



**Address by the Public Protector, Adv. Busisiwe Mkhwebane, during the 2016 Chief Albert Luthuli Memorial Lecture in KwaZulu-Natal on Saturday, November 26, 2016.**

**Lotshani**

**Programme Director, Mr Peter Ndoro;**

**Minister in the Presidency, Hon. Jeff Radebe, MP;**

**Acting Director-General of the Department of Arts and Culture, Mr. Vusithemba Ndimba;**

**Chairperson of Luthuli Museum Council, Mr. Jabulani Sithole;**

**Deputy Chairperson, Adv. MJ Relefane;**

**Luthuli Museum Director, Mr. Brian Xaba;**

**Mr. Wally Serote;**

**Luthuli Family**

**Ladies and gentlemen;**

It is a great honour and privilege for me to have been chosen to deliver the 2016 Chief Albert Luthuli Annual Memorial Lecture, a momentous event in the South African calendar.

It is, for me, a daunting task because, by agreeing to speak here tonight, I was effectively consenting to walking in the giant footsteps of revered luminaries, who have been to this podium for the past 11 years to deliver this lecture.

These include the inaugural one by former President Thabo Mbeki and others by former Zambian President Kenneth Kaunda, former Mozambican President Joachim Chissano, President Jacob Zuma, former Chief Justice Sandile Ngcobo, former Speaker of the National Assembly Dr Frene Ginwala and former Independent Electoral Commission Chairperson Dr. Brigalia Bam.

I would like to thank the Luthuli Museum Council, in particular Chairperson Jabulani Sithole, for extending an invite to my office, enabling us not only to take part in this lecture but also lead the conversation.

My office and I are truly grateful for the opportunity.

### **Keeping the legacy alive**

#### **Albert Luthuli Primary school from Daveyton**

Firstly, I would like to commend the Luthuli Museum Council and the Department of Arts and Culture on the Chief Albert Luthuli Annual Memorial Lecture, which, I am informed, is on its 12<sup>th</sup> year. It is initiatives like this that ensure that the legacy of our struggle icons is kept alive.

The preservation of this legacy is critical in that generations to come will get to appreciate the sacrifices that were made by stalwarts such as Chief Luthuli for us to enjoy the freedom that some take for granted today.

I further wish to congratulate the Luthuli Museum Council for focusing this initiative of such an apposite subject matter, a question on whether the South African Constitution is an impediment or deal-breaker in ensuring nation building and social cohesion for a country with our kind of history.

This is indeed a pertinent question when one takes into account the kind of issues that South Africa grapples with today. We have been observing growing calls for the economic emancipation of the black majority and the resolution of the land question. We have also seen the manifestation of untold racial tensions.

These are issues that have, for a considerable while, been bubbling under the surface and it was only inevitable that they would, at some point, erupt into the open, forcing society to confront them head-on.

Chief Albert Luthuli spent a big part of his life fighting for the political and economic emancipation of the African majority in this country. He fought against the land dispossessions and frowned upon discrimination on the basis of the colour of one's skin.

He dreamed of a democratic South Africa, where there would be equal opportunities for everyone; where everyone would enjoy the same human rights; where we'd all have

equal access to land; and where we'd all be entitled to a dignified quality of life irrespective of the shade of our skin pigmentation.

His sentiments, in this regard, are captured in the famous speech he made in 1952, shortly after he was sacked as Chief of his ancestral rural village of Groutville Reserve, in KwaZulu-Natal following his refusal to choose between his role then as a leader of the African National Congress (ANC) and his chieftaincy duties.

In that speech, which is popularly referred to as the “The Road to Freedom is Via the Cross” speech, Chief Luthuli said the following:

*“I have embraced the non-violent Passive Resistance technique in fighting for freedom because I am convinced it is the only non-revolutionary, legitimate and humane way that could be used by people denied, as we are, effective constitutional means to further aspirations. The wisdom or foolishness of this decision I place in the hands of the Almighty.*

*“What the future has in store for me I do not know. It might be ridicule, imprisonment, concentration camp, flogging, banishment and even death. I only pray to the Almighty to strengthen my resolve so that none of these grip possibilities may deter me from striving for ... the Union of South Africa to make it a true democracy and a true union in form and spirit of all the communities in the land.”*

Our Constitution, which I will discuss in detail later on in my presentation, encapsulates all, and more, of these ideals that Chief Luthuli stood so defiantly for, even in the face of deprivation of the perks and privileges that came with being chief.

