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### **Address by Public Protector Advocate Thuli Madonsela during a Public Lecture at the University of Stellenbosch in Cape Town, Western Cape on the Role of the Public Protector in ensuring accountability and integrity within state affairs**

1 Jun 2011

Programme director, Professor Schwella  
 Public leaders, including the Minister of Sport in the Western Cape province, Dr Meyer  
 Leaders of the various faculties at the University of Stellenbosch  
 Academics  
 Students (also known as 'Maaties')  
 The media  
 Members of the public  
 Ladies and gentlemen

I'm deeply honoured by the invitation to address the academic community of the University of Stellenbosch. My warm feelings about the invitation are not only attributable to the fact that academia was my home for a while.

I am also humbled by the association with a university that made history by designing and manufacturing Africa's first ever microsatellite, the SUNSAT. The university has also produced South African luminaries such as Justices Lourens Ackermann and Edwin Cameron and renowned legal minds such as Billy Downer and Brian Currin.

I am heartened by the interest that academic institutions such as this one are showing in the role of my office, the Public Protector. More importantly, I am deeply humbled by the thought that the organisers of tonight's event believe that my office and I could add value to the important national and global dialogue on combating corruption and promoting clean governance.

The fact that I was accorded the honour of addressing the inaugural dialogue makes it even more special. My speech tonight focuses on: The role of the Public Protector in ensuring accountability and integrity in the conduct of state affairs.

I found no better way to commence my speech than the following pronouncement by then President Nelson Mandela, who had sacrificed 27 of his productive years in Robben Island performing hard labour for his involvement in this country's struggle for democracy and human dignity:

"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.”

These words inform the office’s pursuit of its constitutional mandate of strengthening constitutional democracy by investigating and redressing improper conduct in state affairs and the public administration. They first came to my attention when I read the first Annual Report of the Bermuda Ombudsman, which was issued in 2006. The essence of these words is a commitment not only to accountability but also to the rule of law.

I read from this that former President Mandela understood that his status did not place him above the law and that he was accountable for the public power that the people of South Africa had entrusted him with. I sense from the quote and from President Mandela’s general conduct throughout his term that he never saw accountability as belittling, degrading or irritating.

I recently pondered this quote as I sat in an interview with a senior public officer who held a contrary view on the issue of accountability. Throughout the interview, it was clear that this senior public officer thought that at best his or her office and struggle credentials insulated him/her from the scrutiny of my office or that at the very least entitled him/her to a special dispensation.

I must hasten to say though that in my 18 months of experience as South Africa’s third Public Protector, this entitlement attitude represents an aberration rather than the norm.

Indeed the current president, President Jacob Zuma has conducted himself in accordance with the spirit underpinning the above quote from one of his predecessors at all times when my office has interacted with him or his office. At the launch of the African Ombudsman Research Centre in March 2011, President Zuma said the following:

“The Office of the Public Protector, which is our focus today, has to ensure that citizens are protected from violations of their rights, the abuse of power, negligence, unfair discrimination and maladministration.

People will have faith in the office if they know that the Public Protector will act impartially to protect their rights. Society needs to believe that the Office of the Public Protector will not be influenced by either the complainants or those institutions or individuals that are being investigated.”

Ladies and gentlemen,

This brings us to the focus of our dialogue tonight, which is my office’s role in ensuring accountability and integrity in the conduct of state affairs. Perhaps the starting point should be unpacking the two concepts, namely, accountability and integrity.

Let us start with accountability. Accountability is globally viewed as one of the cornerstones of democracy. According to Professor Marx Bovens, public accountability is the hallmark of modern democratic governance. He states:

“Democracy remains a paper procedure if those in power cannot be held accountable in public for their acts and omissions, for their decisions, their policies, and their expenditures.”

The notion of accountability holds government and society together like glue and it is at the heart of modern democratic processes to address the misuse of power and other forms of inappropriate behavior.

Strom (2000 ) described the concept of modern representative democracy as a series of “principal-agent relations”, in terms of which citizens, the primary principals in a democracy, transfer their sovereignty to political representatives who place their trust in a cabinet.

