



"Recourse to non-compliance with laws and regulations governing the use of public resources".

Address by Public Protector Adv. Thuli Madonsela during the 14th Association of Public Accounts Committees Conference in Port Elizabeth, Eastern Cape on Monday, September 30, 2013.

The President of PAP – HE Hon Bethel Nnaemeka Amadi.

Minister of Cooperative Governance and Traditional Affairs (COGTA) - Hon Lechesa Tsenoli

Deputy Minister of Public Service & Administration - Hon Ayanda Dlodlo

Speaker of Eastern Cape Provincial Legislature - Hon Fikile Xasa.

Deputy Chairperson of the National Council of Provinces (NCOP) Ms T Memela

The SADCOPAC Chairperson - Hon Sipho Makama,

The Outgoing Auditor-General - Mr Terence Nombembe,

Chairperson of the Public Service Commission Mr Ben Mthembu

Acting Chairperson of APAC- Hon Juanita Beukes and the APAC leadership,

The Chairperson of Africa Organisation of PACs - Hon Kom Kom Geng,

Chairperson of West Africa Association of PACs - Hon Edward Dagoseh

Members of APAC

Mayors and Speakers of Municipalities

Invited Guest Secretaries to the Legislatures

Ladies and Gentlemen

It is an honour and privilege for me to take part in the 14th annual Conference of the Association of Public Accounts and to engage this august gathering on the topic” *Recourse to non-compliance with laws and regulations governing the use of public resources*”.

Firstly, I would like to applaud APAC for combining this event with the farewell of one of our country’s brightest patriots, the Auditor General Terrence Nombembe. To my colleague, Terence, I proudly add my voice to those that say your 7 years of service as Auditor General has been a blessing to our democracy and that we look forward to your contribution to the quest for good governance in whatever capacity that may present itself to you.

You should be encouraged by the aim of the conference, which I understand is to strengthen oversight processes to achieve clean administration by next year and beyond.

As we reflect on this noble quest, we need to remind ourselves that “*A wise person does not expect to solve a problem by repeating the behaviour that caused the problem*”.

What have we been doing up until now? Based on the theme I’m meant to address, we have a problem of compliance with laws and regulations. Perhaps, we do not fail to comply all the time otherwise we would have anarchy. But you must agree with me that the problem is serious enough to warrant inclusion on today’s programme.

Besides the programme, the Auditor General’s annual reports tell us that we have a serious compliance problem. A report issued by Minister in the Presidency: Monitoring and Evaluation, Minister Chabane a few days ago tells the same story about most organs of state. Our own Public Protector reports are usually littered with stories of non compliance. I’ve been asked to talk about recourse against non compliance.

I thought it would help to introduce the matter with a case study. I chose Nala in Free State in respect of which 3 months ago I released a report titled “*Pipes to Nowhere*”. The report does not only tell the story of non compliance but also tells us about the consequences of non compliance and recourse available to affected citizens or people.

My team and I were invited to Nala after a public protest over a dysfunctional system that had left people in a situation where they had to jump over human waste every time they left home with some being unable to escape the waste as it found itself into their homes while some were trapped under dysfunctional bucket toilet system involving periods of uncollected buckets while the entire township battled a crippling stench. Behind the problem was a tender that had gone wrong with waste piping of inferior diameter in parts while in others the pipes went nowhere, that is, they were simply buried in front of the toilets. The situation was exacerbated by an incomplete water treatment plant, which could only partially fulfil its mission. Added to the community’s woes was an incomplete RDP housing settlement, a partially done public park and employment irregularities and numerous tender irregularities, including the tender behind the dysfunctional sewage system.

It should be of interest to you that we were brought in to investigate and redress allegations of impunity, particularly relating to alleged failure by relevant public authorities to implement a forensic investigation that had confirmed the said irregularities and advised the appropriate public authorities to implement specified remedial action.

Why do we get systemic failures such as Nala? Do these failures hurt our people? Definitely. What about our resource base? There is no doubt in my mind that our resource base is immensely hurt by these public wrongs. Think about the millions spent to rectify RDP houses? How about fortunes spent on runaway escalation costs of public projects such as stadia and Gautrain, public offices and residences, among others?

Is it a question of inadequate laws? I don’t think so.

