



**Speaking notes for Deputy Public Protector Adv. Kevin Malunga at SAME
Foundation Gala Dinner**

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***The importance of continuing to invest in communities with the
reduced emphasis on the benefits of socio-economic development
on business”***

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1. INTRODUCTION

The twenty-year period of South African democracy since 1994, and 18 years since the signing of the Constitution offers a range of substantial benchmarks in South Africa's evolution through a relatively wide range of initiatives that introduced multiple levels of engagement between government and the private sector to facilitate Corporate social investment through strong policy frameworks and government incentives developed in the past decade.

Over the last decade, South Africa, like many developing countries, has resorted to the use of public-private partnerships as a strategy to deal with its deeply rooted socio-economic, political, fiscal and societal problems. To this end, it has adopted the use private sector partners an integral strategy in national and international developmental plans such as the Millennium Development Goals (MDGs), Accelerated and Shared Growth Initiative for South Africa (AsgiSA), Medium- Term

Strategic Framework (MTSF 2009–2014), and the National Development Plan (NDP), which charts the planning and progress of the country until 2030.

Corporations and their affiliated foundations have for instance, invested significantly in South Africa's education sector, with funding from domestic private sector to education now reaching levels beyond the funding provided by traditional donors.

The private sector is playing an increasing role in the provision of Primary Health Care through both the for-profit and not-for-profit portions of the sector. A dramatic increase in donor-funded, health-related activities, in the HIV and AIDS and tuberculosis fields, has further expanded this sector's involvement in providing Primary Health Care services to a larger proportion of the population (Although serious consideration should be given to finding mechanisms to leverage these resources to address current unmet health service delivery needs among the South African population).

The private sector plays multiple roles in the field of food security from food availability (production and agro processing) to food access (retailing and food pricing) and in food utilisation (food fortification and marketing.) Under the corporate social investment (CSI) responsibility banner many private sector institutions are supporting development programmes in South Africa. The government has also identified agro-processing (agriculture) as a key sector for public/private partnering with the view to not only improve food security but also for the creation of sustainable jobs and enterprises, thus a number of government export and private investment promotion initiatives exist to support the sector.

The Government, through the Department of Water Affairs and Forestry (DWAF) actively pursued partnerships with not for-profit organisations working for the provision of water and sanitation to rural communities to meet its policy objectives.

South Africa's housing policy has now been in place for some 20 years. In partnership with the private sector the Government since 1994 has delivered more than 2.1 million completed houses and another 1.2 million "housing opportunities" (where housing subsidies have been approved and water and sanitation services have been installed, but construction has not yet been finished).

While progressive policies by the state and vigorous engagement with the private sector in the last 20 years or so have led to the expansion of

many services to all South Africans, many citizens and communities are yet to experience the impact of these investment initiatives in the quality of life and their living conditions.... .

Over the past 20 years, the housing backlog increased from 1.5 million to 2.1 million units, while the number of informal settlements has gone up from 300 to 2 225, an increase of 650%. At the same time, the housing subsidy has gone up from R12 500 per household to some R160 500 today, while state spending on housing and community amenities has risen from 1% to 3.7% of GDP. Yet the quality of the houses being delivered is often poor. Many people have long been urging the State to transfer the housing subsidy directly to them, as they could build far better houses for themselves.

Recent reports by Statistics South Africa, the SA Human Rights Commission (SAHRC), UNICEF, and the Department of Women, Children and people with Disabilities (DWCPD) still reveal large disparities in access of the poor and vulnerable to “some of the essentials of life”¹. The above-mentioned report by the SAHRC emphasises that according to the **Gini index**² used by the World bank to measure the extent to which the distribution of income or consumption expenditure among individuals or households, **South Africa has the worst Gini coefficient in the world, making it one of the most unequal countries in the world.** This translates to the following scenarios:

“In South Africa, compared to a child growing up in the richest income quintile, a child in the poorest quintile is two times less likely to have access to adequate sanitation and water; two times less likely to be exposed to early childhood development programmes; three times less likely to complete secondary education; seventeen times more likely to experience hunger; and twenty-five times less likely to be covered by a medical scheme.”