Cabinet ministers delegate or mandate most of their powers to the thousands of civil servants, who in its turn, transfer many powers to more or less independent agencies and public bodies. The agencies and civil servants at the end of the line spend billions of taxpayers' money, use their discretionary powers to grant permits and benefits, they execute public policies, impose fines, and use far reaching powers to deprive people of liberty and possession.

In fact in the modern state the relationship between the citizens and public authorities is best described as a David and Goliath scenario. Public accountability accordingly seeks to ensure that the enormous power wielded by public authorities is exercised within agreed parameters. In other words public accountability is one of the checks and balances for preventing or curbing excesses in the exercise of public power.

Truth be told, public account giving is at the core of democracy. It provides political representatives and voters with the necessary inputs for judging the fairness, effectiveness, and efficiency of governance.

In simple terms public accountability is about giving an account of one's actions by those exercising public power. This takes us to the relationship between accountability and integrity.

Public accountability serves to enhance the integrity of public governance. According to Rose-Ackerman, "The public character of the account giving is a safeguard against corruption, nepotism, abuse of power, and other forms of inappropriate behaviour". The assumption is that public account giving "will deter public managers from secretly misusing their delegated powers and will provide overseers, be they journalists, interest groups, members of Parliament, or official controllers, with essential information to trace administrative abuses" (Rose-Ackerman 1999).

A closer look at accountability discloses that accountability is not only about explaining or taking responsibility but also incorporates redress or fixing the problem.

Ladies and gentlemen,

What role then does my office play in ensuring accountability and integrity in state affairs? The Public Protector belongs to the family of the two-centuries-old institution of the Ombudsman, which can be traced to Sweden.

The idea behind the establishment of the Ombudsman was to have a senior public officer to help balance power between the state and citizens beyond the traditional checks and balances within democracy while serving as a buffer that reconciles the two parties.

The idea was to provide another mechanism to curb excesses in the exercise of power by those entrusted with public power and stewardship over public resources. This was due to a realisation that the courts and other accountability mechanisms in the classical architecture of democracy were inadequate. In fact over the years more accountability agencies have emerged and together these are often referred to as the accountability or integrity sector.

One of the oldest institutions within our own local history as a country that closely resembles the Ombudsman institution is the Makhadzi in the VhaVenda traditional governance system. The Makhadzi serves as a buffer and reconciler between the traditional ruler and the people by serving as the voice of the people and ears of the traditional leader. This keeps the traditional ruler in touch with the views and needs of citizens thus reconciling the people and the government. But the system only works as long as the ruler in question takes the Makhadzi's role as the voice of the people and conscience of government seriously.

The Public Protector is a constitutional officer appointed under Chapter 9 the Constitution to support and strengthen constitutional democracy through exacting accountability from those involved in state affairs.

Section 182(1) of the Constitution places a responsibility of the Public Protector to investigate any conduct in state affairs or the public administration that is alleged to be improper or prejudicial, to report on that conduct and to take appropriate remedial action. It's important to note that unlike other Ombudsman offices, the Public Protector's constitutional responsibility is to take and not to recommend appropriate remedial action.

The scope covers all three arms of government and the three spheres of government and entities in which the state holds a controlling share such as Telkom, Eskom and the South African Airways (SAA), amongst others. The only matters in state affairs that are excluded from the Public Protector's scrutiny are court decisions.

Section 182 also mandates the Public Protector to be accessible to all persons and communities. As may be gleaned from the statement made by President Mandela, the Public Protector is among several oversight agencies that seek to support and strengthen democracy by exacting accountability in the exercise of public power.

