



Address by Public Protector Adv Thuli Madonsela during the Annual General Meeting and Conference of the National Association of Democratic Lawyers in Mthatha, Eastern Cape on Saturday, February 25, 2012

**President of NADEL Ad Gcina Malindi SC;
Vice President of NADEL Mr Krish Govender;
The rest of NADEL Office bearers and members
Cuban Ambassador His Excellency Mr AV Hernandez
Cosatu Secretary General Mr Zwelinzima Vavi;
Leadership of the NLA ;
Representatives of the Media;
Ladies and Gentlemen;**

It is a great honour to address this Annual General Meeting (AGM) and Conference of the National Association of Democratic Lawyers (NADEL) and I am deeply grateful to NADEL's leadership for inviting me.

The AGM and conference taking place under the theme ***“Threats to constitutional democracy: Perspectives and Lessons for Nadel”*** come at the conclusion of the Constitution Week, a focus week dedicated to raising awareness about our Constitution and reflecting on the ground we have covered in the pursuit of the constitutional vision for our society. The meeting also takes place a few weeks after February 04, the day on which our ground breaking and globally admired Constitution was put into operation, 15 years ago. Furthermore in two months time, our democracy will be turning 18 years old.

As I prepared my presentation on the subtheme assigned to me, which is ***“Engaging the Public Protector: Corruption in the Public Sector- Nadel’s role towards anti-corruption and good governance”***, I found myself reflecting on the vision underpinning the constitutional architecture of our democracy, particularly its meaning to the ordinary people of South Africa that approach my office, the Public Protector, daily.

The Constitution promises, among others, to:

“Lay a foundation for a democratic and open society in which governance is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life all the citizens and free the potential of each person....”

As I specifically reflected on the constitutional vision, which amounts to a promise to the people of South Africa, the experience of Grandma Nkosi, a 74 years complainant from Soweto, who approached me recently immediately, came to my mind.

Grandma Nkosi's complained that she is still waiting for the home of her own that she applied for under the social housing scheme 16 years ago. The documents she provided confirm that she applied in 1996, making her one of the first people to apply under what has become known as the RDP housing programme. She said a couple of years after applying, she was once advised during her numerous trips to the Gauteng Department of Housing, now Human Settlements, that her name was on a list for homes to be released shortly.

When she followed up after the identified date passed without delivery, she was told that her name was not on list of the recently released homes. In 2005, she was advised to renew her application under "*Operation Vuselela*". This is evident in the documents she provided and in which the respondent organ of state confirms that she did indeed lodge her original application in 1996. About seven years later she remains without her home and cannot get a cogent explanation as to why she has not received the house. When Grandma Nkosi applied, she was a domestic worker who lived rent-free in a one room backroom at her employer's place in one of Johannesburg suburbs. Today she is a pensioner who survives on a state grant she uses for subsistence and to rent a single room at the back of someone's house in SOWETO.

Sadly, Grandma Nkosi is one of many South Africans that await delivery of basic services that make the rights and life promised by the constitution real. Many of the outstanding rights belong to the group globally referred to as social and economic rights and they include the right to access to adequate housing as envisaged in section 26. They also include section 27 rights such as the right to access to health care services; the right to access to sufficient food and water; and the right to access to social security and social assistance. They also include the right to basic education as envisaged in section 29 of the Constitution.

Clearly in respect of Grandma Nkosi the constitutional promise, incorporating the human dignity that comes with living in a descent home, remains a dream. But is it a dream legitimately delayed by the challenges of delivering in the face of the enormous legacy of the underdevelopment left by years of colonialism and apartheid or a dream derailed by factors such as maladministration and corruption?

If we are honest to ourselves as a people, we will admit that while delivery on the basic services that are fundamental to the restoration of human dignity to the people of South Africa who live in poverty has been delayed by the enormity of the legacy of apartheid and colonialism, there are many areas of delivery that could and should have been achieved had service delivery been not derailed by maladministration and corruption. For example, I remain to be convinced that there is a good reason why Grandma Nkosi is still without a house 16 years after applying for such a house.

This brings me to the subtheme I am required to reflect on, particularly the role of NADEL in the fight against corruption and the promotion of good governance.

In its 25 years of existence NADEL is known to have dedicated its attention on contributing to transforming this country into a constitutional democracy founded on human rights, freedom,

equality and the rule of law. In my discussion with the leadership of NADEL it was clear that the fight against corruption and the promotion of good governance is seen as an integral part of transforming South Africa into the human rights centred inclusive, just and equal opportunity society based on democratic governance that the architects of our Constitution envisaged.

This is not surprising considering that NADEL played a role in shaping the Constitution as an organisation and through the works of its human rights icons such as the late Dullah Omar and former Chief Justice Pius Langa, among others.

