



**Third Griffiths and Victoria Mxenge Memorial Lecture
Delivered by Public Protector Adv Thuli Madonsela at
The Nelson Mandela Metropolitan University,
Port Elizabeth, Eastern Cape.**

***“The Constitutional Importance of Ensuring Accountability to the
Public”***

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Chairperson of Council, Judge Ronnie Pillay;

Vice Chancellor, Prof. Derrick Swartz;

Executive Dean of the Faculty of Law, Prof. Vivienne Lawack-Davids;

Members of the legal professions;

Law students;

Members of the media;

Fellow people of South Africa;

It is an honour and privilege to present the third Griffiths and Victoria Mxenge Memorial lecture. I am humbled by the Nelson Mandela Law School’s decision to associate me with these selfless and gallant legal icons of our struggle who were brutally murdered by the apartheid state for defending justice and human rights.

Being accorded a platform that has previously been graced by distinguished jurists such as Deputy Chief Justice Dikgang Moseneke and retired Constitutional Judge, Justice Albie Sachs is both an honour and a humbling experience.

The University deserves to be commended for keeping the memory of the Griffiths and Victoria Mxenge alive. The Mxenges and countless other South Africans sacrificed their lives for the rights and freedoms we take for granted today. Because of them we have a globally envied Constitution which has a justiciable bill of rights that include socio-economic rights. The preamble to the Constitution includes the following:

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

...Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is protected by law;

Improve the quality of life of all citizens and free the potential of each person”

As can be discerned from the preamble, the Constitution promises a better deal to all the people of South Africa regardless of their social standing. Just recently, a United State Supreme Court Judge, Justice Ruth Bader Ginsburg, was reported in the media to have said the following:

“Egyptians, who are selecting a team to draft a new constitution, should not consider the US's iconic document but instead the "great piece of work" completed in South Africa in 1996.” (Mail & Guardian Online 24 Feb 2012).

It is particularly fitting that the third Griffiths and Victoria Mxenge Memorial Lecture is timed to almost coincide with March 21, our National Human Rights Day. We commemorate National Human Rights Day annually to mark and remember one of the watershed moments in our history as a people in search of justice, democracy and human rights. We also commemorate this day to remind ourselves of the past we hope never to repeat.

Like the Mxenges, 69 people of Sharpeville were murdered by the apartheid state on March 21 in 1960. Their crime was to simply demand justice and basic human rights from a state.

It is worth noting that March 21 is also globally commemorated as International Day for the Elimination of Racial Discrimination, a day proclaimed by the General Assembly of the United Nation in 1966, calling for the elimination of all forms of racial prejudice.

As the Public Protector, a constitutional officer whose principal role is to help the people exact accountability in the exercise of public power, I am particularly delighted to engage you on “***The Constitutional Importance of Ensuring Accountability to the Public.***”

The issue of public accountability is particularly relevant because in my view, Griffiths and Victoria Mxenge were murdered by a state that refused to be accountable, to act with integrity or to be responsive to all its people. The state murdered the Mxenges for daring to question it when it abused people’s human rights.

The Mxenges were lawyers with conscience who devoted their lives to the defence of human dignity and human rights. I believe they did so in the hope that the state that was to replace the apartheid state would be one where people’s demand for accountability would never be viewed as an irritation. Their sacrifice must have been inspired by the hope that the post apartheid first would put people’s basic rights first while being accountable to the people for delivery on such rights.

Indeed the architects of our democracy ensured that the state that we inherited as a result of sacrifices such as those of the Mxenges was a constitutional democracy founded on the supremacy of the Constitution. As we know, in a constitutional democracy nobody is above the Constitution or the law and accordingly, everyone’s actions can be tested for constitutionality. This includes acts of Parliament.

An important feature of constitutional democracy is that all persons entrusted with state power are accountable to the people. The people are the real owners of public power. Public power is given to those in public office on the basis of trust, with the understanding that such power would be exercised in the interests of the people. The Constitution becomes the terms of reference the people have set as boundaries

for the exercise of public power. It also forms the basis on which accountability will be exerted on those entrusted with public power.

This understanding of public power is consistent with the notion of the exercise of public power as an act of stewardship. The idea of exercising public power as an act of stewardship was the centre of an address by Edward Klieswetter, CEO of Alexander Forbes, about a week ago, to my senior leadership team during our leadership and team building retreat on leading a purpose driven organisation.

