



**Address by Public Protector Adv Thuli Madonsela on the during the
Annual General Meeting of the Cape Law Society in Port Alfred,
Eastern Cape on Friday, November 11, 2011.**

Programme Director, Ms Nalini Gangen;

Deputy Judge President of the Eastern Cape, Judge L P Pakade;

**Co-Chairpersons of the Law Society of South Africa, Messrs N
Matlala and P Sham;**

**President of the Law Society of Northern Provinces, Mr J Janse van
Rensburg;**

President of the Black Lawyers Association, Mr P B Mabunda;

Chairperson of the Attorneys Fidelity Fund, Mr S Nkanunu;

Members of the legal community;

Ladies and gentlemen

I am deeply honoured and humbled by the invitation to address this august occasion.

The privilege to address you brings my office one step closer to achieving the constitutional responsibility to be accessible to all persons and communities.

The legal profession is also in its own right one of our critical stakeholder as the Public Protector South Africa. My team and I engage with members of the legal profession almost on a day to day basis in various

capacities. Members of the legal profession often represent complainants in their engagement with my office. The state is also usually advised or represented by a legal professional during a Public Protector investigation, including the point at which findings are released. We also often call upon members of the legal profession to provide *pro bono* legal assistance to poor persons that my office cannot assist and have advised to approach a court.

I found your choice of theme for my address: *“The role of the legal profession can play in protecting the rights of ordinary citizens and holding government accountable”*, both intriguing and encouraging. As I prepared for today’s talk, my mind briefly went back to an encounter with my Pastor who did not approve of my choice of law as a career. He jokingly asked: *“Why would you want to be a shark?”*

I was told a joke about a lawyer, an accountant and a doctor that tried to cross a shark infested strip of water with a boat. Along the way the sharks attacked, devouring the doctor and the accountant. When the lawyer, who was the sole survivor, arrived at on the other side, the news of the shark attack had already reached the people. When asked how he had survived, he simply said: *“Professional courtesy!”*

Of course, I personally had a different belief about lawyers. I knew that most of them could not be compared to sharks even as a joke. My view of lawyers was particularly influenced by what I had read about lawyers that had given their lives to the struggle. The legacy of one of these, Bram Fischer, continues to be celebrated in among others the Bram Fischer lecture, which was presented by Advocate George Bizos, another selfless struggle legal eagle, yesterday. Struggle icon and stalwart, former President Nelson Mandela is also among these and so is Oliver Tambo, another struggle stalwart.

It was gratifying for me that before my parents passed on they experienced first- hand the human rights efforts of lawyers such as Priscilla Jana and John Campbell. I too was touched by the selfless work of these and other lawyers who courageously confronted the apartheid

machinery in defence of human rights and freedoms at enormous cost to themselves and their families.

The legal profession has always been at the centre of the struggle for freedom, human rights and democracy in this country and the rest of the world. Indeed our understanding of democracy, particularly contemporary notions of democracy such as the supremacy of the Constitution and the rule of law have over the years been shaped by the contribution of lawyers. Who will forget the *Madison* case that forever shifted the final say on what constitutes constitutional compliance from Parliament to the courts?

The Cape province has produced many iconic lawyers who gave their lives for the freedoms and human rights we take for granted today. Who will forget the indomitable Mrs Victoria Mxenge whose life and works we recently celebrated under the auspices of SAWLA? Her husband, Griffiths Mxeke was also slaughtered for the work she did in pursuit of our freedoms, democracy and an accountable state. There are many others.

Today, lawyers are equally important in regard to interpreting the Constitution to give meaning to the constitutional provisions on the mandate of the Public Protector.

Addressing the African Ombudsman and Mediators' Association (AOMA) meeting in Durban early this year, then Chief Justice Ngcobo said the following:

“The importance of the role of the Public Protector or Ombudsman is especially clear in many countries throughout Africa, where there is often a desperate need for basic human needs such as food, drinking water, health care, housing, education and social security. Our countries cannot bear the improper allocation of government resources. Having a Public Protector, or Ombudsman, with a mandate to investigate and publicly report in government administration is essential.”

Programme Director;

It appears that former Chief Justice Sandile Ngcobo sees the Public Protector's value in a democracy as involving the responsibility to hold the state accountable by investigating and reporting on government administration to ensure, among other things, that government delivers much needed basic services such as food, water, health care, housing, education and social security.

It is of great interest to my team and I to get a sense as to whether you as the legal eagles of our country agree with the Chief Justice on the role of the Public Protector.