This inequality is furthermore characterised by strong racial disparities that remains in our society. Statistical reports³ reflect that approximately 65.1 % of the approximately 18.6 million children in South Africa⁴, reside in households with a per

1 A Review of Equity and Child Rights - South African Human rights Commission, UNICEF and DWCPD

2 <http://data.worldbank.org/indicator/SI.POV.GINI>

3 *Social profile of vulnerable groups in South Africa, 2002-2012, Stats SA*

4 (38% of the population in South Africa)

capita income of less than R650 a month. Almost one-third (32, 4%) of South African children lived in households which did not contain a single employed member in 2012.⁵ In 2009, nearly three million children (16%) were living in households where child hunger was reported.

The 2015 General Household Survey released recently by Stats SA, reveals that 22,6% of South African households still experience inadequate or severely inadequate access to food.

Hunger is unfortunately not the only consequence of the poor environment in which many of our children find themselves, as most experts are in agreement that the causes of preventable deaths are exacerbated by a lack of access to basic services such as water and sanitation, good health services for children including comprehensive HIV and AIDS interventions, and high levels of trauma and violence. According the Child Rights Manual published by Parliament in 2012, over 100 000 children (under 18 years) die annually as a result of communicable diseases, intentional and unintentional injuries. The main causes of child deaths were due to AIDS, diseases of poverty (e.g. diarrhoeal disease, malnutrition, pneumonia); neonatal causes of deaths (i.e. related to maternal care and obstetrics) and trauma, It is a well-known fact that South Africa currently has the largest number of people living with in HIV in the world (4.9-5.7 million). of which an estimated quarter of a million are children below the age of 15 years infected before and during the birth process and some later through breastfeeding. An estimated 350 000 children and adults died in South Africa of AIDS in 2007 alone. This situation has a direct bearing on the country's ability to attain progress with respect to Millennium Development Goal 4, namely, to reduce child mortality

Stakeholders are also in agreement that the provision of basic services is essential for the livelihood and survival of the more vulnerable people amongst us. The disruption of energy supply and lack of access to adequate, clean water and sanitation facilities have had a direct impact on the health status of our old people and children.

⁵ **Social profile of vulnerable groups in South Africa, 2002–2012** / Statistics South Africa. Pretoria: Statistics South Africa, 2012

In 2008, over 95% of children between 12 and 15 years old were attending school. However, of these children, many are at grades below the ones corresponding to their ages.⁶ The percentage of children of school-going age (between the ages of 7 and 17 years) who attended any kind of educational institution increased substantially between 2002 and 2012, particularly for the younger ages. While more than 98% of children in the age group 8 to 14 years attended school, lower participation rates were observed for children in the older age groups and by the age of 17 years, less than 91% of males and females were still attending school.⁷

2. PUBLIC - PRIVATE PARTNERSHIPS FOR INVESTING IN COMMUNITIES: SYNERGIES AND RISKS

2.1 The Constitutional promise and mandate

The Constitution obliges the South African Government to protect and promote the rights of every individual. It stipulates particularly under the bill of rights that everyone is equal before the law and has the rights to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms, including social economic rights like a right of access to housing, a right of access to healthcare, a right to education, a right to a healthy environment. To promote the achievement of equality, legislative and other measures may be taken to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

Experts agree that equality is not really about just treating people exactly the same, because “*that would freeze the status quo in the inequality*”, but that equality is about substance - the end result and the reality in people’s lives.