Having established that my office also exercises entrusted public power, he shared with us his views on what he expected as a citizen from a public institution such as ours. He argued that proper exercise of public power in pursuit of the constitutional promises required that public power be exercised on the basis of the principle of stewardship. His key message was that stewardship is central to the proper exercise of entrusted power and that accountability is a key requirement of stewardship and responsive public service delivery.

This resonated with me as I too believe public power belongs to the people and not to those entrusted with it and that public power can only be exercised legitimately if exercised in accordance with the will and interests of the people. I further believe that the Mxenges and others who devoted their lives also expected that those entrusted with power in the new state would be accountable servants of the people and not self serving individuals.

An attitude of stewardship by those entrusted with public power is indeed central to accountability to the people. Stewardship makes one understand that power belongs to the people and that it is they that are important and not the persons entrusted with power. Stewardship further appreciates that public power is given on the basis of trust and to be exercised not for self interest but solely for the benefit of the people. Service and accountability are accordingly central to stewardship

I believe former President Nelson Mandela had such a steward leadership in mind as the ethos to inform the new government. He must have expected that stewardship would inform the leaders in the post apartheid state to be drivers of the change that

would ensure that the fruits of democracy that the Mxenges and others sacrificed for became a reality. It must have been on this basis that he told the world the following:

“We live with the hope that as she battles to remake herself, South Africa will be a microcosm of the new world that is striving to be born. Let it never be said by future generations that that indifference cynism, or selfishness made us fail to live up to the ideals of humanism which the Nobel prize encapsulates.”

But what does accountability mean? Specifically what does accountability mean to the average person in South Africa?

To make sense of the concept of public accountability I thought we could apply our minds to the meaning of accountability by those in government to the people of Brarmfischerville in Gauteng. This is a community that invited me last Saturday through a journalist to come and witness first hand their life of indignity and to do something about it.

When I came back I sent a shocking text to my team about having been invited to see something, talk about it and walk on it. They were indeed shocked. Sadly they thought I had been driven crazy by whatever I had experienced to the extent that I would express my displeasure in vulgar terms. Several texts later and after having much fun at their expense, I told them the whole story.

I had been invited by a young gentleman, Mr M, who serves as a spokesperson for the community of Braamfischerville. The people wanted to lodge a complaint of maladministration against the City of Johannesburg (COJ). They claimed that for many years they have had to walk on raw sewage that runs through their streets and houses. We visited a fountain in front of someone’s house, Mr N, where the source of the leak is.

We had to walk through the sewage ourselves and while standing in front of Mr N’s house, we could not bear the stench. They alleged this problem had been there for years and that previously the COJ would send someone to fix it and within ours the problem would be back. They alleged that since 2011, nothing had been done despite numerous reports to the COJ.

Mr N and others further alleged that their children were sick due to the health impact of the health hazards they were exposed to daily. Others alleged that the health impact was also felt by adults. While we were there we saw children playing close by and others cross over. Some wore plastic boots and others didn't.

I was further informed that the entire human settlement was built on a bed of springs and that there was water everywhere. Indeed we saw that there were no gardens or driveways. People had rugs and carpets outside their houses to achieve some evenness for walking purposes. The place was not conducive for children to play outside the houses. We could not even walk on high heels. I was also informed that there were more sewage leakages all over the settlement.

I was asked to investigate how, why and who approved the human settlement. The basis of that concern was that a land survey should have first determined the fitness of the land for establishing a human settlement.

The most pressing request was that I investigate the reason for the sewage leakage and the failure by the COJ to act when asked to do so. I was given the list of names of officials contacted over a period of time and reference numbers. They also alleged that some of the councillors drive by and see the sewage and conditions but are doing nothing about it.

The people, who by then exceeded a dozen, told me that they did not want to stage a protest and were urging fellow residents not to take that route. I was amazed at their responsible leadership and fortitude in the face of such indignity.

I cannot prejudge the case but I do know that no one deserves to live in the conditions I witnessed on Saturday 17 March 2012. I also know that the indignity under which the people of Braamfischerville cannot be consistent with the constitutional promise, which includes justiciable social and economic rights. It also occurred to me that Braam Fischer, the lawyer who sacrificed privilege to dedicate his life to the struggle for inclusive democracy and human rights and after whom the human settlement is named, would not have been proud to be associated with the indignity confronting the people of Braamfischerville.

