



PUBLIC PROTECTOR
SOUTH AFRICA

Address by Public Protector Adv. Thuli Madonsela during the Werksmans Attorneys 2016 Directors Conference in Durban on Friday, May 20, 2016.

Programme Director;

Werksmans Attorneys Chairman, Mr David Hertz;

The leadership of Werksmans Attorneys;

Ladies and gentlemen;

I bring you warm greetings from the Public Protector Team.

We are honoured to participate in this important conference. I would like to express my deepest gratitude to Werksmans Attorneys Chairman, Mr David Hertz for the invitation to what is essentially your strategic planning retreat.

The Public Protector Team and I are particularly encouraged that you have an interest in the rule of law and not just law enforcement and justice. As we all know, the rule of law

transcends law enforcement and justice. Your interest in the rule of law shows that you are concerned about constitutional democracy and peace as the rule of law is at the core of constitutional democracy and peace.

A critical stakeholder

I would like to engage you on the impact of the rule of law on the economy. However, before engaging you the focus of my dialogue, I thought I should engage you briefly regarding why we at the Public Protector South Africa regard you as one of our important stakeholders.

You probably know that we brand ourselves as the go to institution for Gogo Dlamini's or ordinary persons who have reached a brick wall in trying to seek redress for state wrongs.

You on the other hand, are far from the Gogo Dlamini label. You are one South Africa's leading corporate and commercial law firms. You have a clientele base that is made up of multinationals, listed companies, financial institutions, entrepreneurs and government.

Some lawyers could even perceive us as competitors because we are a no fee jurisdiction that mostly operates without lawyers and only allows legal assistance in conduct failure matters. In your case, we often even do the same work in the area of administrative investigations. I believe currently there is even a case where we are investigating similar issues.

It is my sincere opinion that you are indeed an important stakeholder for this constitutional institution.

Our relationship reminds me of the story of 4 men on a sinking boat. Two on the leaking side were trying to get water out of the boat. That side had leaks which were responsible for the boat sinking and it was that side that was sinking fast. One of the men busy taking water out of the boat asked the other two: "Why won't you help". The response was: "The holes are not on our side." As you and I know, should the boat have sunk, they were all going to sink. The only difference was the two spectators were going to sink last.

Your interest in the Public Protector's work and the rule of law says that you appreciate that we are in the same boat and that if we perish we shall do so together. I believe you have an interest in good governance and ethical conduct in state affairs, which is the contribution underpinning the purpose of the Public Protector as a constitutional institution established in terms of sections 181 and 182 of the Constitution to support and strengthen constitutional democracy.

I'm certain that you also have an interest in our work because you share our view and that of the architects of our constitutional democracy that good governance is an essential part of true democracy and that without democracy there can't be sustainable peace.

I also hope that you are in agreement with me that the Constitutional promise of the freed potential of every person and improved quality of life for all cannot happen without the rule of

law and that until that promise is fulfilled we cannot enjoy sustainable peace.

You could say what I've outlined makes you a fellow traveler but not necessarily our stakeholder. Firstly as citizens you have an interest in ensuring that we do what we were created to do. I also believe that your work involves or should involve advising whoever you are dealing with to uphold the rule of law. That is the basis of our interest in your work.

We believe that we collectively have the power and responsibility to ensure that we uphold the rule of law while assisting those we work with to do the same. We also see you as a strategic partner in ensuring that the services of this constitutional institution are accessible to all persons and communities as required by section 182(4) of the Constitution.

What is the rule of law and what is its impact on the economy?

If we are to engage on the impact of the rule of law on the economy it is ideal that we start with a common understanding of the rule of law and its importance.

In the recent case of the Economic Freedom Fighter (EFF) and the Speaker of Parliament, Chief Justice Mogoeng Mogoeng said the following about the rule of law:

“The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick

and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.”

In other words, legality or compliance with the law is an essential part of the rule of law. However, there is more to the rule of law. The World Justice Forum(WJF), which has designed a globally respected Rule of Law Index, defines the rule of law as follows:

The rule of law is a system of rules and rights that enables fair and functioning societies. The... system is one in which the following four universal principles are upheld:

- 1. The government and its officials and agents are accountable under the law.***
- 2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.***
- 3. The process by which the laws are enacted, administered, and enforced is accessible, efficient, and fair.***
- 4. Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.^[3]***

Why do societies need the rule law?