Now, what really is the link between corruption and NADEL's mission and interests, which include equality and justice within a broader quest for democracy and human rights? I thought that a good starting point would be a common understanding of corruption. In this regard I prefer the simple definition offered by Transparency International (TI). According to TI, ***“Corruption is the abuse of entrusted power for private gain”***. Traditionally, corruption involved bribery. In the contemporary world, corruption is an organised crime that involves many actors whose gratification may involve bribes and other benefits, including non financial benefits such as political and other forms of gratification.

Human Rights activist, Mary Robinson has said the following:

“There is no longer any doubt about the linkages between corruption, poverty and human rights abuses. An open and transparent state will provide for fuller realisation of economic, social and political rights. There will be fewer secrets, less discrimination and more equal access to public resources like education, and health care as well as fair treatment by the police and the judicial system”

Going back to Grandma Nkosi's case, you may want to know why I made it a focus of a dialogue on corruption, particularly considering that I have not yet made a finding on the cause of the service failure she has clearly suffered. I must admit that my thoughts are premised on my experience with individual cases and systemic problems in the social housing sector. Last year I shared a story of Ms N who after a similar long wait for social housing delivery, discovered that in fact her house had been delivered but was, through corruption, given to someone else. When she approached my office for recourse she alleged that she was alerted by a whistle-blower in the municipality that her name was on the list of houses that had already been allocated while she obviously continued to pursue an undignified life of living in a shack with no electricity, clean water and descent sanitary facilities. She was eventually given the house but soon became a target of harassment, which allegedly culminated in the burning of the house and her daughter's car.

Of course at this stage I cannot tell if Gogo Nkosi has indeed been robbed of a descent home by corruption in the direct manner involved in Mrs N's case. But even if she has not been a direct victim of corruption, I can state here without any fear of contradiction that corruption is a key factor in her unconscionably long wait for the delivery of the house she applied for 16 years ago.

You may be wondering why I blame corruption when there is clear evidence that the enormous housing backlog forming part of the legacy of apartheid could not be eliminated overnight. That is perhaps true. But I am convinced that corruption is one of the main thieves that has robbed disadvantaged people of South Africa of the service by organs of state that were meant to ensure that they enjoy the dignified lives promised by the Constitution.

In this regard, I distinguish between the direct impact of corruption and its indirect impact. The case of Mrs N involves the direct impact of corruption.

Systemic corruption in the social housing sector is responsible for people jumping the queue or getting houses they don't qualify for. Beyond Mrs N's case we know of public servants that have allocated houses to themselves or proxies. We know of people, including foreigners that buy "RDP" houses they do not qualify for.

Then there's the management of tenders for the construction of houses in the social housing sector. We are now familiar with the story of a developer (I believe pseudo developer) who was paid R8 million for delivering one RDP home. Our files are full of allegations of maladministration and corruption leading to shoddy service and gross overcharging in the social housing sector. When we were in this province for stakeholder consultations last year, an older person took to the podium and complained about a developer who was paid for a development where the houses were up until then incomplete. He further alleged that the developer who regularly passes by the unfinished housing project in his fancy four by four, was rewarded with a more expensive tender for his shoddy service. Stories of a similar nature abound in every province. They also include stories of deliberate use of poor or inadequate materials to maximise profit while leaving the burden of reconstruction, which often means starting afresh, to the state. Clearly corruption in this regard robs the state of many resources for delivery of basic services.

Corruption in other sectors also contributes to service derailment in the social housing sector. Last year my office dealt with a case of a young lady in this province who could not get a grant for her child. She discovered that she was a victim of corruption involving organised crime covering the Department of Health, Home Affairs, SASA, private citizens and a supermarket in the private sector.

Corruption inspired policy formulation, including the determination of service priorities, also robs the people of basic services. This includes investing in projects that could wait in deference to people's basic needs but the policy maker who is driven by self interest, uses his or her power to give the projects that will benefit him/her priority.

What then can NADEL do? More specifically what prospects exist for NADEL to engage with the Public Protector and other Institutions Supporting Constitutional Democracy to combat corruption and maladministration in the pursuit of good governance, democracy and human rights?

With its history of ethical and human rights centred legal practice, NADEL is a natural member of forces for clean governance and accordingly anticorruption. NADEL's products such as the late Dullah Omar and former Chief Justice Pius Langa not only acted as ethical lawyers with a sound conscience but devoted their lives to ensuring that South Africa moves towards a state that is accountable, acts with integrity in both regulation and distribution of state resources while being responsive to all its people.

Lawyer jokes such as lawyers as sharks have never applied to NADEL lawyers. So the same applies to ethics discourses that place lawyers in the same categories as hired assassins and prostitutes.

NADEL's engagement with the Public Protector needs to be informed by the independence of the legal profession. The independence and impartiality of the Public Protector also forms part of the basis for engagement.

