



Address by Public Protector Adv. Thuli Madonsela during a meeting of the South African National Editors Forum on Saturday, November 23, 2013.

Programme Director and Chairperson of SANEF Mr Mpumelelo Mkhabela;

Deputy Chairperson of SANEF Mr Makhudu Sefara;

Treasurer of SANEF, Ms Amina Frense;

Convenor of KZN region of SANEF, Judy Sandison;

SANEF leaders and members present

Ladies and gentlemen

I cherish the honour and privilege of presenting a brief address on Accountability to the Citizenry to this gathering of the captains of industry in the sector that gets South Africa talking. I am deeply grateful to Mr Jovial Rantao and his fellow organizers for the invitation.

As I was preparing for this address, which is essentially about public accountability, my mind was somehow drawn to a scene in the cartoon movie, The Prince of Egypt.

In the scene, Moses has just accidentally killed a slave driver and is trying to run away when his adoptive brother and heir to the Pharaoh throne, Rameses, approaches him.

“No, wait!” Rameses calls out.

“You saw what happened! I just killed a man,” is Moses’ reply.

“We can take care of that. I will make it so it never happened,” Rameses reassures Moses.

“Nothing you can say will change what I’ve done,” Moses replies.

Then Rameses says “I am Egypt! The morning and the evening star! If I say day is night it will be written. And you will be what I say you are. And I say you are innocent!” he says as he places his hands on his brother Moses.

But Moses' response is "What you say does not matter! You don't understand! ..."

One of the lessons that can be drawn from the dialogue is that accountability in human life has a personal ethical dimension, in addition to answerability to others, including authorities charged with enforcement.

One of the things that strike me every time I watch the Prince of Egypt movie (some of us watch cartoon movies) are the different value systems that appear to inform the conduct of Moses and Rameses regardless of them being brothers.

It seems to me, that Moses' value system drives him to make a personal choice to be held answerable for his actions while his brother takes the view that, as a Prince of Egypt, Moses can be placed beyond answerability. In the public accountability discourse, Rameses' actions would be regarded as aiding impunity. In the rule of law movement, such conduct would be viewed as inimical to the rule of law.

It is my considered view that the same applies to public accountability. Meaningful public accountability involves personal ethics and external oversight or enforcement. President Mandela's approach to public accountability appears to reflect this understanding.

Speaking to Public Protector like (Ombudsman) institutions, in the aftermath of a difficult time when his administrative conduct had been challenged and successfully subjected to judicial scrutiny, President Mandela said the following:

"Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order. An essential part of that constitutional architecture is those state institutions supporting constitutional democracy. Amongst those are the Public Protector, the Human Rights Commission, the Auditor General, the Independent Electoral Commission, the Commission on Gender Equality, the Constitutional Court and others...

It was to me never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my government and office and judged against it. One of the first judgments of our Constitutional Court, for example, found that I, as President, administratively acted in a manner they would not condone. From that judgment my government and I drew reassurance that the ordinary citizens of our country would be protected against abuse, no matter from which quarters it would emanate. Similarly, the Public Protector [Ombudsman] had on more than one occasion been required to adjudicate in such matters." (Mandela, 2000)

Perhaps the starting point for our dialogue today should be a brief clarification of what we mean by accountability to the citizenry. From there we can proceed to questions such as who is accountable to whom, why and how? I intend to also briefly touch on what often goes wrong in public accountability in our country. I will then briefly deal with prospects for a better deal in the context of our cherished constitutional democracy, which is on the verge of proudly reaching its 20-year milestone.

Defining accountability for its secretariat, the United Nations General Assembly said the following:

“Accountability is the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception. Accountability includes achieving objectives and high-quality results in a timely and cost-effective manner, in fully implementing and delivering on all mandates to the Secretariat approved by the United Nations intergovernmental bodies and other subsidiary organs established by them in compliance with all resolutions, regulations, rules and ethical standards; truthful, objective, accurate and timely reporting on performance results; responsible stewardship of funds and resources; all aspects of performance, including a clearly defined system of rewards and sanctions; and with due recognition to the important role of the oversight bodies and in full compliance with accepted recommendations.”

One of the things we can glean from the statement is that accountability in the exercise of entrusted power incorporates answerability and taking responsibility.

I like Professor of Public Administration at the Utrecht School of Governance, Sweden, Mike Bovens’ simple definition of accountability. In his article titled Two Concepts of Accountability, Bovens defines accountability as:

“A relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor can be sanctioned”

Bovens goes further to break accountability into the following constituent elements:
A relationship qualifies as a case of accountability when:

1. There is a relationship between an actor and a forum
2. In which the actor is obliged
3. To explain and justify
4. His (or her) conduct
5. The forum can pose questions
6. Pass judgement
7. And the actor can be sanctioned.