The rule of law principally seeks to level the playing field regarding rights, responsibilities and recourse for rights violations or disputes, to facilitate peaceful coexistence. As the WJF states, the rule of law is ***“a system of rules and rights that enables fair and functioning societies”***.

Central to the rule of law are the values of fairness and predictability. In the absence of the rule of law there is a potential of some taking advantage of others leading to conflict and thus undermining peace and stability.

What is the impact of the rule law on the economy?

There are different views on the nexus between the economy and the rule of law. I've had an opportunity to listen to an African Prime Minister and a former Eastern European Prime Minister arguing, at different important global events, that you do not need the rule of law and democracy to achieve economic growth. Both cited the success of some Asian economies in their view without democracy or the rule of law. They suggest benevolent dictatorship as the answer to speedy economic growth and development and that democracy and the rule of law should follow only once significant economic progress has been achieved.

I do not share those views. Empirical evidence suggests that there has to be a level of the rule of law for an economy to thrive, particularly to do so sustainably. Let's face it, who would invest whether as a small village start-up entity or a giant multinational if

there was no guarantee that contracts would be enforced by an independent impartial judicial system that is guided by facts and law only? A few gamblers perhaps, but even they would do so cautiously.

My experience in addressing investors, whom I have engaged locally at the invitation of our financial services sector among others and internationally, including under the UN Global Compact in New York and private initiatives in the United Kingdom, is that the rule of law is one of the critical considerations made in deciding to invest or increase investments. What I discerned is that investors seek a level of policy certainty and assurance regarding the credibility and effectiveness of accountability institutions, including the courts.

Economic outlook in brief

According to StatsSA, unemployment in the country has risen to 26.7 percent of the labour force in the first quarter of this year, the highest level since the first such study in 2008. This represents a 2.4 percent increase from 24.5 percent in the fourth quarter of 2015.

The latest figures mean up to 5.714 million people in the country were without jobs between January and March 2016 compared to 5.2 million previously.

When considering the expanded definition of unemployment, which takes into account people who have stopped looking for work, the figure increased to 36.3 percent, up from 33.8 percent between October and December 2015.

Only yesterday, the Reserve Bank decided to leave the repo rate unchanged at 7 percent. That is rather high for borrowers particularly at the lower end of the economic rung,

Add to that the spotlight that credit ratings agencies such as Moody's, and Standard and Poor's have placed South Africa under of late. If the slide continues to junk status, that could also escalate the cost of borrowing putting a strain on the economy, jobs and further strangling borrowers at the lower rungs of the economy.

The impact of an economic down turn is increased poverty and the likelihood of instability. It is often said a hungry person is an angry person. This is not to justify angry masses that engage in violent protest, a practice I discourage; it is simply to point out the risk.

What does the rule of law have to do with the economic realities?

The rule of law is important for functional democracies and for peace. A working democracy, where peace is the order of the day, presents a conducive environment for the economy to thrive, with investors flocking-in.

This is not to say that current economic woes are due to rule of law lapses. There are rule of law lapses that can and are currently contributing to economic risks both in the public and private sector. Some of these are unveiled during our investigations as a constitutional administrative oversight institution with the broad mandate of all improper conduct in state affairs.

Where the gap exists

Our experiences, as the Public Protector South Africa, shows that we are a country grappling with the following challenges:

1. **Conduct failure** – Many cases that are reported involve alleged abuse of power and abuse of state resources in the public sector. This includes violations of the Executive Ethics Code , conflict of interest, unlawful enrichment, the flouting of procurement rules, poor due diligence on procurement matters and corruption, among other things. This creates business uncertainties and related investment risks. Among other transgressions, are matters such as overbilling and false billing. Employment practices are also subject to increasing irregularities, key being abuse of affirmative action opportunities for cronyism and nepotism among others.
2. **Service failure** – Service planning failure, including non-prioritisation of constitutional responsibilities as required by section 237 of the Constitution is a major challenge. Adherence to plans such as Integrated Development Plans (IDPs) and Strategic Plans is a key problem. The situation is compounded by an apparent culture of disregarding the principles of Batho Pele, where the public is treated with indifference, something which may have given rise to the spate of violent service delivery protests that we have seen over the years. This includes poor or lack of basic services because of poor planning and failure to consult the public regarding their immediate needs, unkept promises involving,

among other things, housing, sanitation, water etc. The outcome of such failure is the tendency for disaffected groups and communities, particularly young people, to resort to violent protest.