The problem, it seems to me centres on government accountability for delivery on socio-economic rights.

In *Government of the Republic of South Africa and others v Grootboom and Others* (2001), Jacob J said the following:

“Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the State ‘to respect, protect, promote and fulfil the rights in the Bill of Rights’ and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.”

The constitutional court is one of the mechanisms for government’s accountability to the people with regard to delivery on constitutional promises, including socio-economic rights. But the court route is onerous. The architects of our Constitution had the foresight to include other accountability mechanisms, among these the Public Protector.

Speaking about the Public Protector and others as additional accountability mechanisms to safeguard our democracy and delivery on constitutional guarantees, particularly human rights former President Mandela once said the following:

“Even the most benevolent of government are made up of people with all the propensities of human failings. The rule of law as we understand it consist 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 the 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. Among 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.”

The importance of the Public Protector or National Ombudsman in helping hold government accountable for delivery on human rights, particularly socio-economic rights, was also highlighted by former Chief Justice, Justice Sandile Ngcobo. In his address at the launch of the African Ombudsman and Mediators Association's Needs Assessment workshop in March 2012, Justice Sandile Ngcobo said:

“The importance of the role of the Public Protector or Ombudsman is especially clear in many countries throughout Africa, where there is often a desperate need for basic human needs such as food, drinking water, health care, housing, education and social security. Our countries cannot bear the improper allocation of government resources. Having a Public Protector, or Ombudsman, with a mandate to investigate and publicly report on government administration is essential.”

If public accountability is central to government delivery on the human rights that inspired the sacrifices of the Mxenge's and others, what really is public accountability?

The question of public accountability was at the centre of the Public Protector Annual Good Governance Week dialogue in 2011. One of the permanent features of the Annual National Good Governance Week, which until last year was referred to as the Public Protector Good Governance, is a Good Governance Conference. Public accountability was the specific focus of the papers presented at and the dialogue we engaged in during the Conference in October 2011.

The dialogue centred on several dimensions of public accountability. The main question was what really is public accountability? A question was asked whether accountability simply meant explaining one's self and taking responsibility or included redress or remedying any wrong or injustice caused by improper conduct.

The dialogue took place in the context of a broader national question on the impact of the findings of the Public Protector. There context had been the need to clarify the

responsibility of organs of state following the Public Protector's findings and pronouncement on remedial action. Participants had been asked to share their thoughts on whether or not the Public Protector could fulfil his/her responsibility of ensuring administrative justice and accountability for abuse of state power and resources and her findings did not have any consequences.

The resounding answer from speakers was that accountability is a much broader concept that incorporates remedial action for wrong doing or injustice. Speakers and pannelists included Ministers, Nkosazana Dlamini Zuma and Richard Baloyi; Deputy Ministers Dina Pule (Now Minister) and Nhlanhla Nene; Premier of the Western Cape Helen Zille, leaders of various State Institutions Supporting Democracy and civil society experts such as Advocate George Bizos.

It was agreed that public accountability incorporated making good on government promises, particularly constitutional promises.

The next question was why does public accountability matter? Various reasons were proffered. The main reason that seemed to enjoy consensus was that those entrusted with power have a duty to account to the power giver. The dialogue also identified accountability as a check and balance against potential excesses in the excess of public power, which include abuse of public power, abuse of public resources and corruption. Public accountability was also seen as a key towards responsive service delivery, incorporating reduced incidences of maladministration.

An equally thorny question was the question of who is accountable to who and how. It was noted that there was a tendency among public authorities to only recognise vertical accountability, particularly to parliament. Participants conceded that the only other form of vertical accountability that is rarely contested is accountability through the courts. Indeed the courts have done a sterling job in enforcing accountability for state delivery on human rights, particularly in the area of human rights. The Grooboom case that I referred to earlier is an example in this regard. Further examples abound in the areas of health, social welfare and housing.

Direct accountability to the people is a major form of public accountability yet it is not uncommon for persons in public office to reject opportunities for answering directly to

the people. A stewardship paradigm sees direct accountability as a natural element of accountability for entrusted power. When people seek answers and redress, they cannot be viewed as an irritation. Incidentally that was a feature of the rejected apartheid that the Mxenges' sought to end.