### **Chief Albert Luthuli – A brief profile with emphasis on issues of social cohesion**

Who was Albert Luthuli? As the Luthuli Museum Council, you surely know more about the man than I do. However, at the risk of preaching to the choir, I will highlight a few notable aspects of his life.

#### **School children:**

Chief Albert John Mvumbi Luthuli is best remembered by many of us, especially the younger folk, as the man after whom the headquarters of the ANC on Sauer Street in the heart of Johannesburg, are named.

But, as far back as 1960, Chief Luthuli's peaceful anti-apartheid message had already echoed across the globe, reaching places as far afield as Scandinavia and prompting the Nobel Peace Prize committee in Norway to sit up and take notice of him.

Soon thereafter, Chief Luthuli became the first black African recipient of the treasured Nobel Peace Prize for his “commitment to the peaceful struggle for human rights in South Africa”.

At the time when the award was conferred on him, Chief Luthuli had been placed under house arrest by the government of the day. Having made special arrangements for the relaxation of the house arrest conditions, Chief Luthuli was able to travel to Oslo, Norway to receive the Prize.

Dressed in traditional Zulu attire (he was proud of his origin), he knew who he is culture, language, and self-esteem, he accepted the Prize, referring to it as the “recognition of the sacrifices made by the peoples of all races in South Africa, particularly the African people, who have endured and suffered so much for so long”.

He was also Chief of the Abase-Makolweni Tribe in Groutville from 1935 until his dismissal in 1952. But Chief Luthuli was also a preacher, which is not surprising considering that his was peaceful politics where violence had no place.

He also believed that sport is one vehicle to be utilised to bring people together, same strategy utilised by President Nelson Mandela.

It was this character of an anti-injustice, pro-human rights and pro-peaceful struggle for freedom that earned him respect across the world as an exemplary leader that was deserving of the Nobel Peace Prize and United Nations Prize in the Field of Human Rights, which was bestowed upon him posthumously in 1968.

One can't help but wonder how Chief Luthuli would have reacted to the progress that we began registering in the early 1990s under the leadership of his successor, OR Tambo, leading to the groundbreaking moment of 1994 when we attained freedom and ushered in the democratic order that he fought so hard for until his last breath in 1967.

### **The Constitution – a “great piece of work”**

As you would know, 1994 was premised on the Interim Constitution of 1993, which then underwent a rigorous review, resulting in the masterpiece that is turning 20-years-old this on December 10, this year.

This brings me to the focus of my input tonight: *Is the Constitution an obstacle or catalyst in fostering Nation Building and Social Cohesion in a historically divided society?*

It is often said that we, the South Africans, have one of the best and most progressive Constitutions in the world. It is true. Even the world's most mature of democracies get green with envy when they look at our supreme law.

This much became clear four years ago, in the aftermath of the “Arab Spring”, when Egypt was preparing to write a new Constitution to chart a course to a new democratic order.

Round about the same time, Associate Justice of the Supreme Court of the United States of America, Justice Ruth Bader Ginsburg, happened to be visiting that North African country.

It appears Egyptian revolutionaries were looking at the American Constitution to model their own around. Justice Ruth Bader Ginsburg had some wise words for them. She said the following:

*“I would not look to the U.S. Constitution if I were drafting a Constitution in the year 2012. I might look at the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights [and] have an independent judiciary. It really is, I think, a great piece of work that was done.”*

There is no doubt in my mind that, in the Constitution of the Republic of South Africa, President Mandela and those that came before him, including OR Tambo and Chief Luthuli could not have bequeathed to us a more precious inheritance.

As South Africans, we should be thankful for the privilege of the visionary leadership that led the process of putting together the Constitution that we have today, ensuring that it addresses the struggles that Tambo and Chief Luthuli waged for the longest time between 1952 and 1993.

The leadership collective that assigned the constitutional assembly the responsibility to carve the content of the Constitution into a fine document that it is today had the foresight that allowed them to anticipate and prepare for the kind of challenges that any new democracy birthed out of a near civil war situation would run into.

They built into the Constitution the people’s entitlements in the form of the Bill of Rights. Added to that was the make-up and role of the state in seeing to it that the people get what they are entitled to. The role of those we elect into public office was clearly spelt out.

