



**Address by Public Protector Adv Thuli Madonsela at the 44th SAPOA
International Property Convention and Exhibition at the Durban
International Convention Centre, KwaZulu-Natal on Thursday, May 31,
2012**

***“The Commercial Property Industry and the State: Jointly Building a
Sustainable Future for South Africa.”***

**Programme Director, Mr Bruce Whitfield;
Former President, Mr FW de Klerk;
President of Sapoa, Mr Kevin Roman;
Chief Executive of Sapoa, Mr Neil Gopal;
Members of Sapoa;
Members of the commercial property industry at large;
Members of the media;
Ladies and gentlemen**

It is such an honour for me to address the 44th South African Property Owners Association (Sapoa) International Property Convention and Exhibition.

I am informed that this convention has, for the past four decades, been South Africa's leading knowledge sharing and networking forum for the commercial and industrial property industry.

This gathering presents an opportunity to take part in the debates that will form part of the knowledge sharing and networking activities, and therefore it is a pleasure for me to be here today.

I am honoured by the privilege to address this gathering of an important sector in our society and the world, the 44th SAPOA International Property Convention. I am sincerely grateful to SAPOA, specifically Mr Neil Gopal the CEO, for graciously and tenaciously extending this platform for dialogue to my office.

To our guests from several parts of the world, I wish to extend a warm welcome to our country and the beautiful city of Durban. I trust that our hosting has met your expectations, which I expect to have been high in the light of the world class reputation acquired following the successful hosting of FIFA 2010 and the recent award of the SKA project.

As I prepared to engage with you, I wondered what could possibly be of value to a gathering of

people that Karl Marx would refer to as the owners of the means of production. I eventually settled on the fact that we have a mutual interest in the proper management of state affairs. I believe you want a climate that allows you to make money in a sustainable way as business persons while pursuing joyful and peaceful lives as citizens and residents. My office, on the other hand, is part of a network of institutions set up to support and strengthen constitutional democracy.

During one of my office's stakeholder dialogues last, I had a brief encounter with a young man who advised me that he was in the property industry. He thanked my team for what he said was sterling work that is ensuring clean business practices within state affairs regarding property matters, specifically relating to leasing and construction. He said my team's efforts had provided a glimmer of hope to him and other genuine entrepreneurs that had given up on doing business with government because they were not connected to the right people or prepared to engage in corrupt activities. My heart sore though at the end of that conversation, I wondered how sustainable are business practices that favour the weak while destroying the strong ones.

It is true that some of my office's activities impact on SAPOA members and, some of the activities in the sectors from which SAPOA draws its members are increasingly coming under my office's scrutiny?

Many of you would know about the 'Against the Rules' reports I issued in 2011 and which contained findings of systemic maladministration in the procurement of office leases for the South African Police Service (SAPS). The reality is that my office receives complaints alleging irregularities in property related matters, primarily regarding leasing, construction, and allocation of the so called RDP houses. Increasingly, we are receiving complaints regarding the disposal an acquisition of state land and the construction of basic infrastructure such as roads, and schools.

I'm particularly encouraged by the content of your dialogue. *Tomorrow, Today*, suggests that you are concerned about the sustainability of the sector and the impact of today's actions on the sector's future. It is true that the quality of tomorrow depends on the quality of the decisions and actions we take today.

In view of the above and in response to the theme of your deliberations, I seek to share some thoughts on the commercial property sector's role and interest in good governance in state affairs. My address topic, accordingly, is ***"The Commercial Property Industry and the State: Jointly Building a Sustainable Future for South Africa."***

Programme Director,

Perhaps the best place to start is my role as Public Protector. What really does my office do and how does this relate to your work and interests as members and stakeholders of SAPOA?

Often referred to as the voice of the voiceless and conscience of the state, the Public Protector is a non-judicial public complaints or grievance body that seeks to supplement the public accountability mechanisms historically associated with democracy. In simple terms, my role as Public Protector is to help the people exact accountability in the exercise of state power and control over state resources, when direct accountability fails. After failing to get answers or justice through direct interface with organs of state, my office steps in by invitation or on own initiative as an alternative to court action.

Section 182 of the Constitution gives the Public Protector the power to investigate any alleged or suspected improper or prejudicial conduct in state affairs or the public administration, report on that conduct and take appropriate remedial action. It is important that unlike the provisions for similar Ombudsman type institutions, the Constitution of South Africa does not say “**recommend remedial action**” as many would like to believe.

Section 182 of the Constitution specifically states that the Public Protector has the power to “**take appropriate remedial action**”. The learned colleagues in the room will agree with me that a view that confuses take appropriate remedial action with recommend appropriate remedial action is cannot be consistent with the general approach to interpretation of statutes.

So serious was the vision of the architects of our constitutional democracy as they contemplated the role of this office that they ensured several guarantees for it, which include a parliamentary vote process with a 60% minimum vote in the National Assembly before a name is submitted to the President for appointment. An equally stringent impeachment process is stipulated for removal from office.

Addressing Parliament during the Justice Budget Vote, Deputy Minister of Justice and Constitutional Development Mr Andries Nel highlighted the fact that the architects of our democracy made a deliberate decision to establish strong Chapter 9 institutions such as the Public Protector to support and strengthen constitutional democracy. Referring to action required following the findings of these institutions, Deputy Minister Nel likened the process to good patients swallowing their medicine.

The views expressed by Deputy Minister Nel are not far from the paradigm that must have informed President Nelson Mandela when he said the following:

“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 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 on Gender Equality, the Constitutional Court and others.” (Nelson Mandela)

His successors, President’s Mbeki and Zuma have similarly pronounced on the place of the Public Protector and other constitutional institutions in our democracy general and public accountability architecture specifically.