Another accountability mechanism that is contested is accountability through the media. In the modern world, it is not possible for the entire nation to engage in meaningful dialogue without the facilitating role of the media. Government accountability to the media is accordingly a necessary form of accountability to the people. It is with this understanding that the right to freedom of expression, enshrined in our Constitution and the Universal Declaration on Human Rights, incorporates freedom of the media.

The media is also a major guarantor of transparency, which again fosters accountability. When people know, they are bound to ask questions.

Underscoring the symbiotic relationship between public accountability and transparency, former United Nations High Commissioner for Human Rights, Mary Robinson illustrated this point better when she said the following:

“There is no longer any doubt about the linkages between corruption, poverty and human rights abuses. An open and transparent state will provide for fuller realisation of economic, social and political rights. There will be fewer secrets, less discrimination and more equal access to public resources like education, and health care as well as fair treatment by the police and the judicial system”

Another contested public accountability channel is that involving the Public Protector and other state institutions supporting constitutional democracy. Most of these are entrenched in Chapter 9 of the Constitution with a mandate to support and strengthen constitutional democracy. The full implications of Chapter 9 on public accountability are yet to be explored or acknowledged. Being a relatively new public accountability mechanism nationally and internationally, the place of the Public Protector is not always understood.

Despite the deliberate choice by the architects of our democracy to expand avenues for public accountability and add the Public Protector and others, the right of the people to ask questions and get redress through this avenue is not always readily appreciated by some of those in public power. Unfortunately this has an impact on the Public Protector's ability to finalise investigations expeditiously and to redress relevant administrative injustices or wrongs.

As you may know, the Public Protector is mandated by sections 182-3 of the Constitution to investigate any conduct in state affairs or the public administration that is alleged or suspected to be improper; to report on that conduct; and to take appropriate remedial action. The dialogue at the Public Protector Good Governance conference spent a considerable amount of time on the responsibility of organs of state following the findings of the Public Protector and his/her pronouncements on remedial action in pursuit of his/her powers under section 182(1)(c) of the Constitution.

I'm interested in your views on whether or not accountability to the public is achieved regardless of whether or not the findings and pronouncements on remedial action are implemented. Our view, which is backed by global court jurisprudence on the Ombudsman institution, is that organs of state should implement unless they can prove on review that the Public Protector's decision was irrational. In other words no Ombudsman in the same position could have arrived at the same conclusion or that it is impossible to implement the remedial action.

It seems to me that our dialogue on the constitutional importance of accounting to the public is bound to raise many of the questions we dealt with last year. I also suspect that as we did last year, on some of the issues we will only go as far as asking the questions and hope that academic discourses will take over and move the debate forward.

This makes me particularly excited to be amongst you as you are the right group to take the debate forward. In this regard I also hope that students too will engage with these issues and contribute to the much needed jurisprudence through their choice of research topics, moot court activities and, ultimately, their fields of practice.

The essence of my engagement with you tonight is that accountability to the public is central to meaningful delivery on the constitutional promise of a better life based human rights and freedoms. For the South African dream that inspired the sacrifices of the Mxenges and others to be realised accountability to the public is a must. I've also said that public accountability is consistent with and made easier if the exercise of public power is informed by the principle of stewardship.

But do we have leadership that embraces the principle of stewardship in government? I have no doubt in my mind that such leadership ethos does exist in government. The progress we have made in advancing and consolidating democracy in many areas of life over the years has been made due to efforts based on accountable and responsive exercise of public power.

But we must be honest and admit that there have been many lapses in stewardship and where that occurs accountability isn't there. The plight of the people of Braamfischerville is instructive in this regard. One of the questions raised by the residents of Braamfischerville was whether or not the rights guaranteed in the Constitution were not applicable to them since their pleas have been ignored for years.

This takes me to the question of factors that impact on meaningful accountability to the public. One of the issues that the people of Braamfischerville posed was the question of transparency in public decision-making. As indicated earlier, they wanted to know who approved the human settlement on and on what basis. They further wanted to know who built the settlement, how were the services procured and who approved the sewage system based on what engineering considerations.