3. **Impunity** – there have been cases of lack of consequences for wrongdoing, something that indirectly perpetuates conduct failure. In particular, there is a need to place as much emphasis on the accountability of political office bearers as done with administrative state functionaries regarding allegations of corruption and abuse of power. Politicians often escape with a little more than a slap in the wrist. In some cases, they get removed from one position only to resurface elsewhere.

4. **The Need to Transcend formal Compliance**

The clarification of the powers of the Public Protector will be an empty victory if public functionaries resort to formal or malicious compliance rather than substantive compliance. The outcome of investigations should be to reaffirm agreed rules and shared values. Otherwise, all matters will end in court making the option of this alternative accountability avenue worthless.

In this regard, the role of lawyers in advising honestly is critical. They should not “give a ride to the proverbial scorpion” or “feed the crocodile”.

5. Reimagining democracy

The advice on transcending formalities equally applies to political oversight and accountability platforms. It is not enough to go through the motions when in reality people are not governing as promised and accountability is compromised through using numbers to win the game. A winner-takes-it-all or zero sum approach might ensure battles are won but may spark an endless war if the people feel substantive democracy is elusive.

The constitution promises all people to play a role in the manner in which they are governed together with various human rights and freedoms.

Achieving this promise substantively, may require reimagining democracy and rethinking the winner takes it all approach.

It is comforting that constitutional democracy, which incorporates administrative scrutiny by constitutional bodies and judicial scrutiny by courts of the work of state functionaries, introduces an important measure of power levelling. However, to ensure the rule of law, we may have to think beyond the gaps caused by proportional representation and the winner-takes-it-all approach to democracy. In this regard President Mandela was exemplary as he made sure political engagement was as inclusive as possible regardless of political party size..

Glimmer of hope

It is important to note that it is not all doom and gloom regarding the rule of law. In fact the challenges I have mentioned are aberrations rather than the norm. They are merely being pointed out to ensure that we collectively prevent them from becoming normative.

South Africa has a very sound legal framework that is equal to the task in so far as combating conduct failure, service failure and impunity. In addition to an advanced constitutional and legal framework, the country has an arsenal of checks and balances which complement the classical *trias politica*, being the Legislature, Executive and the Judiciary. Among the innovative provisions are independent constitutional institutions and the Constitutional Court. Engaged civil society and an active independent media also form part of the solid accountability framework supporting the rule of law.

There's generally respect for the rule of law, at least in its classical sense of no person being above the law or exempted from complying with the law. The courts have also affirmed the powers and importance of non-traditional governance oversight institutions such as the public Protector.

I can say without fear of contradiction that ours is a strong democracy, that was built to last and that is well on its way to maturity. Many of the levers of accountability such as the public protector were introduced to address past experiences and thus close gaps regarding public accountability in particular.

What the legal community can do

As members of the legal community you are an anchor of the rule of law. Through administrative law advice to organs of state and litigants against the state, legal professionals shape public accountability. The role of lawyers also extends to private sector accountability. Worksmens Attorneys further forms part of private entities that are engaged in assisting organs of state with administrative investigations. As indicated earlier, you are investigating alleged tender corruption and other irregularities, among others.

In addition to the good work you are already doing, we ask you to partner with us as the Public Protector to entrench the culture of respect for the rule of law in the country. Firstly ensure as I hope you already do that you do not advise your clients to find loopholes for subverting the law through practices such as illicit capital outflows, among others. Doing so would be poking holes on the boat we are all in.

We further encourage the legal community to continue offering pro-bono services to those in need, who find justice inaccessible because they do not have the financial muscle required in litigation. In this regard, our request that you extend probono services to administrative scrutiny processes particularly indigent persons needing to enforce the Public Protector's remedial action.

Currently, it is mainly the state challenging my office in review proceedings with no one stating the case of Gogo Dlamini and what she or he stands to lose if the state does not comply. No one also represents the taxpayers as a whole in matters involving rigged or improperly handled state contracts or tenders. Your assistance in this regard would be appreciated.

Thanks again for involving us. We are indeed in the same boat, Boat South Africa. Together we can ensure that through accountability, integrity and responsiveness, the state operates optimally to ensure that the potential of all is freed and all lives improved as promised by the Constitution. That requires upholding the rule of law and principles of constitutional democracy.

Thank you.

Adv. Thuli Madonsela

Public Protector of South Africa