



Address by Public Protector Adv Thuli Madonsela during an Annual Human Rights Lecture at the University of Stellenbosch in the Western Cape on Thursday, September 29, 2011.

**Programme Director;
Dean of the Law Faculty, Prof. Gerhard Lubbe;
HF Oppenheimer Chair in Human Rights and Law, Prof Sandra Liebenberg;
Justice Laurie Ackermann;
Representatives of the Webber Wentzel Attorneys (sponsors of the lecture);
Other members of the Judiciary;
Commissioner of the Commission for Gender Equality;
The academia and legal profession;
Students;
Members of the media;
Ladies and gentlemen;**

I am deeply honoured to present the 2011 Annual Human Rights Law Lecture of the University of Stellenbosch.

I am particularly humbled by the interest that the academic community, particularly this university, continues to show in my office. I must confess though that the main attraction for me was the opportunity to renew my acquaintance with Professor Sandy Liebenberg who for years has been one of our country's leading lights on human rights, particularly socio-economic rights.

The pursuit of human rights and democracy has always been at the centre of the struggle for democracy in this country. One of the beacons of hope that inspired this struggle was the Universal Declaration of Human Rights adopted in 1948. Closer home, the freedom charter was a key inspirational document that informed the struggle for democracy and human rights.

My address focuses on the theme *"The role of the Public Protector in Protecting Human Rights and Deepening Democracy"*

My address is structured in the following manner

- The real life story of Mr N;
- The place of the Public Protector in our constitutional architecture;

- Evolution and place of the Ombudsman institution among checks and balances in contemporary democracies;
- The approach of the Public Protector South Africa;
- Paradigm shift from pre-Constitution thinking as a precondition for the Public Protector and other institutions supporting democracy to fulfill their constitutional destiny;
- A few case studies where the Public Protector has had an impact on the protection and promotion of human rights and the deepening of constitutional democracy
- Conclusion

The adoption of the Constitution in 1996 following the first democratic elections in 1994, clearly sealed the country's commitment to constitutional democracy and human rights for all without discrimination. The preamble to the Constitution states the following among others:

We the people of South Africa...to:

- *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
- *lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
- *Improve the quality of life of all citizens and free the potential of each person;”*

What does this promise of democracy, human rights and freedom mean for the ordinary person that I often refer to as Gogo Dlamini. How does this play out in an ordinary person's daily life and interface with the state and those that exercise public power.

Yesterday I related the story of Mr N during my office's media briefing. Perhaps it can help us take a closer look at human rights and democracy challenges of the average person and how the Public Protector plays some role in such contexts.

Mr N, was terminated from the public service because his poor health condition made it difficult for him to perform his duties.

The Department that employed him made him a verbal offer, which included early retirement without the reduction of pension benefits and an added period of three and a half years of service, including the payment of a lump sum salary for that period. This was never confirmed in writing.

The Department subsequently terminated his service without following proper procedures and in the process failed to keep their end of the bargain, leaving the gravely ill Mr N with no medical aid subsidy. As a result his entire monthly pension went to medical expenses.

Upon investigation, I found that the process followed by the Department in terminating Mr N's service was not in compliance with the Public Service Act and the Constitution and therefore constituted maladministration.

I directed that he be re-instated immediately, with effect from 01 November 2011 and that the department conduct an investigation into the incapacity of Mr N due to ill health and consider ill health retirement for him

I also directed that Mr N be placed on a temporary incapacity leave until the finalisation of the ill health retirement and that the employee be compensated for financial damages suffered and the humiliation.

The Department has since made an undertaking to fully implement this remedial action.

Although this may seem like an insignificant case to some, it is cases such as these that reinforce the role of my office in protecting the rights of ordinary people.

The rights Mr N sought to vindicate are clearly guaranteed not only in our domestic Constitution but also in the universal declaration of Human Rights.

As we know the Constitution guarantees everyone the rights to equality, human dignity, life, freedom and security of a person, privacy, freedom of religion, belief and opinion and freedom of expression.

More importantly, the Bill of Rights promises everyone the right to basic necessities such as housing, health care, food, water and social security, education and just administrative action, among other things.

Some of these rights impose positive obligations on the state and those who exercise public power and others impose negative obligations. All are essential and as the Vienna Declaration of 1993 states, human rights are indivisible and interdependent.

But if you have no means to vindicate your right, such rights are meaningless.

Before the Constitution Mr N's options were confined to the classical checks and balances in a democracy. He could have approached a Parliamentarian to raise the matter with the Minister concerned for him. He could have taken the matter to court. To go to court he would have needed money, time and an ability to understand and navigate the complex exclusive dialogue of the courts.