The approach of the people of Braamfischerville underscores the importance of having an empowered public in ensuring meaningful public accountability. The community leaders in that community appear to have informed themselves about their rights, the government regulatory framework and general knowledge on how government works. This has enabled them to ask the right questions to the right people through the right channels.

This underscores the importance of role of the people and community leaders in the enforcement of public accountability to ensure accountability is to be enforced. The people need to empower themselves with information on laws, policies and how government works. This approach to public accountability is more effective and more sustainable than public protests. The latter also have a negative impact on many aspects of democracy, including the very human rights sought to be enforced.

I am particularly encouraged by initiatives that seek to empower people through knowledge so that they can enforce public accountability. There is a rise in such initiatives in countries such as India, where the positive impact on corruption in the public sector has been felt. One such initiative locally is called Ndifuna Ukwazi. Public accountability through an active and informed public is in line with Peter Burnell's assertion that:

“Accountability is central to the theory and practice of both democracy and better governance. In Africa the importance of accountable governance to achieving economic and social development, lasting peace and political stability as well as democracy is widely assumed to be virtually axiomatic.”

Burnell further states that:

“Accountability makes the abuse of power less likely, while at the same time helping to empower governments to serve the ends that democratically elected governments are legitimately asked to pursue.” (Peter Burnell of the Department of Politics and International Studies at the University of Warwick in England, *The Relationship of Accountable Governance and Constitutional Implementation, with Reference to Africa*, 2008)

I have no doubt in my mind that the role of the Public Protector and other oversight institutions will be strengthened by working with empowered communities.

The Public Protector is an Ombudsman office whose role is to serve as a buffer between the people and government. Established in Sweden to supplement traditional checks and balances that seek to curb excesses in the exercise of public power, the Public Protector serves as the voice of the people while amplifying the ears and conscience of the state. Locally we often compare our office to that of the

Vhenda Makhadzi whose role is to be the eyes, ears while giving people a voice. The Makhadzi also serves to amplify the conscience of the the king and his counsel.

The main power of the Public Ptotector derives directly from the constitution. This includes the power to take appropriaye remedial action. The Constitution, which only excludes court decisions from the public affairs that the Public Protector may pronounce on and /or correct impropriety adds that the Public Protector has additional powers assigned by legislation.

The following six key pieces of legislation provide distinct additional mandates to the Public Protector, out of sixteen statutes that recognise the role of the Public Protector in exacting accountability in the exercise of state power:

- The Public Protector Act, 23 of 1994, which focuses mainly on maladministration, abuse of power,, abuse of public resources and appropriate resolution of state-related a disputes;
- The Executive Members' Ethics Act of 1998 and the Executive Ethics Code, which relate to the enforcement ethics on the executive;
- Prevention and Combating of Corrupt Activities Act 12 of 2004 read with the Public Protector Act, gives me the anticorruption mandate;
- The Protected Disclosures Act 26 of 2000, which mandates me to protect whistleblowers;
- The Promotion of Access to Information Act 2 of 2000, which gives me the information regulation mandate; and
- The Housing Protection Measures Act 95 of 1998, which empowers me to review decisions of the Home Builder's Registration Council.

We have summarised our mandate as three pronged, involving a non-judicial enforcement of administrative justice; enforcement of executive ethics and exacting accountability with regard to the use of state resources on the other. The resource oversight mandate includes an anticorruption mandate.

Going back to the broader question on the constitutional importance of ensuring accountability to the public, the Public Protector is an important mechanism that was included in our public accountability framework by the architects of our democracy.

However, optimal accountability to the public as envisaged in the Constitution requires that those in public power recognise the multiple accountabilities I outlined earlier. Key among these is an empowered public.

With empowered people and optimal use of state institutions supporting democracy, our chances of achieving the South African dream that inspired the Mxenges to make the sacrifices they made, are bound to be optimised. Such arrangement is a guarantee for transforming the state into one that is more accountable, operates with integrity and is optimally responsive to the needs of the all its citizens and residents.

That state does not see the people's demands for accountability as an irritation. That state is based on public office being handled on the principle of stewardship.

I believe that's what the Mxenges would have wanted to see in the human rights based democratic South Africa they fought and died for. Together we can work with those who exercise public power to make that South Africa a reality. We need not break anything or shout to achieve that.

Thank you.

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