The President is given a role to uphold the constitution as the supreme law of the country, the Constitutional Court judgment by CJ Mogoeng Mogoeng mentioned that the President is the Constitutional being by design and commander in chief of state affairs.

The National Assembly is the voice of all South Africans, poor, voiceless and the watchdog of state resources. The NA holds the executive accountable for the fulfilment of promises made to the populace through the state of nation address. The chapter 9 institutions like the Public Protector assist in strengthening constitutional democracy.

In addition to these, the drafters of this valuable document appended the checks and balances that would empower to the people to hold to account those they have elected into public office in the event they deviated from their pact with the electorate. These include the legislature, the courts and the independent constitutional institutions.

This is why, 20 years later, our democracy continues to function like a well-oiled machine. Today, we continue to pride ourselves with the strong and independent judiciary that we have. We have consistently held free and fair national and provincial, and local government elections since 1994.

We also boast highly respected and competent constitutional institutions that include the South African Human Rights Commission, the Public Protector, the Auditor-General and the Electoral Commission that continue to support and strengthen our constitutional democracy.

Efforts continue to improve the quality of life of all our people, with millions of families having been provided with housing, electricity and water since 1994. Billions of rand in social grants are also distributed to the poor while public health care and education continue to account for a lion's share of government expenditure.

### **Takeaways from the Constitution on the Public Protector**

Programme Director;

As a Public Protector, it would be remiss of me not to talk specifically about my office as one of the institutions and, essentially, a resource that our Constitution makes available for our people to hold the state to account.

Along with five other independent state institutions, whose job is to strengthen constitutional democracy, the Public Protector is established under section 181 of the Constitution.

In section 182, the Constitution enjoins the Public Protector to investigate any conduct in state affairs that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct and to take appropriate remedial action. The Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation. The Public protector is independent and subject only to the law and impartial in exercising its power and perform its function without fear, favour or prejudice.

This gives us a broad mandate which has been interpreted to incorporate oversight over service failure and conduct failure in all state affairs. This means we have jurisdiction over national, provincial and local government; state-owned enterprises; and pretty much any institution that fits the description of an organ of state.

The mandate primarily incorporates ensuring public accountability with regard administrative justice, ethical conduct and control over state resources and opportunities.

In addition to the investigative mandate, the Constitution also instructs the Public Protector to be accessible to all persons and communities.

We also have additional powers as regulated by national legislation.

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

1. We have the power to investigate, conciliate, mediate, negotiate, advise or do anything necessary to resolve disputes and rectify maladministration in state affairs and related matters, including abuse of power, abuse of state resources, unethical conduct and corruption on own initiative or complaints under the Public Protector Act; going forward we can assist government on preventing issues like #Feesmustfall and service delivery protests
2. We have the sole power to investigate and report on violations of the Executive Ethics Code under the Executive Members' Ethics Act;
3. We have a shared power to investigate allegations of corrupt activities as envisaged under the Prevention and Combating of Corrupt Activities Act;
4. Another shared power that we have is that of receiving protected disclosures and serve as a safe haven under the Protected Disclosures Act;
5. We further have the sole power to review the decisions of the National Home Builders Registration Council under the Housing Protection Measures Act;
6. Lastly, we are an alternative forum under the Promotion of Equality and Prevention of Unfair Discrimination Act; and
7. We also are involved in information regulation under the Promotion of Access to Information Act.

Basically, anyone can approach the Public Protector with complaints of service or conduct failure like corruption. And there is no cost attached to our services, thereby ensuring that those who lack the necessary financial muscle to litigate against the state have an avenue that can serve justice free of charge.

The Constitutional Court, in a case of EFF and others vs Speaker of the National Assembly and others, put the mandate of the Public Protector in the simplest of terms. Delivering that watershed judgment, Chief Justice Mogoeng Mogoeng said the following:

*“The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation.*

*“Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalized a voice and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath that impropriety and corruption by government officials are.”*

Having recently turned 21 years of age, this institution has worked hard over the years to resolve most of the hundreds of thousands of cases brought before it, an overwhelming majority of which were ordinary people’s grievances.

These included complaints over alleged poor service delivery relating to housing, electricity, water, social grants, pensions, Unemployment Insurance Fund, workers’ compensation, identity documents, birth certificates, policing and the provision of public healthcare services, among other things.

There were also cases of conduct failure matters such as corruption, fraud, abuse of power and resources as well as ethical lapses.