Our Constitutional Guarantees

Firstly, we have a sound constitutional foundation. One of the things we did well at the commencement of the Journey towards constitutional democracy, was the adoption of our globally acclaimed Constitution.

Renowned American Judge, Justice Ruth Bader Ginsburg had the following comment about our Constitution, in February 2012:

“I would not look at the US constitution, if I were drafting a constitution in the year 2012. I might look at the constitution of South Africa. ...

That was deliberate attempt to have a fundamental instrument of government that embraced basic human rights have an independent judiciary. It really is, I think, a great piece of work that was done.”

We do indeed have a remarkable Constitution. Its ground breaking features though transcend the entrenchment of human rights. My view is that one of the remarkable features of our Constitution is the fact that it:

- Spells out the vision of society it sets out to create a foundation for;
- Outlines the basic entitlements of citizens and residents;
- Stipulates the character of the state to deliver the envisaged society; and
- Establishes multiple and complementary public accountability mechanisms.

The constitutional vision of society

The vision of the society we sought to become can be discerned from the pronouncement of the framers of our Constitution in the preamble to the Constitution, which states the following:

“We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

***Respect those who have worked to build and develop our country;
and***

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

- ***Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;***
- ***Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;***
- ***Improve the quality of life of all citizens and free the potential of each person; and***
- ***Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'***

You will note that a key feature of the society envisaged in the Constitution is a society where ***all citizens enjoy an improved quality of life*** and ***each person's potential is freed***.

In the society envisaged in the Constitution, citizens enjoy certain basic human rights and freedoms. This means every person in this country has basic rights they are entitled to by virtue of being a human being. These rights are not earned through good behaviour or good relations with those in government, they are earned by simply being human or in some cases a juristic person. The Bill of Rights is a cornerstone of Democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. The rights also include social and economic rights such as the rights to Housing, food, water, education and access to health care, social security, language, culture, information etc.

Character of the state

The framers of our Constitution knew that a different state architecture and character was needed for the state to play a central role in transforming our society from what it was at the onset of democracy to that which ensures an improved quality of life for all. It is not surprising

that the Constitution makes specific provisions regarding the character of the state. These include:

Foundational values in section one that include

- 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

Provisions that define the character of the state include the following:

Section 96, which deals with specifics in terms of how the executive must conduct itself, particularly in so far as steering clear of self-interest in favour of public interest.

- section 237; advocates for the prioritisation of constitutional responsibilities, such as breathing life into the Bill of Rights, ahead of delicacies or what some refer to as the “nice-to-haves”.
- ethical provisions for MPLs, provinces and municipalities
- section 195: Chapter 10 focuses on principles of the public administration, again placing much emphasis on putting the people first
- section 112-116, Cooperative governance

Even the issue of procurement is regulated by section 217 of the Constitution, which lays the foundation for a fair, cost effective and transparent procurement system.

The regulatory framework is reinforced by a comprehensive legislative framework, which includes, the Public Finance Management (PFMA) Act 1 of 1999, the Preferential Procurement Policy Framework Act No.5 of 2000 (PPPFA); Executive Members’ Ethics Act (EMEA); the Promotion of Administrative Justice Act (PAJA) ; the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000(Equality Act); and Promotion of Access to Information Act (PAIA).

The laws are backed by elaborate regulations and policies. These include National Treasury regulations such as the Supply Chain Management (SCM) Guides, which deal with, among other things, what is referred to as Demand Management. From the EMEA comes the Executive Ethics Code, which requires members of the executive to act in good faith, with integrity and in the public interest.

Public Accountability

On the accountability front, the country boasts an elaborate multiagency integrity sector. Key components of the integrity sector include the following:

- a) The Public Protector;
- b) The Auditor General;
- c) The Public Service Commission;
- e) The Directorate for Priority Crime Investigation or the Hawks (SAPS);
- d) The Asset Forfeiture Unit (National Prosecuting Authority;)
- f) Inspector General Intelligence;
- g) The Special Investigating; and
- h) The Anti-Corruption Coordinating Committee (DPSA)

These bodies can bring recourse in the event there is non-compliance with the laws and regulations governing the use of state resource. They work with traditional checks and balances such as the courts, National Prosecuting Authority and Parliamentary Structures, particularly the Select Committee on Public Accounts (SCOPA) and the Joint Committee on Ethics.