But the Constitution is not only about rights and systems of legitimate enforceable rules. It is concerned with the property of the relations among human beings in this country and how the institutions of a just society treat its citizens, not only politically but also economically and socially. Essentially, the Constitutional promise of a

⁶ Statistics South Africa (2009) General Household Survey (2009). Pretoria, Cape Town: Statistics South Africa. Analysis by Chennells and Hall, Children’s Institute, University of Cape Town (2011)

⁷ **Social profile of vulnerable groups in South Africa, 2002–2012** / Statistics South Africa. Pretoria: Statistics South Africa, 2012

better life for all means bringing to an end all manifestations of injustice and gross unfairness and synonyms such as prejudice, inequity, unlawfulness, inhumanity, maltreatment, inequality, malpractice and misuse.

2.2 Good governance as an essential requirement and enabler for an effective and successful public- private engagement

“Democratic reforms do not necessarily help the poor unless the institutions of government are improved, in terms of being mechanisms for popular participation, the administration of justice, and bureaucracies stimulated by incentives and held accountable by performance measures.”⁸

Good governance alone will not end poverty, but we cannot significantly reduce poverty, especially within a human rights approach, without good governance.”⁹

While past disparities and backlogs with service delivery based on racial divides obviously contributed to the country’s socio-economic problems, the Public Service Accountability Monitor (PSAM) believes that a major cause of inequality in South Africa is poor governance, which includes not only corruption, but also poor performance of government officials in their management of public resources and a lack of political will to act against underperforming officials. The poor management of public resources translates directly into poor public service delivery implementation, and thus obviously undermines any public- private partnership or engagement aimed at poverty alleviation and other initiatives to address inequality.

Good governance entails *“an administration that is sensitive and responsive to the needs of the people and is effective in coping with emerging challenges in society by framing and implementing appropriate laws and measures. It includes strict rules of accountability”*.

The Constitution is the cornerstone of the Country’s governance system. It stipulates where power lies within the state, what the institutions of government are, and how they are intended to operate. Good governance emerges from its structural provisions, such as separation of powers and statement of explicit rights that guard against authoritarian control. While other processes are equally important, such as a culture of human rights, the rule of law, gender equality and open electoral

⁸ <http://www.polity.org.za/polity/govdocs/reports/poverty2.html>

⁹ *Governance, Accountability and Poverty Alleviation in South Africa* Paper delivered by Mr Derek Luyt, Media and Advocacy Head of the Public Service,Accountability Monitor (PSAM), at the United Nations Social Forum on 2 September 2008 in Geneva, Switzerland.

processes, effective governance can take place only if state institutions function properly and are responsive to the needs of individuals in society, especially the poor and marginalised.

In a Constitutional democracy, the framework of Constitution and law exemplifies essential elements of good governance and accountability by, inter alia -

- a) Prescribing the powers of government and the procedure of exercising powers.
- b) Ensuring equal treatment and equal protection of law.
- c) Guaranteeing protection against arbitrariness of government and excess of administrative powers.
- d) Creating accountability mechanisms for the exercise of powers and formulation of policies to the people/ representatives of the people
- e) Ensuring procedural transparency of exercising all administrative powers.
- f) Providing remedies against any kind of mal-administration and injustice done to the aggrieved citizens, as well as institutional mechanisms to redress grievances.

In South Africa, accountability is especially important at provincial and local municipal level, since it is at these levels that the major part of the national budget aimed at alleviating poverty through the provision of housing, health and education services, is spent.

2.3 Primary accountability and shared responsibilities

In terms of the preamble of the Constitution of the Republic of South Africa, 1996, the **primary purpose of the South African Government** is to improve the quality of life of society and develop the potential of individuals together. There is therefore, general consensus amongst academia and public administration practitioners alike, that the core function in the public service in South Africa is thus to seek the achievement of progressive realisation of the constitutional rights of its citizens through service delivery.

