



**Address by Public Protector Adv. Busisiwe Mkhwebane during the Annual General Meeting of members of the Mpumalanga Circle of the Law Society of the Northern Provinces at Protea Hotel Kruger Gate in Skukuza on Saturday, August 19, 2017**

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**Honourable Judge President of the Mpumalanga High Court, Judge Legodi;  
President of the Law Society of the Northern Provinces, Mr. L B Sigogo;  
Chairperson of the Mpumalanga Attorneys Council, Mr. T M N Kgomo;  
Council Members of the Mpumalanga Attorneys Council;  
Attorneys practicing in the Mpumalanga Province;  
Members of the Law Society of the Northern Provinces;  
Chairperson from the various Circle Councils;  
Distinguished Guests;  
Ladies and gentlemen;**

Good morning;

Let me first express my sincerest appreciation to you, the Mpumalanga Circle of the Law Society of Northern Provinces, for deeming it fit to have me as a speaker on the occasion of your Annual General Meeting. I am, indeed, humbled by the invitation.

When your request landed on my desk several months ago, I jumped at the opportunity without even thinking twice. This was because Legal Professional Bodies such as yourselves rank highly among the stakeholders groupings that I, as the Public Protector, ought to engage with from time to time. Further being approached by one of you whom I was his junior at University, Mr Job Mokoena.

You will note later on in my presentation that you are a key stakeholder to my office, and so, it becomes critical that we have this type of engagement now and then.

Unfortunately, we meet at a time when the legal community is mourning the loss of one of its greatest sons, Mr. Nic Swart, who was, until his untimely passing, the Chief Executive Officer of the Law Society of South Africa and Director of its legal wing, the Legal Education and Development (LEAD).

His death is a massive loss for the South African legal fraternity. I am informed that under his leadership, LEAD developed many educational programmes that sought to empower young lawyers and new entrants to the profession. Those that knew him well attest to his passion for continuous legal education and how his efforts and strategic direction made LEAD the world class legal education service provider it is today.

Undoubtedly a man devoted to the development of the legal profession, it is no wonder Mr. Swart passed away in line of duty while in Botswana, where he was representing the South African legal profession at the Southern African Development Community Lawyers Association (SADC-LA).

This profession is, indeed, poorer without him. Our hearts go out to his family, friends, colleagues and the Law Society of South Africa community at large. May his gentle soul rest in eternal peace.

Programme Director;

On this month, 27 years ago, in Havana, Cuba, the Eighth United Nations (UN) Congress on the Prevention of Crime and Treatment of Offenders adopted a document titled “Basic Principles on the Role of Lawyers”.

It was a document containing up to 29 principles that covered various themes, including access to lawyers and legal services; special safeguards in criminal and justice matters; qualifications and training; duties and responsibilities; and freedom of expression and association.

Some of the ideals that this document recognized were the need for conditions under which justice can be maintained; the promotion of respect for human rights and fundamental freedoms without discrimination on the

basis of race, sex, language or religion; equality before the law and the presumption of people's innocence until proven otherwise.

It also recognized the right to be tried without undue delay and the right to a fair public hearing by a competent, independent and impartial tribunal established by law.

I am pleased today to be in the midst of the people whose business it is to ensure that the ideals contained in that document are upheld on any given day. It also pleases my heart to see the role that the Law Society of Northern Provinces, of which you are part, has played over the years to ensure that its members exist to see to it that these ideals are entrenched.

As far back as one can remember, lawyers in this country have always played a role that sought to ensure that there is justice and observation of legal ideals similar to those contained in the "Basic Principles on the Role of Lawyers" document.

This was the case even during the most difficult of times when the country was under apartheid rule. Regrettably, some of the lawyers that led from the front during those days eventually paid the ultimate price for their steadfastness in so far as the need to uphold those ideals was concerned.

When you arrive at the headquarters of the National Prosecuting Authority (NPA) in Silverton, Pretoria, the first thing that catches your eye is the name of the building.