The Constitution further creates space for additional powers that may be conferred by legislation. To-date, there are about 16 statutes that confer such additional powers. The key mandate areas for the Public Protector that can be discerned from the Constitution and legislation are the following:

- Maladministration and appropriate resolution of state related disputes mandate as conferred by the Public Protector Act 23 of 1994. The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs.
- Executive ethics enforcement mandate as conferred by the Executive Members' Ethic Act of 1998 and the Executive Ethics Code. It's important to note that this mandate only covers the entire Executive, i.e. President, Ministers, Deputy Ministers, Premiers and Members of the Executive Council. The right to trigger an investigation is also restricted to the President, a Premier, a Member of Parliament and a member of a provincial legislature. The report must go to the President:
  - Anticorruption mandate as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 read with the PPA. This mandate is shared with other agencies.
  - Whistle-blower protection mandate as conferred by the Protected Disclosures Act 26 of 2000. This mandate is shared with the Auditor General and other agencies to be named by government;
  - Regulation of information mandate as conferred by the Promotion of Access to Information Act 2 of 2000; and
  - The power to review decisions of the Home Builder's Registration Council as conferred by the Housing Protection Measures Act 95 of 1998.
  - Except under the EMEA, anyone may lodge a complaint with my office against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. It is also important to note that to investigate, I need not necessarily receive a complaint.

My office basically 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. However, our 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.

The work is mostly performed under the PPA. But sometimes the matter is investigated or resolved in terms of the PPA and other mandate areas. For example, a matter may involve the PPA, the PDA and the PCCAA.

An example of a matter that straddles service and conduct failure is a matter that recently came to my attention involving an RDP or social housing house. The current complaint is that a house that was burnt down and reported has never been attended to. The history though involves an allegation of corruption in the award of an RDP house and subsequent harassment of a whistle-blower.

Another matter that involved a combination of service and conduct failure was a case involving the payment of a ghost employee (an intern) for two years. A similar matter involved the payment of the complainant's pension to a ghost pensioner.

More recently we had a service failure complaint that revealed a fraud scam that cut across the Departments of Home Affairs, the Department of Health, the Department of Social Development/South African Social Security Agency (SASSA) and a private supermarket.

Promotion of Access to Information Act (PAIA) disputes are usually resolved specifically under that Act.

Our approach to investigations is two-pronged. We strive to promptly resolve each complaint and redress each upheld wrong while assisting organs of state to diagnose and correct systemic administrative deficiencies with a view to curbing recurring service and conduct failures. The systemic interventions include helping organs of state review their internal complaints mechanisms to eliminate the need for my office's involvement in complaints handling.

My office's work is driven by the commitment we have made to the people of South Africa and Parliament, to be accessible to and trusted by all persons and communities; provide prompt remedial action; and promote good governance in all state affairs.

In recent times my office has placed a spotlight on the constitutional imperative of taking appropriate remedial action. I am convinced that without redress the Public Protector is a gate to nowhere. It is not enough for organs of state to simply provide the service that was delayed or denied before my office stepped-in. I firmly believe that remedial action should bring the complainant as close as possible to where they would have been had the state acted properly at the outset.

While financial compensation is often the right thing to do, at times a simple apology suffices. In fact apologising when you have wronged someone is one of the foundational values of traditional African societies and is interrelated with the values of ubuntu and human dignity.

Ladies and gentlemen,

Remedial action is also important in conduct failure, particularly in the area of integrity, including conflict of interest, abuse of power, fraud and corruption. The opposite is impunity which is a recipe for systemic recurring conduct failure.

The importance of remedial action or redress is core to the issue of accountability. If we take a global perspective, a few would deny that impunity is one of Africa's greatest challenges. It is important that as a maturing democracy we do not allow impunity to become our Achilles Heel.

Presiding over public funds comes with a lot of responsibilities. For example, section 217 of our Constitution requires that when procuring goods or services with public funds, one needs to do so in accordance with a system that fair, equitable, transparent, competitive and cost effective.

While failure to meet these requirements may be improper, unlawful

and amount to maladministration, there are other ramifications. The failure to exact accountability and integrity in state affairs robs communities of the delivery of essential developments and quality services such as roads, housing, lights and water.

When the level of dissatisfaction among communities reaches boiling point, it spills into the streets in a form of violent protests that we often see in townships, squatter camps and rural villages. While I do not condone violence and the vandalizing of infrastructure, I believe that citizens have a right to complain and that when they do so there must be accountability.