The architects of our constitutional democracy gave Mr N and others another chance and another voice for engaging with those who exercise public power where they feel wronged. This takes me to the place of the Public Protector in our constitutional architecture.

The Place of the Public Protector

In a deliberate move to ensure that the government is accountable in respect of its responsibilities, the architects of our constitution established institutions such as the Public Protector. This was over and above traditional checks and balances such as the legislature, courts and tribunals. Most of these institutions are entrenched under Chapter 9 of our Constitution and thus are often referred to as Chapter 9 institutions. Their role is to strengthen and support democracy through complementary oversight.

My office is accordingly one of these institutions that are a post 1994 innovation for strengthening constitutional democracy by limiting excesses in the exercise of public power while deepening accountability. The end result is another chance or avenue for the people to engage with those they have entrusted with public power and to hold them accountable for the exercise of such power.

I must hasten to say that the South African Public Protector is not a human rights body whose

core business is the protection and promotion of human rights. Its role is to ensure good administration by investigating and rooting out improper conduct or maladministration in the management of state affairs. Through this role of exerting accountability in the exercise of public power the Public Protector contributes to the strengthening of democracy and protection of human rights.

During a meeting of the African Ombudsman and Mediators' Association in Durban six months ago, former Chief Justice Sandile Ngcobo summed up the value of a constitutionally-defined Public Protector or Ombudsman as follows:

“The value of a constitutionally-defined Public Protector, or Ombudsman, is that the independent investigation of government action is an essential component of a strong constitutional democracy. The importance of the Ombudsman’s role is especially clear in many countries throughout Africa, where there is often a desperate need for basic human necessities, from access to food and clean drinking water, to healthcare, housing, education and social security.”

The place of the Public Protector in our democracy is defined by sections 181(1) and (2) of the Constitution, which outlines the mandate and powers of this office. Section 182(1) of the Constitution empowers the Public Protector 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 take appropriate remedial action.

Key mandate areas for that can be discerned from the Constitution and legislation are the following:

- Maladministration and appropriate resolution of state related disputes mandate as conferred by the Public Protector Act 23 of 1994. The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs ;
- Executive ethics enforcement mandate as conferred by the Executive Members' Ethics Act of 1998 and the Executive Ethics Code. It is important to note that 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. The report must go to the President;
- Anticorruption mandate as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 read with the Public Protector Act. This mandate is shared with other agencies;
- Whistle-blower protection mandate as conferred by the Protected Disclosures Act 26 of 2000. This mandate is shared with the Auditor General and other agencies to be named by government;
- Regulation of information mandate as conferred by the Promotion of Access to Information Act 2 of 2000; and
- The power to review decisions of the Home Builder's Registration Council as conferred by the Housing Protection Measures Act 95 of 1998.

Except under the Executive Members' Ethics Act, anyone may lodge a complaint with my office against any organ of state and the service is free. The complainant needs not be a victim of the

alleged improper conduct or maladministration. It is also important to note that to investigate, I need not necessarily receive a complaint.

When formal apartheid ended in 1994, the newly elected democratic government undertook to redress past inequalities, inequities, injustices and oppression, amid high hopes and expectations from the public about the tangible benefits democracy would bring.

A constitutional order based on the rule of law and the principle of the separation of powers and functions in the state and in government, with a human rights orientation, play a central role in South Africa's democracy

Recognising that the task of ensuring adherence to the Constitution and good governance could not be guaranteed by the traditional institutions alone the Constitution created a multiplicity of institutions to protect and promote the rights of specific constituencies in South Africa, each of them with a specific mandate, including the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board) and the Commission for Gender Equality and the Human Rights Commission, as well as the Public Protector.

Former President Nelson Mandela accurately placed these institutions at the same level as the Constitutional Court as additional measures to guaranteed democracy, human rights and the rule of law. This is demonstrated in the following statement made by him during the International Ombudsman Institute conference in South Africa.

“Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities’ are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.

An essential part of that constitutional architecture is those state institutions supporting constitutional democracy. Amongst those are the Public Protector, the Human Rights Commission, the Auditor-General, the Independent Electoral Commission, the Commission for Gender Equality, the Constitutional Court and others.”

The evolution and role of the Ombudsman in protecting human rights and deepening democracy

The Evolution and role of the Ombudsman globally. Introduced about 200 years ago in Sweden, the Ombudsman has evolved over the years as a significant player in holding public actors accountable for their actions. Key areas of contribution have been administrative justice but the role has, over the years extended to other areas of exercise of public power.

McMillan speaks about the Ombudsman's under-appreciated role in the promotion of human rights.