Human rights bodies such as the South African Human Rights Commission, Commission on Religions, Linguistic and Cultural Rights; and the Commission on Gender Equality also play critical roles in ensuring compliance. The same applies to institutional compliance bodies such as Integrity Commissions and the Military Ombudsman. The Presidency's Monitoring Unit is increasingly playing some role while Treasury is increasingly seeing its role as transcending that of simply dishing out money.

With so many laws and structures that undoubtedly drain a fortune from the state fiscus, why do we get situations such as Nala?

A recurring theme I have come across in my four year as Public Protector is the curse of impunity. When there are no consequences, many people just go ahead and engage in wrong doing. A friend once told me that society and organisations comprise three groups of humans namely:

1. The ethical minority about 20% that will do good because they believe it is the right thing to do;
2. The majority that will do the right thing if there is certainty that wrong doing will incur adverse consequences (about 70%)
3. A delinquent minority that will take a chance on wrong doing regardless of knowledge about consequences

If my friend is right, ensuring compliance in the public sector requires more than laws. It requires values entrenchment to ensure that there are those that do not need policing; unwavering controls and enforcement to ensure that all know that consequences for wrong doing is a certainty and that those that disregard rules no matter what are excised from the system.

Is it possible that over the years we have allowed a culture of rule breaking with impunity to develop? I recall very distinctly that during my years as a public servant we used to be filled with trepidation when we heard terms such as unauthorised expenditure, **fruitless and wasteful expenditure**, irregular award of a contract, etc. I distinctly remember the one time I was threatened with those words on the eve of a strategic planning meeting my unit had organised in the Department of Justice in my first year as Chief Director there. I don't get a sense that these have similar weight today.

Let us consider a case study of a trip that came to my attention not so long ago

In an e-mail exchange the CEO of an organ of state was being taken to task by SMS level manager A and Public Office bearer C for refusing to sign *ex post facto* an authority trip for another SMS manager B. The latter had submitted an authority form, never waited to see if approved

and went on the trip paying with his credit card for accommodation and petrol card for travel. He now wanted a refund plus S&T. It turned out that the CEO had actually declined the trip authority considering it premature.

Amazingly, SMS Manager A's arguments said nothing about unauthorised expenditure and simply focussed on the merits, arguing that the organisation had received value. Public Office Bearer C who was being copied by the irate SMS manager A, joined in and supported the two SMS manager, again focussing on the value add of the trip. Nothing was said about **unauthorised expenditure or insubordination**. It was only when Public Office Bearer D who was also being copied joined in much later pointing out that unauthorised expenditure was not an issue for debate but compliance enforcement that Public Office Bearer C retracted the support given earlier.

What lessons can be drawn from this case?

Is it possible that the managers had done this before or seen it done before with **impunity**? Regarding the one public office bearer, it turned out that he was relatively new in the public service, which explained the Machiavellian **end justifies the means attitude**. Is it possible that having **a new leadership that is not conversant with prescripts** is part of the fault lines? What about the copying of office bearers? Could it be a case of **using friends in high places to avoid accountability**? In the case in point, Manager A could have gotten away with the unauthorised expenditure under SMS Manger B and Public Office Bearer C, if Public Office Bearer D, who is an old hand in the public service had not called his bluff.

Perhaps we also need to take a close look at the Machiavellian approach **of the end justifies the means**? Isn't that attitude a tad too prevalent for comfort? How often do we hear the argument that the rules are too onerous coming from public office bearers who are the ones that have to guide their institutions to ensure compliance? Does that attitude not encourage disdain for the rules or culture of blaming the rules instead of exacting accountability? With proper planning, are the rules

really onerous? What about the fact that there are regulated deviations for cases such as emergencies and sole suppliers?

I must also indicate though that our work uncovers a lot of **abuse of these deviations**. For example, we get a lot of cases where the urgency requirements are used when there is no urgency or the urgency has passed. This was the case in "*Against the rules*". We also get the sole provider deviation used for goods and services where there are lots of supplies. In one case, for example, the supplier of security services in a Gauteng based entity was procured using the sole supplier deviation regime.