In a wide sense public-private partnerships based on corporate social responsibility considerations to improve the quality of life of communities, will be most effective where there is manifestation of mutual commitment and trust, and whereby risk, rewards, resources, skills, expertise and finances are shared

However, where the private sector assists with or contribute towards the upliftment of communities through activities which essentially constitute the performance of institutional function by the State, the private sector contribution is not always regulated by contractual commitments between the public and private party in terms of which substantial financial, technical and operational risk is transferred to the private party. In fact sometimes there are no formal engagements to capture elements such as trust, mutual commitment, or social and community obligations, which are necessary accountability considerations.

There are suggestions that public-private engagements can reduce accountability and undermine public control ¹⁰, with some writers arguing that shared accountability in such engagements “**becomes joint irresponsibility in practice, with no-one ultimately being accountable.**”¹¹

Community projects may involve different stakeholders with varying interests, resulting in the blurring of public and private sector responsibilities to the extent that shared accountability may result in general irresponsibility from all involved if not checked. Therefore, understanding the different accountability relations and ensuring that all are working properly and reinforcing one another marks a positive step.

The overarching requirement of transparency and accountability on both the public and private sectors are also affirmed in legislation and policies. For instance Section 217(1) of the Constitution of the Republic of South Africa 1996, states that when an organ of state in the national, provincial or local sphere of government or other institution identified in the national legislation contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent and cost-effective. Furthermore, the different laws and policies governing private partnership contributions (Treasury Regulation No. 16 of 2004; the Municipal Systems Act, 2000, the Municipal Finance Management Act, 2003 and the Promotion of Administrative Justice Act, 2000), in South Africa emphasise accountability and transparency and advocate for value for money in the procurement of goods and services.

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¹¹ Jones, G. & Stewart, J. 2009. ‘New development: accountability in public–private partnership: the case of local strategic partnerships’, *Public Money and Management*, 29(1): 59–64.

The importance of integrity and moral responsibility in the performance of a public duty makes the final dimension of accountability, known as accountability as a virtue, crucial.

Yet, notwithstanding the overarching requirements of transparency and accountability several transparency concerns are evident in public-private partnerships or engagements. Among these are procurement irregularities, non-disclosure and corruption.

Treasury Regulation 16 make provision for accounting officers to sign off an anti-corruption policy for community projects, and call for forensic audits if fraud or corruption are suspected. However, some engagements still offer considerable latitude for manipulation by companies and government officials, which is difficult for the public and anti-corruption agencies to spot.

Therefore, in order to maintain public trust and ensure fairness, all parties must be willing to expose their proposals to public scrutiny.

2.4 The necessity for Community involvement

It could be argued that the level of involvement of the community in projects might further slow down the process because the community does not speak with a unified voice and *often tend to be passive receivers of services rather than voluntary participants.*

The reality is that completely excluding the community on issues of public-private partnerships would undermine legislation such as the provisions of Section 152 of the Constitution (the five basic objectives of municipalities) and the *Batho Pele* principles (DPSA 2005). For example, the Gautrain has been criticised for the lack of significant public consultations and legislative debates before it was approved and put out to tender (Stephen 2005).

Citizens, government officials, Parliament, the electorate, the courts, tax payers, shareholders and the local community are the principals in community projects. Elected officials, politicians and administrators are obliged to explain to the public how they are carrying out their public responsibilities. Public institutions exercising

public powers, using public resources and providing public services, therefore need to be accountable to those on whose behalf they act

2.5 Effective coordination and monitoring of resources

Treasury Regulation 16 makes provision for the accounting officer or accounting authority of the institution that is party formal agreement to ensure that the agreement is properly implemented, managed, enforced, monitored and reported according to the mechanisms and procedures as approved by National Treasury. In reality, there are no mechanisms and procedures in place to manage the contributions from the private sector. Moreover, the institution's accounting officer usually has little authority over the private party, because the private party is not part of the government's democratic chain of command.

The reality is that the implementation community projects also affects social issues such as land resumption, town planning, employment, heritage and environmental protection. However, there are usually no provisions for social and environmental auditing

Early and serious engagement and participation by the community in the policy and decision-making processes relating to community projects and the checks and balances from the community on their activities will facilitate monitoring.