The legislative mandate of the Public Protector extends to the power to resolve disputes and redress injustice relating to maladministration and abuse of state power under the Public Protector Act(PPA); enforcement of executive ethics under the Executive Members Ethics Act(EMEA); Investigation of Corrupt Practices under the Prevention and Combating of Corrupt Activities(PCCAA), whistle-blower protection under the Protected Disclosures Act(PDA); Review of the Home Builder’s Registration Council under the Housing Protection Measures Act(HPMA) and resolution of access to information disputes under the Protection of Access to Information Act(PAIA).

These six statutes are part of about sixteen pieces of legislation that mention the Public Protector. Others include NEMA, the Equality act, the Energy Act, the PFMA and the SIU Act.

You will note from the range of matters covered in the mandate that many of my office's operations and my decisions have an impact on this sector. Earlier on I referred to my encounter with the young entrepreneur. He probably had been exposed to the "*Against the Rules*" reports.

One of the unknown aspects of the mandate of the Public Protector is the review of the decisions of the Home Builders Council. This should be of interest to SAPOA although this is a mandate we'd like to part with.

I thought you might be interested in some of the experiences my team and I are able to share on the commercial property sector.

Leasing

We've already touched on leasing matters and specifically the "*Against the Rules*" reports. What we need to know is that these reports simply dealt with are a tip on an iceberg regarding the problems in the management of government leasing.

My office is currently dealing with lot of cases involving leasing matters that transcend the leasing of building of office space at all levels of government and state owned or controlled entities.

Key concerns in this are as identified in the gainst the rules reports and include the following:

- Process irregularities, for example, a non-competitive and preferences of connected bidders. Lack of due diligence.
- Gross overpricing. Whistle-blower who said the information he was going to give me would make "*Against the Rules*" child play.
- Shoddy service due to poor quality assurance. D- Grade buildings at pricing that exceed A-Grade plus cost of renovation on the state.

Allegations of organised corruption involving many rain makers (those who make things happen) and beneficiaries.

Construction

Government recently announced an intention to abandon rental of office space in favour of building its own infrastructure for permanent needs or services. This is a great idea indeed and is in line with global trends.

But this is no guarantee against the looting of state resources. Problems bedevilling leasing are endemic in state construction projects. I've heard a joke that it takes far less money than it takes to build a simple police station, school, hospital or office block.

Problems are the same as above namely procurement, pricing and quality assurance. Two examples come to mind from our experience as the Public Protector Team. Braamfischerville Gauteng and Nala in the Free State

Lessons emerging from the two are the following:

- Planning and approval of projects, including geotechnical report
- Procurement
- Quality assurance. For example in Braamfischerville, Gauteng, where we are currently investigating and intervening, a settlement built before the 1994 dawn of democracy, part of the settlement is built on wetlands and the sanitation system is dysfunctional. In Nala Free State where we are also intervening and investigating, we went to the house of a grandmother who has been forced to revert to a dysfunctional bucket system and were told that the piping for the supposedly waterborne sewage system ends just in front of her toilet. Now isn't that fraud?

Problem includes ensuring that you pay for what was procured. In these cases who are the officials, including engineers that approved and thus certified that there was a match between the specs and what had been delivered. One province is said to have paid one million rands for one RDP house. Who approved?

- Pricing. Overpricing plus escalating costs.
- Complaints regarding corruption particularly corruption executed as organised crime with multiple actors and therefore multiple beneficiaries of kick-backs and other benefits or proceeds of such organised crime

Planning of Capital Projects

Escalating costs brings me to the issue of planning. Let us take Gautrain for example. Do you recall how much it was meant to cost when the project was approved by Cabinet? How much are we talking about today?

I've been asked to find out the causes of uncontrolled escalation. The idea is to also draw lessons on causal factors and implications for our national budget in the future.

On the issue of planning of capital projects, a related matter prioritisation, we are increasingly getting complaints about non-delivery on basic services because money suddenly went into unplanned projects not in the strategic plan. In Cape Town they complained about a stadium that had become a white elephant. Anyway the Constitutional protection of socio-economic rights requires the ring-fencing of public resources for basic needs before undertaking nice to do projects. You'll agree with me that you can't drive a Ferrari while living in a squatter camp.

Clearly then, we have a common interest in ensuring clean governance within our state. As the young person who approached me in Cape Town it is in everyone's interest to have clean governance and that one of the benefits of this is the levelling of the playing field. We also do not want a bad name for the industry nor for our country. The reality is that this industry has done excellently in placing us on the global map, including the attraction of tourists. Indeed, most industry workers are hard workers who want to earn an honest living. In government too, the average public servant works hard and honestly.

It is incumbent upon all of us to ensure that we do not look the other way when things go wrong. Public resources are finite, when they are looted. Soon there will be nothing for delivering the better life promised by the Constitution. If that's not done and where accountability fails constitutional democracy is undermined leaving our people with extra-judicial options such as the Tunisian option.

One of the things we need to be honest about is the link between maladministration and corruption. In fact it's so hard to prove gratification in corruption matters and a maladministration finding is all we can do. This is where the industry can help. Whistle-blowing and the protection of whistle-blowers may help us to collectively flush out the bad apples.

In other words when SAPOA members see wrong-doing, they should not look the other way.

The commercial property industry and the state need to work together so that we can be a step closer to the realisation of the ideal of an accountable state that operates with the highest order of integrity while being responsive to the needs of its citizens.

We are co-creators of our own future. Lets a build the future we want to be part of and let's not squander our children's future through bad decisions that will place the state in unmanageable debt.

Thank you.

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