In the discourse around the so called Arab spring, it has been suggested that there's even anecdotal evidence suggesting that countries with effective ombudsman institutions are more stable..

The Approach of the Public Protector

The Public Protector as Ombudsman institution does not compete with the Human Rights Commission in the protection of human rights.

The Public Protector's focus is the vindication of the rights of individuals who are the victims of improper and unjust acts on the part of state administration. They often act as mediator between aggrieved individual and public institutions. Their primary function is to ensure fairness and legality in public administration.

The Public Protector's relationship with the promotion and protection of human rights has a number of dimensions:

- Reinforcing a strong tradition of civil society
- Establishing respect of human rights
- Important contributor to the maintenance of the rule of law
- Part of the broader oversight framework of constitutional obligations, policy, legislation and administrative practices in the public administration

The Public Protector strives to make constitutional democracy and the fulfilment of human rights a reality to South Africans from all levels through serving as a catalyst for change in pursuit of good governance, which includes administrative justice and good administration.

Good governance presupposes that those governing do so in compliance with the Constitution and other regulatory provisions, remain true to their mandate and are accountable to the mandate givers. Maladministration is the opposite of good governance and ethics and integrity are core elements of good governance. The Public Protector has a reactive and a proactive mandate regarding ensuring that state affairs are conducted with integrity and general good governance.

“Corruption and mal-administration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.” (Judge Arthur Chaskalson).

We have said that we see ourselves playing a similar role to the Makhadzi. This institution has traditionally provided people with an additional voice to engage with those that exercise public power in order to correct their administrative wrongs, excesses or omissions.

Case studies

Administrative Justice

Department to apologise for ID delay

The Public Protector investigated a complaint in connection with undue delay caused by the Department of Home Affairs in the rectification of an identity document. The Public Protector's remedial action was that the Department extend an apology to the complainant. In addition, it was recommended that the Director-General take steps to ensure that the capturing of ID

applications and compliance with turnaround times in the process of ID rectifications be monitored in the interest of service delivery.

Social Justice

Department urged to provide wheelchairs for the indigent

The Public Protector investigated a complaint against the Western Cape Rehabilitation Centre, an institution under the Provincial Department of Health, after Mr X's son was allegedly "dumped at an old age home to die" and the centre refused to take him back. The complainant's son had been involved in a motor vehicle accident and suffered serious brain damage and needed long-term nursing care.

The Public Protector found that although the son needed permanent long-term nursing care, he was still entitled to health care service as provided for in section 27 of the Constitution, which includes provision of wheelchair and assistive devices. The Department also failed to inform the family timeously that they could request that Mr X's son be reclassified as a non-medical aid patient.

The Public Protector's remedial action was that the Department include the reclassification of the complainant's son as a non-medical aid patient with immediate effect for the purpose of acquiring a wheelchair and should ensure that every patient in the province be notified regarding such possible reclassification.

School urged to admit learner and amend admission policy

The Public Protector investigated a complaint by Mr X after his daughter's application for admission to Milnerton High School in Cape Town was rejected by the school, which argued that she resided outside its feeder area. The Public Protector found that the school's admission policy did not conform to the policies.

Ethical Governance

Several matters relating to ethical governance have been investigated over the years. More recent cases include the President's disclosure which led to changes in the Executive Ethics Code and a review of the Executive Members Ethics Act. There have been two cases involving conflict of interest. There have also been cases that have dealt with ethics relating to the comforts that public representatives can legitimately enjoy. In this regard there is a duty to place the public interest above public responsibilities as per the examples given during our recent media briefing.

Investigations have also dealt with abuse of state power, abuse of resources and allegations of corruption. The most famous cases in this regard are the Against the Rules Reports.

Social Integration

Municipality failed aged couple for a decade:

The Public Protector investigated a complaint relating to the failure of the City of Tshwane Municipality to transfer property which the complainants had purchased, and subsequently

allocated the same property to a third party.

Right to nationality denied

The Public Protector investigated an alleged failure by the Northern Cape Department of Home Affairs to register the birth of a child and to naturalise the mother who had resided in the Republic of South Africa since 1998. I found that no investigation had been undertaken by the Department to look into and verify the status and citizenship of the child, nor had it been taken into account that the person who acknowledged himself to be the father was a South African citizen or that the child did not have citizenship or nationality of any other country, or had no right to such citizenship or nationality in terms of the South African Citizenship Act. Furthermore, the view of the Department to deport the complainant (mother) would have the effect that the minor child who apparently qualified for South African citizenship would have to be deported to a country where she had no right or nationality.