There is also plain **criminality in the form of corruption and fraud**. Fraud usual takes the form of forged company profiles, including number of years in business, previous projects and employees. This was one of the things we picked up in "*On the Point of Tenders*". Tax clearance certificates are also either forged or swapped. But on this issue it boils down to those that have to check these failing to do their job or colluding with the bidder/s in question. But how do you prove collusion, which of course amounts to corruption under the Prevention and Combating of Corrupt Activities Act? Modern Corruption rarely involves **bribes**. The wrong doers usually use a concept referred to as **warehousing**. A proxy that cannot be picked up from the CIPC data base by surname is said to be used as a proxy to hold shares or the interest of the decision maker to avoid the latter's' interest being easily dictated.

Occasionally **a bribe is required**. We are finalising a case of that nature. To fund the bribe though the state must be overcharged. Accordingly, **overcharging, overbilling and double billing are common** complaints in respect of many of tender or contract related complaints we get. This was an issue in *Against the Rules and on the Point of Tenders*. *Against the rules* is also a classical case of *scope creep*, another phenomenon that we constantly deal with.

It must be noted that overbilling and **scope creep** would not be possible if rules were obeyed. In this regard, the relevant prescripts fall under a category of procurement or supply chain processes relating to what is

referred to as demand management. Even overcharging would not be possible if demand management were to be adhered to as the rules require market testing and budget securing before going out on tender.

Another prescript that would make this impossible is the **requirement of order numbers** to be issued before services or goods are received and the requirement of **full correspondence between the order number and invoice**, including company name and registration number as well as exact amounts of money.

The bottom line though is that when rules are ignored or broken there must be accountability. When there **is no such accountability, rule breaking** becomes normative and eventually part of the organisational culture.

An interesting observation we made during our investigation into allegations of systemic service failure and maladministration in Gamagara Municipality (Olifantshoek) in the Northern Cape was a claim that there were no rules to be broken. Deviations from normative practices were justified on the **absence of policies** on key things such as staff transport allowances, accommodation allowances, recruitment and allocation of community land, among others. This is a recipe for bad administration including corruption. An equally problematic situation is that of organs of state developing own policies giving employees benefits outside the broader regulatory framework or industry good practice. This was the case with regard to Gamagara accommodation benefits for officials examples, where a Chief Financial Officer had his rent virtually fully paid by the municipality for over two years.

Ethical violations are a common feature of complaints against members of the Executive at national, provincial and against mayors and councillors. A commonly flouted ethical issue, it would appear, is the issue of **managing conflict of interest**. From investigations done to-date, it would appear that in many instances, violations are due to lack of appreciation of this area of ethics and the absence of an overarching national code of ethics, leading to some organs of state setting the bar as low as possible.

Is it possible that poor enforcement of own rules is not the only problem and that external enforcement is also often. I've heard complaints from Parliamentarians and from the Auditor General regarding reluctance or tardiness with regard to implementation of findings.

Our own experience at the Public Protector mostly involves effortless implementation. I have come across a few cases of non-implementation though. Two cases I came across during the Stakeholder Dialogue and Public Hearings 2013 the findings and reports of my predecessors Advocates Mushwana and Baqwa.

Is the implementation challenge a natural consequence of the current law as some allege? But there is no gap in the Constitution.

My office's mandate is clearly stated in the Constitution as that of supporting and strengthening investigating and redressing improper conduct in all state affairs. Section 182 of the Constitution specifically states that:

The Public Protector has power as regulated by legislation to

“investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action.”

At the Public Protector SA we chose to be faithful to the Constitution and the law. Once I have made findings as mandated by the Constitution and the Public Protector Act, we follow up with a process of monitoring the implementation of remedial action. We have gotten better over the years, although we are constantly strengthening our system.

We refuse to be distracted by those that say we do not have any powers to ensure implementation. In any event their views are neither supported by the Constitution nor the main Act regulating our operations, the Public Protector Act, 23 of 1994. Section 8 of the Public Protector Act, states clearly that the Public Protector has the power to make and

communicate her findings. The power to make findings means you can make a determination.

With regard to the nature of enforcement of remedial action, clearly my office's powers, as an Ombudsman institution, are not as stringent as a court. We cannot for example attach property for a debt. The most powerful compliance instrument for us is moral suasion through public dialogue facilitated by the media. Our extensive use of the media is accordingly not only in compliance with the constitutional injunction in section 182(4) that the Public Protector's services be accessible to all persons and communities, it is also in the pursuit of moral suasion.