Corruption is a major thief of public resources and accordingly a source of service delivery discontents. Seriousness in combating corruption includes seriousness about accountability in the conduct of state affairs. My office believes that such accountability should apply to both public actors and private actors involved in state affairs. Corruption as we all know is a bilateral crime. For corruption to occur, it takes two to tango.

It seems to me that accountability is one of the tenets underpinning our National Anti-Corruption Strategy which was approved by Cabinet nine years ago. It also informs the legal framework that includes the Constitution, the Prevention and Combating of Corrupt Activities Act, Prevention of Organised Crime Act, Public Finance Management Act, Protected Disclosures Act and Witness Protection Act among other things.

While broad architecture for combating corruption accommodates the role of my office, I support the view that a dedicated independent anticorruption agency should be established. As you know, the Constitutional Court has already pronounced on this matter in the Glenister judgement.

Should section 182 of the Constitution be retained as it is, my office will always have residual jurisdiction on conduct failure, including fraud and corruption. This would be consistent with the access to justice value of my office. As indicated earlier, many of the complaints the office entertains straddle various issues. For example I recently received a complaint from a man who claimed he was short changed in a tender bid through corruption. The current mandate allows me to help him with cost free civil justice while addressing conduct failure within the state.

For my office to be effective though, organs of state need to be responsive. Section 181(3) of the Constitution states that: "Other organs of state, through legislative and other measures, must assist and protect these institutions [Institutions Supporting Democracy] to ensure the independence, impartiality, dignity and effectiveness of these institutions."

Section 181(4) goes further to say that "no person or organ of state may interfere with the functioning of these institutions."

Cooperation includes taking findings and remedial action seriously. This view is in line with growing global jurisprudence indicating that the courts have taken the view that the state must implement the Ombudsman's findings unless the Ombudsman's reasoning is irrational or there are cogent reasons for not implementing.

When organs of state fail to cooperate, nothing changes for the better and the cycle of systemic service and conduct failure is not broken. This results in delivery of poor quality services and underdevelopment as the resources that would have been used for these purposes are diverted for personal gain. Government itself is also a loser as it cannot fulfill its developmental goals and election promises.

The Chief Justice of South Africa, Justice Sandile Ngcobo recently said the following:

"The value of a constitutionally-defined Public Protector, or Ombudsman, is that the independent investigation of government action is an essential component of a strong constitutional democracy. The importance of the Ombudsman's role is especially clear in many countries throughout Africa, where there is often a desperate need for

basic human necessities, from access to food and clean drinking water, to healthcare, housing, education and social security.”

In conclusion, programme director,

There is a need for an ongoing societal dialogue on the role of the Public Protector. One of contents of the dialogue should be the centrality of the issue of accountability.

The issue of my office’s trustworthiness must also form part of the dialogue. Trustworthiness is a cornerstone of the Ombudsman institution. How do I become trustworthy if I have different dispensations for different people? That is why the constitution drafters gave the same independence and impartiality requirement to this office as accorded courts. Transparency is also critical for accountability. Herein lies the role of the media and public debates.

I do however, firmly believe that our democracy is on track. We have the right constitutional and policy architecture for a strong democracy that is anchored on transparency, accountability and integrity in the conduct of state affairs. The general commitment to honour and implement the Constitution and the law is also encouraging.

I am generally encouraged by government efforts regarding the promotion of accountability and integrity, including anticorruption, in the conduct of state affairs and the public administration. An example of such efforts are measures announced yesterday by the Minister of Finance with a view to combating corruption in and eliminating irregularities in tenders involving large sums of public money. I am convinced that we are not a kleptocracy or in real danger of becoming a failed state.

However, to stay on track we must guard against impunity. The rule of law should remain supreme and no one should be above the law.

Let us continue to work together to shine light in dark places in pursuit of our democracy. I believe that those that sacrificed for the privileges we enjoy today expect nothing less than our vigilant guarding of our democracy and public resources.

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