I urged the Department to take the necessary steps to assist the complainant with making an application for a late registration of the birth of her child within 30 days. In addition, the Department, in consultation with the Department of Health and other stakeholders, and in terms of the Prevention and Combating of Trafficking in Persons Bill and the South Africa Citizenship Amendment Bill, should formulate a policy and a service level agreement that would assist in the early identification of similar cases.

Poverty eradication and other millennium development goals

Community battles with service delivery challenges

The Public Protector investigated a complaint relating to allegations of poor service delivery by Senqu Local Municipality to the residents of New Location and Khwezi Townships in Lady Grey, and to the communities of Walaza, Khasalala, Mfityi, Ndefela, Mbhobho and Hinana villages in Sterkspruit. The residents complained about water supply, sanitation, road maintenance and electricity, among other things.

The Public Protector remedial action was that the managers of the municipality take steps to fast track the planning and implementation of water and sanitation projects in the rural areas of Sterkspruit and should ensure that water supply and sanitation were prioritised in Khasalala village as it was the only village where water had not been provided in line with it's the municipality's commitment as reflected in the Integrated Development Plan.

If the complainants in these matter did not have access to an ombudsman institution such as the Public Protector, they would probably have had to follow the route of *Soobramoney* and so many others who were obliged to approached the courts for the protection and enforcement of their rights and take legal action to seek access to state resources and services or compelling the State to comply with its duties. Common law remedies or relief in terms of section 38 of the Constitution would not have necessarily catered for his personal circumstances and would have been subject to certain barriers and limitations as interpreted by the courts , such as the duty to take appropriate measures within available resources.

The general consensus is that everybody that is adversely affected by the improper conduct in state affairs would not always be in the position to seek a remedy through litigation or another legal mechanism. It has been a number of years since the Administrative Law in South Africa

has been systematically reshaped, to give life to the Constitutional values of legality, rationality, impartiality, fairness and transparency and to provide effective practical protection of people's rights by the enactment of legislation for the protection of the freedom of information and administrative justice, the introduction of a different scheme for judicial review of administrative decisions, and the growth in activity and importance of the High Court's constitutional writ jurisdiction. Therefore, the role of the ombudsman (as provided in the system of oversight and accountability for conduct in state affairs provided for in section 182 of the Constitution) has developed in response to the shortcomings of legislative and judicial method in ensuring that individuals receive appropriate consideration and protection against adverse government action. (*The Role of the Ombudsman in Protecting Human Rights, address by Prof John Mcmillan, Commonwealth Ombudsman, to Conference on 'Legislatures and the Protection of Human Rights', University Of Melbourne, Faculty of Law, 21 July 2006*)

Complaints of maladministration and human rights questions that arise daily are of great consequences to many South Africans. Their quality of life and enjoyment of citizenship can hinge quite directly on how effectively these questions are resolved.

People know and appreciate they have a protected right to complain against public institutions. *"the right to complain, when securely embedded, is surely one of the most significant human rights activities that we can strive for"*(Michelle Falardus-Ramsay – Canadian Human Rights Commissioner).

This was also reiterated by Prof McMillan that Ombudsman offices are especially interested in safeguarding *administrative law rights*. This includes the right to complain about the actions of a government agency without reprisal, the right to natural justice (a fair hearing, and an unbiased decision) before adverse action is taken by a government agency, and the right to equal and non-discriminatory treatment by government.

A modern Ombudsman institution such as the Public Protector has an added responsibility to constantly and continuously strive to contribute to the transformation of government, in terms of its accountability and sensitivity to individual rights and administrative justice. Yet the significance and effectiveness of this transformation does not lie in legal and academic discussions, but in the difference made to the lives of ordinary South Africans who experience the adverse consequences of a government agency's mistake or poor administrative practice on a daily basis. When that happens, they may not always be able to seek a remedy through litigation or another legal mechanism as explained by Stephen Owen :

A finding of administrative negligence and a recommendation ... to remedy the harm caused by it pursuant to ombudsman legislation is not necessarily based on the same findings that a court would require to establish legal liability. Ombudsman authority to recommend remedial action derives from the premise that a fair remedy with respect to administrative wrongdoing is not always available at law. This is a premise that is fundamental to the creation of the institution of the ombudsman as an entity separate from the formal justice system. To a large extent, the office of the ombudsman is established by legislatures in recognition of the inadequacy of the courts to deal with many injustices arising from the nature of modern bureaucracy"

The remedial armory of the Public Protector includes options that can be an effective and practical way of resolving the maladministration, and more importantly deal with the consequences thereof. In many instances all that a person wants is an apology from

government, a proper explanation of what happened, an undertaking that the system has been changed to ensure that a rights violation will not occur again.