Proudly emblazoned, in big letters, across the façade, the name reads: "Victoria and Griffiths Mxenge Building" – a befitting tribute to husband and wife, both of whom fell victim to apartheid brutality in the early 1980s. The question is why was the building named after these two? Why specifically them?

Since we are in women's month, I will elect to tell you briefly about how Victoria earned that honour. A former nurse, she was admitted as an attorney after studying law through the University of South Africa (UNISA).

Soon thereafter, she joined her lawyer husband's then five-year-old legal practice. As a lawyer, Victoria intervened a lot in cases involving the protection of young people that were maltreated while in detention.

Unfortunately, her husband was killed by apartheid police that same year, leaving her not only to raise their children alone but to continue with the running of his legal practice. In 1984, she was part of the defense team in the treason trial of, among others, leaders of the United Democratic Front in the Pietermaritzburg Supreme Court.

The following year, she was invited to address about 50 000 people that had come to pay their last respects for the “Cradock Four”. These were activists Matthew Goniwe, Fort Calata, Sparrow Mkhonto and Sicelo Mhlauli, who had been killed by security police.

Days after speaking at the funeral, on 01 August 1985, Victoria was herself murdered. Four men shot and killed her at her home in Umlazi township, outside Durban in KwaZulu-Natal, with her children watching as their mother’s blood pooled around her.

This month marks the 32<sup>nd</sup> anniversary of her brutal death.

As the Public Protector, I salute the South African legal fraternity for the role it continues to play in ensuring that ours is a healthy constitutional democracy that upholds justice, the protection of human rights and respect for the rule of law.

This brings me to the purpose of my being here today. You have asked me to deal with two points: First, you want me to address you on the constitutional mandate of the Public Protector. Second, you want to hear from me on what role practicing attorneys can play to advance the constitutional mandate of the Public Protector. Allow me to start with the former.

It is fortunate that the Public Protector is no longer the enigmatic institution that it once was. Nowadays, virtually everybody is well-versed on what the Public Protector is; what this institution exists for; and its potential impact in helping our constitutional democracy to thrive.

Be that as it may, I beg for your indulgence as I take you through the genesis and constitutional mandate of this institution as we have come to understand it.

Apart from the birth of the whole idea of an ombudsman more than two centuries ago in Scandinavia, the origins of this office can be traced back to June 1979 when the office of the Advocate-General was established, following what was called “the information scandal”.

It was a graft-buster that accounted to the state-president, more like the modern day Special Investigating Unit. By 1991, it has undergone an evolution, resulting in being enjoined to investigate maladministration in addition to its corruption mandate and rebranded the Office of the Ombudsman.

And then a new day dawned in April 1994, leading to the birth of the democratic order. That order had been made possible by the 1993 Interim Constitution that provided for the establishment a Public Protector. The Public Protector Act 23 of 1994 was later passed, leading to the opening, the following year, of the institution I head today.

In the final constitution of 1996, the Public Protector was established, under Chapter 9, in section 181, as one of half-a-dozen independent institutions with the mammoth task of supporting constitutional democracy. The section in question provides that:

"1. The following state institutions strengthen constitutional democracy in the Republic:

a. The Public Protector.

.....

2. These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

4. No person or organ of state may interfere with the functioning of these institutions.

5. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

Section 182 then deals specifically with the Public Protector, giving the institution original power. It provides that:

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

(a) To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) To report on that conduct; and

(c) To take appropriate remedial action

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

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

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

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

In line with the provision for additional powers and functions "prescribed by national legislation" as envisaged in 182(2), the Public Protector also has:

a) The power, in terms of the Public Protector Act, 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;
- b) The power to investigate and report on violations of the Executive Ethics Code under the Executive Members' Ethics Act;
  - c) The power to investigate allegations of corrupt activities as envisaged under the Prevention and Combating of Corrupt Activities Act;
  - d) The power to receive protected disclosures and serve as a safe haven for whistleblowers under the Protected Disclosures Act; and
  - e) The power to review the decisions of the National Home Builders Registration Council under the National Protection of Housing Measures Act.