This approach resonates with the approach we unanimously agreed to as participants during the Public Protector Good Governance conference in 2011. During the conference, which was attended by several Cabinet Ministers, Chairpersons of Parliamentary Committees, Provincial legislature and executive representatives, local government leaders, political party leaders, academics, lawyers, the judiciary, business leaders and civil society representatives, we unanimously agreed that public accountability includes answerability, taking responsibility and making amends in the event of wrongdoing.

But in our case we went further to include that public accountability incorporates active citizenship, where citizens are not simply confined to asking questions after the effect but are also meaningfully involved in deciding the agenda for action that is to later form the basis for answerability. This added dimension is apparent in the definition offered by Business

Dictionary.com, which provides that public accountability refers to:

“Obligations of public enterprises and agencies (who are entrusted with public resources) to be answerable for fiscal and social responsibilities, to those who have assigned such responsibilities to them.” (emphasis added).

<http://www.businessdictionary.com/definition/public-accountability.html#ixzz2ISYEbw4L>

At the good governance conference, we further agreed that public accountability is essentially part of good stewardship over public power and resources. We did so bearing in mind that public power and resources belong to the people as a whole or citizens and are given to a few on the basis of trust.

It is my considered view that the character of the state envisaged in our Constitution makes accountability by those entrusted with state power central while entrenching citizen participation. This can be seen in the founding values in section 1 of the Constitution, which provides the following:

“Founding provisions

1. Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b. Non-racialism and non-sexism.
- c. Supremacy of the constitution and the rule of law.
- d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2. Supremacy of the Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

3. Citizenship

1. There is a common South African citizenship
2. All citizens are-
 - a. equally entitled to the rights, privileges and benefits of citizenship; and
 - b. equally subject to the duties and responsibilities of citizenship.
 - c. National legislation must provide for the acquisition, loss and restoration of citizenship.
3. National legislation must provide for the acquisition, loss and restoration of citizenship. “

Having settled that all those entrusted with public power are accountable to the citizenry, the next question is how?

The Constitution presents the citizens with several accountability avenues that transcend the traditional checks and balances that used to form pillars of parliamentary democracy. The accountability avenues entrenched in the Constitution include the following:

Political accountability

Bovens says accountability operates along the principal-agent relationship. The people, as principals, appoint a few through an electoral process that takes place once every 5 years, and delegate to these (trusted) few, the authority to take care of their collective resources and regulation of their affairs. It is done in good faith with the understanding that the selected few will always act in accordance with the authority given by the people through the Constitution and laws and will put public interest first. The proportional representation electoral system, while excellent in improving inclusiveness, has limitation though with regard to ensuring direct accountability to the electorate.

Parliament further delegates power to the Executive, which subsequently delegates the power further to an army of public servants and public entities. All of them are required to operate strictly within the authority they are assigned and in the public interest. Parliament exacts accountability over the Executive for the exercise of the power assigned by the Executive. This is provided for in section 55 of the Constitution.

It is worth noting though that at any given time, people can question the exercise of the said authority directly, through petitions and related measures. With advances in technology and access to information made possible through freedom of the media, this direct accountability is made easier these days. It is the duty of those entrusted with public power to be answerable, take responsibility and make amends on their own when there has been wrongdoing.

I must say that this is the point when the personal dimension of accountability is central as it should take the public authority's integrity and good faith to judge their own conduct and make amends when they find themselves wanting.

During my participation at the Talberg Forum organized by the Talberg Foundation in Sweden earlier this, I was deeply struck by how strong this element of public accountability is in both the public and private sectors. My team and I were in awe as we listened to stories of how various high level state actors have quickly admitted fault and offered to make amends when a public wrong occurred through their actions, or under their watch. One story that amazes me to this day is that of a Minister on the verge of becoming the Prime Minister, who is said to have voluntarily resigned when a scandal broke over her having purchased some toblerone chocolate, using the state credit card without reimbursing government. The closest we got to this in our country was when MEC Humphrey Memezi resigned after a media exposé of the purchase of a R10 000 painting at McDonalds, using his state credit card.

Beyond the media, political accountability can be enhanced considerably through the involvement of civil organizations. Already in South Africa, organizations such as trade unions, Corruption Watch and Ndifuna Ukwazi, are enhancing ongoing dialogue between organs of state and citizens on issues of policy, seeking answers and requesting redress for perceived wrongdoing.

Legal accountability is another familiar avenue for accountability. Courts have been around in some form or another virtually throughout the history of democracy. Through the courts, citizens

can exact accountability in the exercise of public and other forms of power. In a constitutional democracy such as ours the role of the courts is made more powerful through the principle of judicial review introduced by the US judiciary in 1803 through the case of Marbury versus Madison. In our case the Constitution clearly stipulates as indicated above that it is “the supreme law of the Republic; law or conduct inconsistent with it is invalid....”

I beg to be forgiven if I am wrong but I often get a sense that we are not all on board regarding the supremacy of the Constitution and not of Parliament.