According to a World Bank (2011) report, successful service outcomes depend on the government working with citizens to design, implement and evaluate services with each party, each of which holds the other accountable. Also, the United Nations Millennium Project (UNMP 2005: 98) stresses the need for public managers to work more closely with community-based organisations, *which at the very least should participate in the design and monitoring of plans through representations of the strategy group and regular civil society consultation.*

Perhaps the first step in engaging the community is to sensitise them through information awareness campaigns in an attempt to obtain a ***radical shift from the perception that they are mere service receivers to accepting their responsibility as participants in service delivery.***

Another way to secure community participation is to ensure that there are clear and transparent channels of communication where elected officials, politicians and administrators are obliged to explain publicly, fully and fairly to the citizens how they are carrying out responsibilities that affect the public, and where concerns can be discussed in a language acceptable to all.

3. THE ROLE OF THE PUBLIC PROTECTOR

3.1 Constitutional mandate of the Public Protector

Established under chapter 9 of the Constitution, the Public Protector has the power under section 182 of the Constitution to strengthen and support constitutional democracy by:

- a) investigating 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.

The Public Protector's mandate covers all organs of state at national, provincial and local levels, including local government and extends to state owned enterprises, statutory bodies and public institutions. Court decisions are excluded.

Section 182(4) enjoins the Public Protector to be accessible to all persons and communities

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

- a) Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs(Core);
- b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):
- c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);

- d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;
- e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and
- f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs translates to a multi-pronged approach to handling complaints to ensure

- a) correction of transgressions by organs of State,
- b) a proper diagnosis and correction of any administrative inadequacies, including systemic failures
- c) that proper redress is provided in cases requiring remedial action.

The Public Protector understands its mandate as involving righting administrative wrongs of the state by redressing service and conduct failure.

- **Service failure** usually involves general maladministration in the form of service delayed or service denied. The case load covers the entire span of the classical definition of maladministration which includes: undue delay; abuse of power; unfair, capricious or discourteous behavior and the violation of a human right.
- **Conduct failure** includes integrity issues such as unethical behavior; dishonesty or improper dealings in respect of public money; improper enrichment and receipt of improper advantage; abuse of power; abuse of resources and ultimately; **fraud; and corruption**
- Section 182(4) of the Constitution requires the Public Protector to be accessible to all persons and communities.
- The Public Protector has 20 offices, which include the National Office, 9 Provincial Offices and 10 Regional Offices.
- In pursuit of our strategic goal to be accessible to and trusted by all persons and communities the Public Protector has been embarking on a comprehensive outreach and advocacy programme through, clinics, MOPP clinics, information sessions and radio. The goal of reaching 30 million persons has been achieved

in fact, performance statistics show that we reached more than 51 million people, which is up by over 17 million from the previous year. Various platforms, including the news media and our own outreach activities such as the annual Stakeholder Consultation Dialogue and Good Governance Week made it possible for us to reach this milestone

3.2 The role of the Public Protector in seeking and enforcing accountability for unethical conduct and governance failures

As an institution that can investigate and report on ethical and integrity violations in the public administration, the Public Protector provides crucial oversight aimed at detecting misconduct and ensuring that those found to be in breach of their public duties, face the consequences of their actions.

However, the mandate of the Public Protector as an Ombudsman Office allows it to function as more than just an oversight body because she consider the findings on a complaint not only on compliance with the relevant regulatory framework, but more widely on the basis of what is fair and reasonable in all the circumstances. The determination of fairness includes considering all of the ways in which the circumstances in question have affected the complainant and the wider community. The standards of fairness transcends lawfulness and allows the Public Protector to measure conduct against the ethical values and principles that must underlie public administration as embedded in section 195 of the Constitution, including impartiality, fair and equitable services, responsiveness, accountability and a high standard of professional ethics.