NADEL, as it did in its history, can be a voice of reason on what really the Public Protector as an ombudsman institution is and what is its place in a constitutional democracy. This can be done through participating in the development of jurisprudence on, among other things, the space accorded by the Constitution. I've previously located this challenge to what I referred to the before Constitution and after Constitution thinking. The point I was making is that people continue to think of democracy pillars in terms of Parliament, the Executive and Courts, which was the case before the new constitutional dispensation. What is needed is a paradigm shift that acknowledges the role of oversight bodies such as the Public Protector as additional avenues for justice and public accountability mechanisms.

One of the bones of contention is the meaning of "taking appropriate remedial action" as envisaged in section 182(1) (c) of the Constitution. Often when we insist on implementation, we are told a Public Protector is not a court of law. This flies in the face of global jurisprudence on the role of the Ombudsman. The reality also is that there are many structures that are not courts but have the power to take enforceable remedial action. In regard to the Public Protector, the global idea is that the state must implement unless cause can be shown that the Public Protector's decision was unreasonable.

Another is the relationship of the Public Protector Act with other statutes that not only grant rights but also outline processes for vindicating such rights. An example is a case I recently dealt with involving allegations of maladministration in the area of provisional liquidations. One of my challenges was the Master of the High Court coming back after what was apparently a successful conciliation to say that she could not change the decision that led to the complaint to me as she was not *functus officio*. She argued that she could only change her decision following a successful review.

The Labour Relations Act is another common problem area. NADEL can particularly help develop a national understanding of the Public Protector's administrative justice and broader and more meaningful public accountability potential. Section 182(5) also needs unpacking. Is it a sound strategy for the PP to pursue corruption as maladministration while the NPA and others pursue it as crime?

The Public Protector's main mandate is section 181 and 2 of the Constitution.

The mandate is also in five key statutory mandate areas, which are as follows:

- The Public Protector Act 23 of 1994. This law confers maladministration and appropriate resolution of state related disputes mandate. The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs ;
- The Executive Members' Ethic Act of 1998 and the Executive Ethics Code enforces executive ethics. This mandate only covers the entire Executive, i.e. President, Ministers, Deputy Ministers, Premiers and Members of the Executive Council. The right to trigger an investigation is also restricted to the President, a Premier, a Member of Parliament and a member of a provincial legislature but members of the public can lodge

a complaint in terms of this legislation through a parliamentarian. The report thereof must go to the President;

- The Prevention and Combating of Corrupt Activities Act 12 of 2004 read with the Public Protector Act confers an anticorruption mandate. This mandate is shared with other agencies;
- The Protected Disclosures Act 26 of 2000 ensures that we protect whistle-blowers. This mandate is also shared with the Auditor General and other agencies;
- We have the regulation of information mandate as conferred by the Promotion of Access to Information Act 2 of 2000; and
- We have the power to review decisions of the Home Builder's Registration Council as conferred by the Housing Protection Measures Act 95 of 1998.

Democracy is a dialogue and NADEL is in a unique position to facilitate a meaningful dialogue between the state and the people. It's also a part of a united front against maladministration and corruption is needed.

NADEL can also be an important role player in placing maladministration, corruption and good governance on the lips of all South Africans from small school going children. This could be done through incorporating these issues in NADEL's training and outreach programmes. NADEL can also contribute to helping people understand the cost of corruption to them and the link of corruption to service delivery. According to Adv George Bizos, people often see public money as orphaned money. Through empowerment of people, we'll hold those who rob them of resources accountable. They will say: "you are not eating for us, in fact, you are actually eating from us."

NADEL is also uniquely placed to continue to be a force for ethical governance. It is important that legal advice to government does not encourage the paradigm of might is right when dealing with its own people.

In conclusion, I want to state emphatically that we are not a corrupt country. We have stronger forces for good governance (within and outside government) than for corruption.

However, we have a serious problem in corruption and it is growing. According to TI we were number 54 in 2010 and 64 in 2011. We also fell slightly in other global indicators. Our own indicators show mixed fortunes with improvements in some areas and worsening in others. The volume of corruption cases in my office has definitely grown. I am not sure if it is due to increased visibility of and confidence in office or escalation of corruption. Whatever the case if we ignore the problem of corruption it will undermine democracy.

In the fast paced contemporary world, 5 years is too long to correct bad governance and poor service delivery through the ballot box. We've seen that in the Arab spring. We have also seen it in the service delivery protests.

NADEL can remain a positive factor for change by not only giving people a meaningful voice to hold government accountable but by also giving government a conscience. This will ensure that our people never see protest as their only option to get the state to hear them and respond to their needs.

Lastly, to answer the question whether corruption is a threat to democracy, my answer is a definite yes. If unattended corruption will, among other things, deplete resources, leading to major discontent to service delivery, which could lead to instability.

If we work together we can strengthen the forces against maladministration and corruption and thus ensure that our democracy delivers according to the constitutional specifications.

Thank you.

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