We are all familiar with the classical checks and balances in a democracy that Montesque and others saw as essential for democratic and accountable exercise of public power. You will recall that the Montesquean classical ideal for a true democracy is accountable and constrained exercise of state power achieved primarily through diffused state power. At the core of diffused state power is separation of power between Parliament, the Executive and an independent judiciary.

The idea behind diffused state power and the classical checks and balances was to curb excesses in the exercise of public power. Historically, the executive branch of government has emerged over the years as the most powerful arm of government and the highest risk of abuse of public power, including administrative injustices and abuse of state resources.

For many centuries, the legislature and the courts as well as direct accountability to the people by those entrusted with public power were seen as adequate checks and balances against the abuse of state power and related excesses.

However, about two centuries ago, the King of Sweden concluded that the traditional checks and balances were inadequate in curbing excesses in the exercise of state power and ensuring that that government puts the will and interest of the people first. On his return

from Turkey, he introduced what we now know as the Ombudsman. It is said that he got the idea from his visit to Turkey. The King appointed the office in question as his eyes and equipped it with the mandate to investigate and redress alleged injustices and wrongdoing of government against the people. Incidentally, it is said that the King took this action to prevent rioting because people were extremely unhappy with excesses in the exercise of government power and use of public resources.

Fifteen years ago, the people of South Africa, came to the same conclusion that the traditional checks and balances were not enough to ensure that the new South Africa was always governed in the interest of its people and public resources deployed in accordance with the Constitution, the law and people's needs.

The Public Protector is established under Section 181 of the Constitution to support and strengthen constitutional democracy. One of seven institutions for this purpose, the Public Protector's specific mandate is spelt out in Section 182, which states that:

“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.”

Section 182(4) of the Constitution further states that the Public Protector must be accessible to all persons and communities. Section 182(5) adds that the Public Protector has additional powers as prescribed by legislation. The additional powers are spelt out in 16 statutes. The Public Protector Act 23 of 1994, which is the main statutory vehicle giving effect to Section 182 of the Constitution, gives a variety of options for redressing grievances regarding the acts or omissions of government. The Act says I should resolve matters, make findings, express a point of view or make a recommendation.

What is not known to the general public is that there are several hidden mandates of the Public Protector. Among those is the anti-corruption mandate. The Public Protector Act read with the Prevention and Combating of Corrupt Activities Act gives the Public Protector the power and responsibility to enforce the Prevention and Combating of Corrupt Activities Act. This mandate is shared with other institutions including the Public Service Commission.

How many of you know that the Public Protector has review powers, which are different from the power to investigate? The Housing Measures Protection Act designates the Public Protector as the institution with the power to review decisions of the Home Builders Registration Council regarding disputes involving construction contracts or agreements in the housing sector. Also, little known is the mandate of the Public Protector to protect whistleblowers under the Protected Disclosures Act and the Public Protector's mandate as an information regulator under the Promotion of Access to Information Act.

Most of you know that the Public Protector is the sole agency responsible for the enforcement of the Executive Members' Ethics Act and the Executive Ethic Code. However, many people don't know that although they can't approach the Public Protector directly to hold members of the executive (President, Ministers, Premiers and MECs) accountable under the Act and Code, they can approach a Member of Parliament if it is a national member or a Member of the Provincial Legislature to approach the Public Protector on their behalf.

I was recently amazed when a senior staff member in my office informed me excitedly that my colleague is also an Environmental Ombudsman. When I informed him that I too am also an Environmental Ombudsman, he was surprised. To make it easier for our staff to and stakeholders to understand the full mandate of my office we compiled and published a compact book detailing all the constitutional and statutory powers of the Public Protector.

As I am engaging with you as fellow lawyers, I thought it would be proper to bring to your attention that the Public Protector Act empowers me to make findings and not suggestions or allegations. It's important to note that the power to recommend, which is the most well known aspect of my powers, is one of several options I have to resolve grievances regarding the properness administrative acts or omissions in the exercise of public power.

The Public Protector Act further mandates me to resolve grievances or disputes involving conduct in state affairs through conciliation, mediation, negotiation or any other means. These two are hidden powers. Often when we seek to mediate, organs of state ask why we are deviating from investigating. In understanding what we refer to as ADR powers of the Public Protector, it's important to note that the end product envisaged in the Act is a resolved grievance or dispute.

The area of ADR is an important possible area of collaboration or finding common ground between my office and the legal profession. This brings me to some of the questions that arise during my office's interface with organs of state and their legal representatives.

The one persistent question is: What weight do your decisions carry? My team and I always say that the best way to resolve uncertainties regarding the impact of my findings is to adopt a progressive approach to the interpretation of Section 182(1)(c). We have always maintained that it's unthinkable that the framers of our Constitution established the Public Protector as a mechanism to support democracy and yet wanted its findings to have no consequences. If so, why would Section 182(1)(c) be phrased in stronger terms than similar provisions regarding the powers of the Ombudsman in other countries where the formulation is "make recommendations?"

