of remedial action.

This makes sense as a Public Protector's decision is not self-executing like that of a court. However, this is an advantage because, with a court, an applicant requires more resources to get a lawyer to force the respondent to implement the court order.

A key aspect that makes the Public Protector a unique access to justice vehicle, accordingly, is that of being a leveller of the playing field. Like the Makadzi in Venda culture, the Public Protector is an important safety valve, constantly working with others to repair broken dialogue between the people and those they have entrusted with their collective power and resources.

This not only ensures accountability by those in government but it also helps ensure public governance processes and services remain alive to the needs and views of and are accordingly responsive to the people.

Former Chief Justice Sandile Ngcobo had the following to say about the Public Protector and related institutions:

***“The importance of the role of the public Protector is especially clear in many countries throughout Africa, where there is often a desperate need for basic human needs such as food, drinking water, health care, housing, education and social security.”***

I have spoken about the Public Protector's powers coming from the Constitution. There are more powers given to the office by legislation in pursuit of section 182(4) of the Constitution.

The laws that give the Public Protector additional powers have added the following mandates:

- Power to investigate, conciliate, mediate, negotiate, advise or do anything necessary to resolve disputes and rectify maladministration in state affairs and reared matters, including abuse of power, abuse of state resources, unethical conduct and corruption on own initiative or complaints under the Public Protector Act;
- Sole power to investigate and report on violations of the Executive Ethics Code under the Executive Members' Ethics Act;
- Shared power to investigate allegations of corrupt activities as envisaged under the Prevention and Combatting of Corrupt Activities Act;
- Shared power to receive protected disclosures and serve as a Safe Harbour under the Protected Disclosures Act;
- Sole power to review the decisions of the National Home Builders Registration Council under the Housing Protection Measures Act;
- An alternative forum under the Promotion of Equality and Prevention of Unfair Discrimination Act; and
- Information regulation under the Promotion of Access to Information Act.

I am concerned though over increasing suggestions that government is not obliged to do anything after the people have complained and the Public Protector has adjudicated the complaint. Those who advocate this view say it is so because the Public Protector is not a judge or court of law. This logic is beyond flawed because we all know that you need not be a judge to have power to make binding decisions.

They also reduce the Public Protector's powers to the power to "making recommendations". This is despite the fact that nowhere in the section applicable to the Public Protector does the Constitution use the word "recommendation". The argument is that no state actor or organ of state is obliged to implement the remedies in the Public Protector's report. Even worse, a suggestion has been made

that an organ of state that is a respondent in an investigation may order an executive structure to review the findings of the Public Protector.

I'm saddened by the fact that these views, which seek to water down public accountability through administrative scrutiny, are also supported by a few lawyers. However, I'm encouraged that the Law Society of South Africa, representing more than 22 000 attorneys in this country, has shot down these views and aligned itself with the view that says the power to take appropriate remedial action entails the power to ensure remedial action is taken to redress maladministration.

I honestly believe that the argument that says there is no obligation to implement the findings Public Protector takes us 20 years back. The question has to be asked: Why would the architects of our democracy create an access for justice avenue for the people of South Africa, which then turns out to be a gate to nowhere?

Why are we saying to Gogo Dlamini out there, who have genuine complaints about public healthcare services, RDP housing services, social security, water provision, among other things: "Here is an avenue for you to exact accountability and vindicate your rights" and yet turn around to say "should this avenue say your claims are substantiated we will turn a blind eye"? Does this not undermine access to justice? Does this not undermine constitutional democracy?

In the *Mail & Guardian vs the Public Protector*, the Supreme Court of Appeal had the following to say:

***"The Constitution upon which the nation is founded is a grave solemn promise to all its citizens. It includes a promise of representative and accountable government functioning within the framework of pockets of independence that are provided by various independent institutions. One of those independent institutions is the office of the Public Protector.***

***"The office of the Public Protector is an important institution. It provides what will often be a last defense against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee."***

What then are we asking lawyers to do?

1. There is clearly a need for research in the institution of the Ombudsman as an avenue for access to justice and the legal professions can be of much needed assistance in that regard;

2. The legal community can also assist by adding its voice to the debate on the interpretation of the constitutional and legislative powers of institutions such as the Public Protector in the context of access to justice;
3. Members of the legal community, particularly those privileged to advise the state, could help strengthen our constitutional democracy by offering the state and state actors frank counsel to avoid unnecessary embarrassment and most importantly, miscarriage of justice;
4. The legal community can also assist through outreach activities such as this one to educate society about our constitution and the law, including people's rights and entitlements and the state's role, responsibilities and character;
5. Lawyers can also workshop our people on the meaning of the supremacy of the Constitution and the rule of law; and
6. Lawyers can also help the cause of access to justice by providing pro bono services to the less privileged.

We all need to put shoulder to the wheel in efforts to ensure that our state is accountable, operates with integrity and is responsive to people's needs.

Thank you.

**Adv. Thuli Madonsela**

**Public Protector of South Africa**