Over the next seven years, we will continue on that path, taking our services to the grassroots so that people in remote areas also get access to this institution so that they can hold the state to account and get justice. To achieve this, we will be working hard to develop, nurture and harness cordial relation with stakeholders, especially the state as the respondent in all the matter brought before us.

### **Not yet utopia – Still a long way to go**

This seemingly flawless framework and the related achievements are not meant to suggest that we live in a perfect setting. Many of our people remain left behind. We are grappling with a widening gap between the rich and the poor as inequalities continue to deepen. We face a student uprising over tertiary education fees. Unemployment is spiraling out of control and the economy is not growing at a desired rate. We know from the figures released by the Statistics SA this week that the rate of joblessness for the third quarter of this year reached a 13-year high of 27.1 percent.

My daughter was asking, why government is not using their power to redress the imbalances of the past. Blacks have political power but not economic power.

Regarding social cohesion, racial tensions have hit a new high. Many of us are still shocked following the so called #CoffinAssaultCase in Mpumalanga; just as we were forgetting the Penny Sparrow and other cases.

The race problems have always been there. However, in the last few months, we have seen a surge. But the problem of racism has been more complex than the blatant forms of discrimination that have formed part of trending topics in our social discourse.

### **A ray of light – hope for the future**

These notwithstanding, I wish to argue that our Constitution, which is a living document, remains the only guiding light that can deliver us to the proverbial Promised Land.

In the same way it helped us to make it out of a very dark past, I wish to argue that it will see us through these challenges. This because all the hurdles that we face were anticipated by the brains behind our Constitution and nothing was left to chance.

The challenge with our constitution is that under the Bill of rights “everyone “is protected and one of the rights available to citizens is the right to vote. South Africans never had an opportunity to debrief and enjoy the fruits of the struggle heroes before opening up to the world.

As I draw towards my conclusion, I wish to make a few proposals in response to the important questions that Mr. Jabulani Sithole and his team at the Luthuli Museum Council have put to me.

#### ***· How do we get the nation to understand and internalize the Constitution to a point they believe in it and it becomes part of their everyday life experience?***

There are no easy answers to these questions but I am hopeful that my contribution will spark a conversation that will lead to solutions. Firstly, let us look to Chief Albert Luthuli.

Earlier, I mentioned that he was a preacher and a teacher. Therein lies our answer.

#### **Teacher Lungile and Principal Manana:**

Preachers spend their entire lives encouraging and persuading us not only to read but to also study the bible. They also teach us the scriptures.

#### **Chief: respected amongst the followers**

Accordingly, we should encourage and persuade our people to study, understand and internalize the Constitution. I know that the Department of Justice prints, in all eleven official languages, and distributes free copies of the Constitution.

I believe that if every single one of us owned a copy in the language we are comfortable with and spent time studying the document, we'd have an empowered nation.

We speak of an active citizenry. We cannot have such a citizenry if the citizens are not informed of their entitlements, the responsibilities of the state, the manner in which the state ought to conduct itself and the available avenues to employ in holding the state accountable.

I know that our basic education school curriculum covers, in a subject called Life Orientation, things such as human rights and so forth. I believe more should be done to inculcate constitutional studies in the curriculum.

**EXEMPLARY SCHOOL:** Albert Luthuli Primary using art to internalize the Constitution, need to be part of the curriculum.

Sport can also play a major role. We have seen it work during Nelson Mandela's time, though there is still an issue of sporting codes meeting transformational quotas. Until when will we put on makeup on this deep wound?

That is the one way that I think we can achieve an understanding and internalization of the Constitution in our nation.

· ***As a developmental state, is the Constitution better placed to address the country's widening social inequalities and thus ensures economic transformation for all to benefit?***

Our Constitution is not an end in itself but a means to an end. To this end, it has created a fertile ground for Parliament to pass laws that seek to reverse the imbalances of the past, particularly on economic transformation.

Over the years, Parliament has passed laws such as the Preferential Procurement Policy Framework Act No.5 of 2000 (PPPFA), the Broad-Based Black Economic Empowerment Act No. 53 of 2003 and the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, among other statutes.

Have these laws yielded the desired results? Yes and no. Yes, in the sense that the tide is turning, albeit slowly and no in that laws such as BBBEE are often alleged to be benefiting the few, who are politically connected.

A full and proper implementation of these laws can help us go the distance. We need more dialogue around that and this conversation must not be limited within the walls of power. Ordinary people, who were meant to benefit from these laws, must take part.