My role is to give justice where there were administrative injustices, identifying systemic deficiencies, exacting accountability in the use of public power and control over state resources and taking remedial action. The objective is that remedial action should bring the complainant as close as possible to where they would have been had the state acted properly, not only to provide the denied service. It will mean very little to a justified complainant if the outcome of the investigation or the report by the Public Protector serves and promotes all these objectives, but leaves the complainant without any remedy. I have said it before, without redress and remedial action the Public Protector would *“be a gate to nowhere”*.

State administration in South Africa is bound by the principles and values contained in section 195 of the Constitution, that include exhibiting high levels of integrity, openness and ethical behaviour. The ethical principles public sector agencies are consistent with a redress framework which provides that, when people are unfairly or unreasonably affected by decisions, the agencies should take all fair and reasonable steps to make good. These principles underlie the redress guidelines.

The Courts have confirmed that organs of state are obliged in terms of section 195 of the Constitution to correct or rectify wrongful action for which they are responsible. Agencies should make sensible decisions to reach out of court settlements, or better still, to forestall the need for legal proceedings at all. Redress can be offered without admission of liability. The Constitutional basis for remedial action to restore administrative justice has also been confirmed by the Constitutional Court, making it clear that no member of the public should suffer prejudice or injustice as result of the wrongful actions of an organ of state:

*“Since the advent of our constitutional dispensation, administrative justice has become a constitutional imperative... **and every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.**”...*

Ultimately, the purpose of a public remedy is

- *“to afford the prejudiced party administrative justice,*
- *to advance efficient and effective public administration compelled by constitutional precepts; and*
- *at a broader level, to entrench the rule of law” .*

The Constitution entrusted me in discharging my constitutional mandate, with the responsibility to appreciate instances where remedial action is required, the enhanced ability (“to take”) to determine what form of remedial action is appropriate and the responsibility to ensure that such action is implemented.

Bearing in mind the observation of Kriegler J in Fose's case , that appropriate relief means that which is "specifically fitted or suitable", it seems to me that it would be just and equitable for an aggrieved person to be placed in the same position in which he/ she would have been had her fundamental right to lawful and reasonable administrative action not been infringed:

"In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced."

In my view this is one of the key objectives in creating institutions such as the Public Protector, with the mandate to support and strengthen constitutional democracy through mediating power between the state and the people and reconciling the state with its people. This is achieved through two-pronged approach. We resolve each complaint promptly and ensure remedial action in deserving cases. We also take systemic measures to help the state to improve its systems so that it gets things right most of the time and recurrence is prevented. This we regard as our key role in promoting good governance. We also seek to ensure that when service fails, there's prompt accountability in organs of state without people having to resort to my office or the courts. As indicated earlier my office's role in holding the state accountable goes beyond assessing the lawfulness of the conduct of organs of state or state actors and incorporates ensuring that conduct in question was proper. An inquiry into properness includes considerations of lawfulness, fairness, reasonableness and other dimensions of good administration and good governance.

In this regard, the former President Nelson Mandela reminded us of the importance of accountability to democracy:

" Our experience had 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.

Public awareness and participation in maintaining efficiency in government within the context of human rights are vital to making a reality of democracy. Many South Africans can still recall a time when the face of the public service was hostile and a complaint could lead to victimisation or harassment, when access to justice seemed an unrealistic dream. In the new South Africa the face of the public service is changing radically."

The kind of accountability expected from the state in terms of upholding the underlying and fundamental principles of constitutional democracy, such as the public interest, public trust, rule of law and good governance, requires the public body to be fair and also take responsibility for the consequences of the improper performance of its administrative functions.

The Honourable Deputy Minister of Justice and Constitutional Development, Mr Andries Nel emphasised that for the Office of the Public Protector to effectively discharge its constitutional and legislative responsibility. He once stated:

The office of the Public Protector is very important to democracy, especially in a country like South Africa in which the majority of people were subjected to oppression and injustices that were perpetrated by the apartheid regime. It is institutions like the Public Protector which must ensure that that the vision contained in our Constitution is realised for all citizens, especially poor and vulnerable."

We have a sound architecture and many willing and able to implement. The only risk we face is if we do not address emerging weaknesses relating to skills paucity and corruption.

The Constitution requires of all of us to have made a paradigm shift. We should constantly

remind ourselves of AC, i.e. After Constitution thinking when we exercise our functions opposed to the situation Before the Constitution. Those who exercise State power should embrace AC thinking. If we do that we stand a good chance to take our country to a higher level in this regard and restore people's hope and trust in our democracy.

Thank you.

Adv TN Madonsela
Public Protector of the Republic of South Africa