

Independence of the legal profession, like the judiciary, is paramount – Public Protector

While all role players in the justice system are required to have a level of independence, Public Protector Thuli Madonsela has highlighted that, for the judiciary and the legal profession, independence is 'paramount'.

Ms Madonsela made the statement during a speech at the Gauteng Law Council's annual general meeting in Midrand on 6 October 2012, in which she also discussed the Marikana tragedy and her office's submissions on the Legal Practice Bill (B20 of 2012) (the Bill), among others.

Marikana

Ms Madonsela praised the legal profession for its response to the Marikana tragedy, which left over 40 people dead, and in particular noted that many lawyers were worried about the Marikana people.

'It was quite amazing to see how lawyers have reacted It reminds us of the past of the legal profession in this country,' she said.

Ms Madonsela added that she had been particularly encouraged by the fact that when it became clear that the families of some of the deceased were not going to be represented at the commission of inquiry into the incident, lawyers had argued that the state must provide resources to ensure that the families have the opportunity to engage in the accountability process.

'That for me was the kind of ethical lawyering that we were used to seeing during apartheid, during the Truth and Reconciliation Commission and now in Marikana,' she said.

Independence in the judicial system

Ms Madonsela noted that concerns had been raised about judicial independence and emphasised that this should be examined as part of a broader issue of independence:

‘The real independence that is entrenched in the Constitution is independence in the judiciary system as a whole,’ Ms Madonsela said, adding that ‘it is not enough’ to have independent and impartial judges if other role players, such as registrars, prosecutors, police, lawyers and the legal profession, were not independent.

‘The independence of all these other actors is as important as the independence of the judiciary. Obviously the levels of independence differ. The independence of the judiciary is paramount. The rest of the system must be independent, but there are degrees. ... The independence of the clerk of court is not going to be underpinned by the same guarantees as the independence of the judicial officers. The issue of the independence of the legal profession is paramount too because [it] is an important feeder of the judicial system,’ she said.

Ms Madonsela said that the profession also serves ‘a particular purpose’ in respect of access to justice: ‘The legal profession becomes the voice of the voiceless in many instances and, of course, it lends its voice to powerful people as well, but particularly to the voiceless, and it becomes important that the impartiality is not just there, but that it is also perceived by those who engage with the system.’

In respect of criticism against the judiciary and the legal profession, she noted that some criticism had been perceived as interference; however, she said it was important not to confuse fair criticism and accountability with interference: 'Fair criticism cannot interfere with independence of both the judiciary and the legal profession and accountability is also not inconsistent with independence,' she said.

Perceptions of the profession

Ms Madonsela said that the conduct of some members of the legal profession allowed the perception of lawyers as 'sharks' to prosper, despite this not applying to the average lawyer.

The Public Protector emphasised that it was up to the profession to ensure that lawyers are not judged by their 'weakest link', namely those who give the 'noble profession' a bad name.

The Legal Practice Bill

Ms Madonsela informed those present that her office had made submissions on the Bill, which it did not support in its entirety. In particular, she said there were 'certain gaps' relating to accountability of lawyers that needed to be resolved. She said that this was based on her office's experience in dealing with cases involving legal practitioners, some of which related to Road Accident Fund claims and the administration of estates.

However, her office supported the Bill's establishment of an independent ombud for the legal profession. The goal of the office will be to protect and promote the public interest, ensure the proper investigation of complaints, promote high standards of integrity in, and the independence of, the legal profession (see s 47 of the Bill).

Ms Madosela said it was essential that the ombud was an independent institution, but how this should be done, the Public Protector had 'left for other parties to look at'.

Working with lawyers

On the role of lawyers in respect of her office, Ms Madonsela said she had benefited from working with lawyers, who had proven to be 'very helpful' to the Public Protector's work. She described insights from lawyers as 'invaluable' to her office and highlighted some of the opportunities for her office and the profession to work together, including:

- Strengthening state contracts to ensure accountability for wrongdoing. 'Let us create contracts that foster accountability by those who contract with the state,' she said.
- Providing *pro bono* assistance to complainants.
- Providing expert opinions.
- Advising the state 'with the vision in mind of making sure that the state creates a society that we want to become'.

In closing, Ms Madonsela elaborated on this last item:

'Each nation gets the country it deserves. Whatever country we become will be the country we decide to make it. During the struggle we fought for what we have now and the Constitution that is respected by the entire world. We have the power now and the opportunity to influence the behaviours of the state and the other fellow human beings that we advise on a day-to-day basis to play their part in creating that society that we chose to become. If we do so [and] if we work together, we can make sure that our state is accountable; that public accountability is not an option, but a must; that our state operates with integrity at all times and ultimately is responsive to all our people.'

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