The mandate of the Public Protector to act as a conscience of the State goes beyond showing the state where it might have gone wrong, but also making things right on a moral and ethical level – to ensure that no member of the public should suffer prejudice or injustice as result of the wrongful actions of an organ of state. To this extent the Constitution empowers the Public Protector to take appropriate remedial action in order to address and “put right” the specific action or unethical conduct (eg maladministration) that gave rise to the particular grievance in the first place, and ensuring that any and every finding of impropriety is effectively remedied.

Accountability, ethical leadership and a culture of professional ethics in the Public Service requires every official to

- a) act fairly and takes responsibility for wrongful actions by the State ,
- b) (publically) acknowledge unfair or improper performance of administrative functions and improprieties and apologise for them, and
- c) take steps to make amends.

Section 182(b) of the Constitution and section 8(1) and 8(2)(b) of the Public Protector Act enable the Public Protector through the powers of, inter alia, persuasion and publicity to bring investigations, which are normally conducted in private circumstances, into the public domain by way of the reporting and publication of the findings and remedial action. The objective is to -

- a) inform our stakeholders, including Parliament, as well as interested parties about investigations where the results are significant and the issues are of significant public interest;
- b) publicly seek a commitment from the affected state institution(s) to acknowledge and rectify cases of maladministration or unethical conduct that have led to injustice or hardship;
- c) ensure fairness for the complainant and, where appropriate, for others who have suffered injustice or hardship as a result of the same maladministration or poor service;
- d) Use the lessons learned from complaints to ensure that maladministration or poor service is not repeated; and
- e) Record and use information on the outcome of complaints to improve services.

The Public Protector reports also have broader applicability than the agency which is the subject of the investigation. They are seen by many in the public sector as vehicles for learning and understanding. Many of the reports tabled in this were in high demand given the issues highlighted

Agencies are also able to draw on Public Protector reports to improve their own practices. Ongoing regular monitoring of the Public Protector's findings and remedial action by agencies can help to prevent maladministration and systemic issues from developing and foster a culture of continuous improvement. The Public Protector's

findings also provide a standard against which local governments, departments and agencies should measure their own performance.

While the public reporting and publication of the findings and remedial action in an investigation plays an important role in promoting awareness of the Public Protector and his or her operations, the vast majority of complaints are resolved through a voluntary and cooperative approach, without using these formal powers. The so-called “high profile” matters make up just a fraction of the institution’s caseload. In fact the number of investigations in which the Public Protector decided to issue reports in terms of section 182(1)(b) of the Constitution represents a little more than **0.1%** of the total number of 24 759 the office was able to finalise cases the previous financial year.

One of the factors that contributed to the increased output in the number of cases is the focus on early resolution methods, including ADR. An estimated 70% of the matters dealt with the Public Protector office are being resolved through early resolution approaches. These are cases that we call “**bread and butter**” matters that need to be resolved with speed because complainants in such cases are often on the verge of losing their houses or sources of income unless the Public Protector steps in to help.

Through my own personal experience as the chairperson of many of the ADR proceedings, I have been privileged on numerous to observe the transformation of the public officials from being representatives of organs of state to becoming public servants, acting consciously in recognising what is right and fair in the specific circumstances to resolve matters in an amicable way.

4. CONCLUSION

Our test of whether or not we are effectively discharging our Constitutional mandates, lies in the assessment of the impact and difference that we make in the lives of ordinary South Africans in their aspirations to experience the Constitutional promise of a better life for all.

In approaching our Constitutional and statutory mandates we endeavour to balance the values of accessibility, promptitude, responsiveness and effectiveness.

While all the Constitutional checks and balances are important, it is critical to mention that it should not be left to the state to ensure that we have a living Constitution capable of accommodating our collective dreams and aspirations as a Nation. It must also be understood that development should be the pursuit of everyone with the state primarily acting as an enabler and regulator. However, as a developmental state our state must directly engage in the delivery of basic needs such as water, health, education, infrastructure and to a limited extent, housing.