What we glean from the above is that the powers and functions of my office are quite broad. Fortunately, we have the benefit of the wisdom of the Constitutional Court, which crystalized my office's role in a few paragraphs found in a judgment handed down in March 2016. This was in the case of the Economic Freedom Fighters and others versus the Speaker of the National Assembly and others.

Reading out the unanimous verdict, Chief Justice Mogoeng Mogoeng unambiguously put it as follows:

*“The Public Protector is ... 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 marginalised 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.”*

The Chief Justice went to great lengths to explain, in layman’s terms, the thinking behind the role of this institution. As you would have seen elsewhere in the judgment, he clarified that complaints entrusted to us as the Public Protector are meant remedy impropriety, prejudice, unlawful enrichment or corruption in government circles.

He emphasized that one cannot talk of remedial action “unless a remedy in the true sense is provided to address a complaint in a meaningful way”. He found as irreconcilable the power to take appropriate remedial action that is inconsequential and free to be ignored with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen constitutional democracy. It is this judgment which clarified the binding nature of the PP remedial action (it is like a court order and must be implemented unless set aside by a court)

And so, walking into office on 15 October 2016, following my appointment as Public Protector a few days earlier, I had one thing in mind. This was, in the words of the Constitutional Court, to *“give the poor and the marginalized a voice, and teeth that would bite corruption and abuse excruciatingly”*.

I rallied my management team at a hotel not far from my office for a strategic planning session, where I revealed my plans for the office and, together with the team, worked out the mechanics thereof. Out of that session came what we know today as *Vision 2023: Taking the services of the Public Protector to Grassroots*.

It is a blueprint through which I endeavour to ensure that, for the duration of my seven-year, non-renewable term of office, the services my office renders reach communities that live in far-away places, in the margins of society.

Unfortunately, some mischievous people have misconstrued this noble plan to mean I will be paying less attention to issues of governance that

continue to plague the country. Nothing could be further from the truth. In fact, it is the poor that suffer the most when funds are syphoned from the public purse to swell the pockets of the corrupt and the unscrupulous.

And, therefore, this proves without any doubt that Vision 2023 is about fighting corruption with as much vigour as we will seek to advance the following eight pillars on which the Vision is anchored:

1. Access - Bringing services closer to the doorsteps of communities located at the grassroots, in the margins of society.
2. Vernacular - Communicating to communities in their own languages and making use of media platforms particularly radio stations- that use vernacular languages.
3. Footprint - Exploring the use of courts, municipal premises and traditional offices to supplement the 19 offices that we already have across the land, with view to increasing our reach.
4. Agreements - Signing Memoranda of Understanding with stakeholders such as the South African Local Government Association (SALGA) for mutually beneficial partnerships.
5. Safe haven - Being a stronghold for the poor and the marginalised.
6. Rights - Empowering the public to enforce their rights by peacefully holding their leaders to account so that we may focus on addressing systemic challenges.
7. Complaints resolution - Encouraging organs of state to establish own effective complaints resolution units or sector-specific Ombudsman institutions such as the Health and Military Ombudsman.
8. Self-protection - Empowering people to become their own liberators, who see themselves as Public Protector in their own right.

By so doing, I believe that by the year 2023, when I vacate office, I would be leaving behind an empowered public. I would have contributed to bringing the taste of freedom and democracy to the forgotten people that only hear about this liberty from some of us and have never felt its presence.

Programme Director;

On my appointment, I said I would hit the ground-running. And that is exactly what I did. I did not wait for Parliament to approve our Strategic Plan and Annual Performance Plan, which seek to operationalize Vision 2023. I proceeded to implement, for I already knew the direction in which I wanted to steer this ship.

As a result, the impact of Vision 2023 is already being felt on the ground. With as little as 402 staff members, we managed to put to rest over 10 000 cases out of a total workload of more than 16 000 by the end of the 2016/17 financial year.

The rest of the cases were carried over to the current financial year. Of those finalised, just over 600 fell outside the remit of the Public Protector while a little more than 900 were referred to other competent institutions for resolution.