### **The following strategies can be used:**

- Promote Income generating strategies by integrating social protection into economic livelihood( to contribute to GDP)
- Set aside from government purchase programs to benefit women and youth cooperatives in school feeding, school uniforms etc. This will eradicate poverty and unemployment.
- Promote vocational training for unemployed economically active youth( Chinese lesson)
- Mindset change to encourage entrepreneurs to create employment instead of focusing in studying and be employed
- Leverage stokvels and self-help group saving to promote and retain money circulation in poor areas to enable the poor to build their assets
- Pension buy back to assist public servants to buy property using their pension money and repay at a reasonable percentage to end cycle of burden to the national fiscus through pension fund

The wheel of transformation is slow, and we need to ask ourselves whether our transformation agenda is working for our people or we need to move towards radical transformation?

### ***How have we fared as a country in terms of nation building and social cohesion?***

On nation building, it appears little effort has been made by government as the active agent of state to make it compulsory to internalize the South African history. (Primary school)

Patriotism through respect of the flag by the citizenry is one of the things that, in my view, should be prioritized by government so that people swear allegiance to the country.

This could be achieved through making it compulsory for all schools (both public and private), clinics, hospitals, universities etc. to hoist the flag outside their premises.

On social cohesion, some racial groups in our midst appear to be making little or no effort to speak at least one indigenous language. Life goes on as usual, therefore creating a gap in social cohesion.

However, logic dictates that if genuine reconciliation is to happen, we ought to meet each other halfway. Unfortunately, all these suggest that we are still not united in our diversity. South Africa has no common culture. This glares when we commemorate national holidays, where participation by some racial groups is minimal and little effort is made to understand the importance of days such as Youth Day, Human Rights Day, Freedom Day and Women's Day.

In countries like China, it's compulsory to study Mandarin at all international schools. Why is it still compulsory for our children to pass two languages and more often than not its English and Afrikaans, no compulsion to have an African language in each province to speed up social cohesion?

As President Mandela once said, if you speak to a person in their own language you speak to their heart. We need more conversation around this matter so that we can begin to understand what exactly is at the heart of the problems. We know that there are tensions occasioned by the discontent around economic exclusion and land issues.

· ***To what extent does the Constitution make practical the betterment of the lives of the majority of South Africans?***

Earlier on, I referred to the promise of an improved quality of life for all and a freed potential of each person as spelt out in the preamble of the Constitution.

I further highlighted the fact that these promises are given effect by the Bill of Rights, which I also went to great lengths to break down.

Having said that, I must stress the fact that our Constitution is aspirational. It envisages an ideal country that the midwives of this democracy wanted for the people of this country.

The state's (government, citizenry, laws) role is to work hard and consistently to urge closer to that ideal country. We must keep that in mind at all times.

· ***To what extent does the Constitution give credence to President Mandela's 25 May 1994 'Never Again' speech at the opening of the South Africa Parliament in Cape Town, when he committed that '...never again shall this beautiful land again experience the oppression of one by the other'?***

In his 1996 speech to workshop of the International Ombudsman Institute, President Mandela makes the point that democratic South Africa, which finds its basis in the Constitution, was meant to transform the state from the insular one of yesteryear to an inclusive one that looks after its people.

**In that speech, President said the following:**

*"Just over two years ago, on the inauguration of a democratic government in South Africa, we pledged that our land would never again experience oppression and domination. We knew the daunting task of building peace, prosperity, non-racialism and non-sexism required that a culture of democracy should take root in a society accustomed to violent discrimination and autocracy.*

*"We were mindful from the very start 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.”*

Ladies and gentlemen, we have a beautiful country whose democracy is based on a Constitution that is the envy of the world. We were not supposed to make it but we did. Many had written us off. They thought we were going to plunge this country into a civil war. We defied the odds and, through dialogue, we have made it thus far, with the Constitution as our guiding light.

Yes, we have experienced and we continue to battle with one challenge after the other. But who said it would be easy? We come from a history of overcoming obstacles. Let us draw from our experiences to negotiate the huddles that continue to sprout before us as we march to the Promised Land. We shall overcome.

Once again, let me commend the Luthuli Museum Council for this wonderful initiative and for inviting my office and I to participate.

Ngiyathokoza

**Adv. Busisiwe Mkhwebane**  
**Public Protector of South Africa**