In the dialogue on the impact of my findings I constantly draw attention to the global jurisprudence on the Ombudsman's recommendations. The general understanding in this regard is that although Ombudsman findings do not have the same binding effect as court decisions, the state is generally expected to implement unless there are cogent reasons against implementation of remedial action or the Ombudsman's (Public Protector's) findings are irrational.

This takes us to the role of the legal profession in protecting the rights of ordinary persons and ensuring accountability by government. Earlier on I stated that I was encouraged by your choice of theme. It is consistent with the time tested spirit that has characterised the work of the legal profession in this country. The profession has always seen itself as a force for change for good in our society. But is the legal profession always playing that constructive role when advising organs of state when the people exact accountability through the Public Protector?

I want to briefly go back to the encounter with my church Pastor. One of the things he said was that lawyers are like hired assassins and

prostitutes! They act in accordance with the wishes of whoever pays them. Now that was a very serious allegation which in my mind I immediately dismissed. But was there perhaps some element of truth in my Pastor's views?

This morning, I was listening to our human rights icon, Adv George Bizos on "Morning Live." He said something remarkable. Bizos said lawyers are as good as their clients. Now what if a client wants to get away with murder? As lawyers, should we knowingly aid them? I don't think so! In fact, I do know that many of you would not willingly do so. A friend who has acted as an attorney and adviser for a municipality for years informed me once that he educates his clients about the principle of legality, human rights and ethical governance. He informed me that often new appointees believe political power places them above the law in regard to hiring, firing and awarding state contracts.

I am confident that many of you do the same. That indeed is what distinguishes a legal profession from a hired assassin. A legal professional does not simply pander to the dictates of a client but advises in a manner consistent with ethical governance, human rights and the rule of law.

I don't believe it is proper for a lawyer to advise government to disregard its responsibilities just because it can get away with it. Let's imagine a granny whose son is disabled due to being shot by a policeman and the family wants millions for compensation. If as a lawyer you drag the matter for as long as possible and apply your skills that the state pays a ridiculously low amount, who really wins and who loses? Does the state really win when the burden of care for a wrong committed in the exercise of state power ends up being borne by a poor family in Alexandra township or some informal settlement? This is where the tag of hired assassin seems to stick.

In our dealings with the state, we often come across similar unhelpful attitudes. Instead of assisting the state to take responsibility for its wrong doing, state lawyers often take a confrontational approach to my office's investigation, findings and remedial action.

The spirit of doing the right thing does exist though in many aspects of public life. For example, this week the government of Gauteng (Department of Education) acted in an exemplary manner when a young child was injured at a school in circumstances that could have been prevented. The swift action taken showed empathy, respect for human

rights and eagerness to protect the interests of affected citizens regardless of their status in society. Within a few days an investigation was concluded with government accepting responsibility and providing care to the family. The only question for discussion was how much will do as a fair and just compensation in the circumstances. If lawyers were involved, they advised admirably and that's the spirit demanded by the Constitution.

After all as lawyers, we want to be part of a fair and just society. As lawyers we can choose to be the voices of reason and not hired assassins. We do not want to be part of a society where might is right. We certainly do not want to create a state that uses its power to undermine its own citizens.

Legal professionals today have the responsibility and opportunity to continue the legacy of promoting human rights and accountable use of public power. We cannot encourage wrong doing as that will undermine the constitutional democracy we are all trying to consolidate. Legal professionals can also play a meaningful role in promoting access to justice through the Public Protector. Someone recently questioned that the Public Protector provides administrative justice as its core function. As astonishing as that was, it suggested a need for a continuing dialogue on what exactly did the Constitution drafters have in mind on protecting the public.

From what was the public to be protected? On our side, we've maintained that the Public Protector protects the people from bad governance by exacting accountability in the exercise of public power. We've said that the desired outcome of such oversight is to ensure administrative justice and that public power is always exercised in accordance with the law and in the public interest.

I believe we can work together to promote good governance and democracy. To achieve this, we must continue to engage in the dialogue about the role of my office. Ultimately together we can play a meaningful role in ensuring that the ideal of an accountable state that operates with the highest level of integrity at all times while being responsive to the needs of its citizens and residents is realised.

I would like to leave you the following wise words from my colleague in Naca-China:

“Deal with the difficult while it is yet easy; deal with the great while it is yet small.”

Thank you.

Adv TN Madonsela
Public Protector of the Republic of South Africa