In line with our resolve to broaden access, we traversed the length and breadth of South Africa, introducing the Public Protector to far-flung communities and registering new complaints as we went along. About 800 community outreach clinics were held countrywide in this regard. These contributed to the total figure of close to 10 000 new complaints received during the period concerned.

The demographics of the people that flock to our offices for help continued to be skewed in favour of males, who accounted for 64 percent of the complaints we dealt with. Only 32 percent of the matter were from females. The rest were not specified.

Now, it is an established fact that an overwhelming majority of the cases we conclude do not result in formal investigation reports. This is because a lot of the matters are resolved through alternative dispute resolution mechanisms, where we bring the warring parties together, sit them around the table and begin the process of mediating, negotiating and conciliating, with a view to emerging with settlement agreements that are signed by both parties. We then monitor implementation after which we consider the file closed.

In more serious matters involving conduct failure, however, we issue investigation reports. Seventeen (17) such reports were issued during the year ending March 31, 2017.

Among the issues of concern coming out of these reports are whistleblower victimisation, problems with workmen's compensation, governance matters troubling local government and the plight of small business people, who are frustrated by organs of state either through failure to pay for services rendered or irregular award of tenders at the expense of deserving Small Medium Micro Enterprises.

Other themes coming through in the reports are the blurred lines between political party and state, and alleged manifestations of the phenomenon of "state capture" – a serious matter that should be dealt with swiftly. We all know the matter is sub judice and will be heard on 24-26 October 2017.

This information, including the data I quoted, will be confirmed after the auditing process and be revealed in an Annual Report to be tabled in the National Assembly later this month.

Although we are able to report this much progress, it has not been smooth-sailing. The roll-out of Vision 2023 has been something of a rollercoaster ride, given the prevailing mood and hostility directed to my office. The antagonism has, in the main, been based on half-truths, innuendo and unwarranted vitriolic attacks on my person.

A lot of these challenges, we believe, are occasioned by the politicization of this office. It has become something of a political football that is abused by players in that space. And this has been very distracting for the team and I. Furthermore, it may have chipped away at a portion of our reputation as an organization. I must admit, this has been the biggest hurdle thus far.

But we have been here before. Historically, democratic institutions in this country have suffered these kind of attacks in the run up to and during the year of a certain political event that will take place later this year. Institutions such as the NPA know this far too well.

I will not go deep into those matters because I am not a politician and I don't play in that space. My interest right now is to keep the team's eyes

firmly fixed on the ball so that we are not sidetracked by matters that do not concern us. We will strive to stay on course despite the noise.

Having said that, I have been careful not to be arrogant and deaf to constructive criticism. To this end, I have taken note of the criticism of the High Court in the CIEX/ABSA Lifeboat matter. As you may be aware, I consented to the order to set aside the remedial action and the judgment in that matter was handed down this week. We have taken that punch with humility. It is our view that constructive criticism builds people and institutions if they draw lessons from it. And that is precisely what we are going to do; draw lessons from it. Though the report is binding until set aside by the Court, it is also the subject of judicial review.

This kind of attitude towards constructive criticism is important because thousands upon thousands of ordinary people in this country look to us to contribute to their wish to see their quality of life improving. They look to us to help free their potential. We dare not fail them.

As I draw to a conclusion, what role do I see you playing in helping my office to effectively implement its constitutional mandate? There are a few things on which we could use your help.

The Public Protector has over the years received complaints against attorneys, but has maintained that such matters be dealt with by the relevant law society.

We do deal with complaints against the Law Society itself, where people mostly allege failure to hold attorneys accountable. In 2016, we received a total of 26 such cases. In some cases, it would be complaints of racial nature where black complainants allege that grievances against white lawyers are not given the same attention as those against black attorneys as a caller on Power FM recently complained to me.

We are aware of criticism levelled against the law societies (as reflected in a complaint assessed this morning), questioning the independence, objectivity and processes of the disciplinary proceedings and investigations of the Law Societies.