Of course use powers such as subpoena, at least to get a non-complying party to come and explain reasons for ignoring remedial action directed in the Public Protector reports. The power to issue subpoenas also forms part of the hard power legally available to my office to get answers we need. A related power is the power to issue contempt of the public protector. Both powers are exactly similar to those of judicial officers and do not require judicial assistance to be exercised. The only time my power needs judicial assistance is in the event we have to resort to search and seizure. That power needs a court application. I must hasten to indicate that we don't easily use these powers which we refer to as hard power. Soft power or persuasion is used as much as possible.

Assuming the Constitution only gave my office the power to recommend, would disregarding the remedial action in my reports be constitutional. Not at all! If we are to be guided by global Ombudsman jurisprudence, the findings are binding. It is the remedial action that may be negotiated with a view to agreeing on an equally satisfactory response to the findings. Ignoring findings is not an option. That's a violation of the rule of law. The route available for those wishing to dispute findings, which is rare, is review via the judicial system. Even then, a court will only overturn an Ombudsman's findings if such findings are irrational, i.e. no reasonable Ombudsman would have arrived at the same answer if faced with the same facts and similar circumstances.

But what about institutions such as the Auditor General, the Public Service Commission and the Special investigating Unit (SIU). My respectful view is that a rule of law approach requires an approach that accepts the findings as binding. Regarding remedial action, it must be implemented unless impossible to implement. If remedial action is

considered unreasonable or impossible to implement, an alternative that equally fixes the problem must be mutually explored.

This takes me to the role of Parliament. Parliament is ordinarily brought in with regard to ensuring that remedial action is taken. In most countries, a Parliamentary debate is requested when the executive has unreasonably failed to implement remedial action. In that case Parliament is not invited to second guess the Ombudsman's findings but rather to note such findings and focus the Executive's reasons for not implementing remedial action.

The courts ultimately also have a role. For example, if there is refusal to implement, the complainant may take the matter to court. In countries such as the United Kingdom and Bermuda, this has occurred. This is where we get the jurisprudence on unreasonableness. In the United Kingdom, the main jurisprudence in this regard, can be gleaned from the Ombudsman case titled "*Equitable Life: A decade of regulatory failure*". In Bermuda is the recent case involving the Minister of Justice's refusal to review a decision as directed by the Ombudsman hiding under the principle of *functus officio*. Incidentally, a similar case is currently in court locally, involving one of my recent reports.

Where to from here?

We need to restore the culture of compliance in our organisations. The following should be considered:

1. Capacity building through training, particularly policy inductions and regular briefings when policies change;
2. Provision of easily digestible materials such as pocket books and posters on key policy provisions and concepts;
3. Celebrating and rewarding compliance;
4. Consistent rejection of non-compliance;
5. Zero impunity for non-compliance;
6. A cooperative rather than competitive paradigm among integrity institutions, including internal ones;
7. Strengthening synergies in oversight value chain;
8. Learning and growing together;
9. Overseers walking the talk on good governance;
10. Better protection of whistle-blowers; and
11. Adherence to a rule of law paradigm.

As I conclude, chairperson, I wish to reiterate that ours is not a problem of inadequate laws as we have a great Constitution and an abundance of laws.

On the enforcement front, we also are not short of bodies as we have an extensive network of bodies. The key lies in these bodies utilising their powers fully while the top leadership in government abides by the rule of law.

In other words, we need to constitute ourselves into a united front against maladies such as non-compliance, which in Public Protector language is called maladministration. Through a united front for good governance, we can ensure that ours is an accountable state that operates with integrity while being responsive to the needs of all people in the republic.

In that spirit we invite you to join us in the promotion of good governance during the Good Governance Week, 21 - 26 October 2013. Each organ of state and civil society entity is free to engage in an activity of choice in promotion of good governance in addition to participating at the annual good governance conference, which will be taking place in Tshwane from 21 – 22 October 2013.

Let me end with a quote from Chief Albert Luthuli:

"I, as a Christian, have always felt that there is one thing above all about 'apartheid' or 'separate development' that is unforgivable. It seems utterly indifferent to the suffering of individual persons, who lose their land, their homes, their jobs, in pursuit of what surely is the most terrible dream in the world."– Albert Luthuli, 1960 Nobel Peace Prize Winner.

Thank you.

Adv. Thuli Madonsela

Public Protector South Africa