Administrative accountability is the less appreciated of the avenues availed by the Constitution to hold those entrusted with public power accountable. In our context the Constitution creates several quasi-judicial and administrative accountability bodies to help the people exact accountability in the exercise of public power. President Mandela makes reference to these bodies in his plea for them to be respected and complied with as they execute their constitutional functions. As indicated in the Madiba quote earlier, the Public Protector is one of these.

Bovens notes the important role these quasi-judicial and administrative bodies, that include Public Protector-like (Ombudsmen) institutions, in securing “not only the probity and legality of public spending, but also its efficiency and effectiveness”. These administrative forums exercise regular financial and administrative scrutiny, often on the basis of specific statutes and prescribed norms,” he advises.

In the last two years I have raised concerns regarding the extent to which as a nation we fully appreciate the role and place to be accorded to the Public Protector and the other unique or sui juries bodies introduced by our Constitution. I am often surprised when confronted with organs of state that think my decisions are allegations or suggestions. I had a Minister recently who indicated in response to my formal report that she had made a decision on the matter as empowered by the law and considers the matter closed. In another case a single and implicated member of a state institution is taking me to court claiming I have no jurisdiction, despite the Constitution being clear on jurisdiction and on top of the fact that she never raised this during the investigation. Also worth noting is that her commission has accepted and undertaken to implement my determinations. I also had an acting head of another constitutional body saying to me, as her office is also created by the Constitution, it cannot be scrutinized by mine. Incidentally that seems to be an emerging popular view among a few, who should know better. Where it comes from I am totally baffled.

The Auditor General, established under exactly the same chapter that establishes the Public Protector, scrutinizes our actions every year whether we are constitutional bodies or not. Incidentally my office has under the two previous leaders done the same. Some of you may recall that a Member of Parliament who was inexplicably fuming and accusing me of all manner of things on 15 October this year also accused me along the same lines.

This takes me to the question of accountability of these new generation institutions themselves. Constitutionally speaking their accountability is the same as that of members of cabinet. For example, with regard to institutions created under Chapter 9, mostly the ones mentioned in the Madiba quote, the accountability clause, which is section 181(5) is not different from section 92(2) applying to the Executive. However what is important is to take section 181 as whole and thus take into account that the Constitution requires these institutions to act independently, impartially without fear or favour. In fact section 181(2), which is similarly phrased as section 165(2), says these institutions are independent and subject only to the law and the Constitution.

The common scholarly understanding confirmed by a legal opinion commissioned by and given to Parliament recently, is that the decisions of these institutions cannot be second-guessed. That means for example if the IEC says an election was free and fair, Parliament cannot pronounce otherwise. The same applies to an audit opinion by the Auditor General. I somehow get the view though that when the Public protector is concerned, a few are struggling with this reality.

I have attributed a lot of the misunderstanding to pre-Constitution thinking and the fact that the Public Protector is one of the youngest of these innovative administrative accountability institutions. Part of the problem though is the parochial notion of accountability as limited to vertical or hierarchical relationships only. These institutions are clearly based on horizontal accountability, something I equate with the role of traffic officers.

Going forward how do we close the gaps?

That there is a growing trust deficit between organs of state and the people of South Africa is something that can only be disputed by a visitor from another planet. Clearly action needs to be taken urgently to identify and address the causes. Based on my experience particularly through investigations and Stakeholder Forums, it has become clear that the key problem lies in inadequacies with regard to accountability to citizens. I recently read an article that pointed out that many communities increasingly believe that if they start a fire (literally) the decision makers will come and will listen.

I recently spoke against this view at a community meeting in Mmabatho, where I labelled it unpatriotic. I drew parallels with their inheritance asking if they would destroy their inheritance to get back at a care taker who was abusing such inheritance while being indifferent to their grievances. Their answer was no, they wouldn't.

Theory aside though we must urgently step up efforts aimed at reducing the public trust deficit. It is my considered view that a huge part of the answer lies in strengthening accountability to citizens by those who exercise public power. Such accountability must be full and not only end at explanations or justifications. It must include taking responsibility and making amends for wrongdoing. There should be no holy cows though or impunity.

Let us not forget that institutions created to support and strengthen constitutional democracy are part of the equation regarding enhancing public accountability and ultimately public trust. They must accordingly be respected, supported and accorded the space to do their work efficiently and effectively. To the extent possible, the public oversight bodies need to form a seamless value chain that avoids cracks that can be exploited by wrongdoers. Ultimately transparency, aided by freedom of the media, is essential for meaningful public accountability. If we join hands we can ensure that as we move into the next decade of democracy our state is more accountable, operates with greater integrity and is responsive to all the people.

Yesterday at Stellenbosch University, I quoted a Chinese proverb I picked up from one of the daily newspapers in the past week. It remains relevant today. "The best time to plant a tree was 20 years ago. The next best time is now"

Thank you

Adv. Thuli Madonsela

Public Protector of South Africa
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