We have a good relationship with LSSA. The former Public Protector and LSSA met in May 2015 and discussed collaboration in respect of *pro bono* assistance to complainants who require legal assistance, either in respect of matters that cannot be dealt with by the Public Protector, and where legal remedies are more appropriate, or emanating from investigations where the complainant requires the intervention or relief of a court of Law. Discussions also centred about the issue of legal education and training initiatives for Public Protector staff.

Many of you provide legal advice to organs of state in matters that we are investigating. Our plea is that, in advising the state, always remember to make it clear to functionaries there that the Public Protector is neither a foe nor a friend of the government.

I know that a vast majority of you are good people who share this sentiment. Unfortunately, there are a handful who advise the state to disregard our processes. This makes it difficult for us to live up to our constitutional mandate and to meet the needs of the people of South Africa.

When we reach that stage, we start weighing our options, which include resorting to making use of the hard powers given to us by the law. These include instituting contempt of the Public Protector proceedings, embarking on search and seizure processes or issuing subpoenas.

I must stress the point that we only invoke these powers as a last resort; when all else has failed. We, therefore, appeal to you to assist us in that regard. Help your clients understand us better. Help them understand the Constitutional Court judgment and our broader constitutional mandate.

In addition, as indicated, we are often approached by distraught members of the public that we can't help because their grievances fall outside our ambit. Sometimes the only forum that can be of help to them is a court of law. But, as we know, litigation does not come cheap and you find that the people affected do not have the financial muscle to pay a lawyer.

In those circumstances, we would appreciate if some of your members would be prepared to take up those matters on behalf of such members of the public on a *pro bono* basis. Between 2016 and this year, we have referred about 77 cases to the Law Society to assist in that regard.

But we, too, as the Public Protector, need legal advice from time to time. Some of our reports get taken on judicial review. As we speak, we have about 25 review cases pending in the High Court. The numbers have gone up since that Constitutional Court judgment. In such instances, we are going to look to people such as yourselves to assist. We hope you will avail yourselves. This message is especially directed at firms of historically disadvantaged persons in line with the country's transformative agenda.

Lastly, the Law Society of Northern Provinces is due to be wound up, so as a completely new structure comes to life. The envisaged structure will be in terms of the Legal Practice Act. It is hoped that the new structure will be representative, where all current recognised formations' views in the profession would have been accommodated.

From my office's standpoint, I think the interest is to see a structure that is "people centred" coming up. Such a structure could forge more formal relationship (through signing of cooperation agreement/Memorandum of Understanding) with Public Protector to enable us to achieve our Vision 2023 goals.

The envisaged new structure must not miss an opportunity to also put at its centre, conceptualised straight into its pillars the responses to the "triple challenges" our women have suffered (and still do to this day), that way the women emancipation will translate from being mere rhetoric to concrete plans. A legal profession must lead the way, law is to blame for any form of subjugation, but it also is it the core for emancipation, liberation and any form of relief.

I can't step down from the podium having not commented on this. Recently we saw lawyers marching to the Union Building and the key complaint was "briefing patterns". While we understand that LSNP (now at its twilight) may have been trapped by issues related to legal ethics etc. there is certainly a contradiction in the situation that the Law Society survives on (i) interest generated by Attorneys Trust Accounts; (ii) members annual subscriptions; etc. but it wouldn't actively educate the public and the commercial sector about the benefits of a fair spread of work, that way the Law Society would have been instrumental in building/ imparting skills to the PDI's.

Lastly, we wish to appeal to you to help entrench the culture of good governance in both the public and private sectors. This includes in your own spaces as individuals doing business with either of sectors. We do not like reading about alleged fraudulent activities as Road Accident Fund claims. Such things only serve to tarnish this good profession of Victoria Mxenge and others.

Let us work jointly, using the law, to see to it that South Africa becomes the country that Victoria, her contemporaries and many other lawyers that fought the evil system of apartheid yearned for. Keep up the good work.

Thank you.

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