

### ***How would you define your office?***

The International Bar Association in 1974 defined the Office of Ombudsman as 'an office provided for by the Constitution or by action of the legislature or parliament and headed by an independent high level official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports'. That definition by the IBA is an apt definition of my office.

### ***Your office is frequently in the limelight but little is known of its statutory and practical functioning.***

The Public Protector is independent of government and any political party. He receives complaints from aggrieved persons against government officials and agencies. He has the power to "recommend corrective action and issue reports" or he can report the matter to Parliament. Anyone can complain to the office. If the Public Protector finds that a complaint is justified he will do whatever is necessary to find a solution – including recommending changes to the system.

A complaint should preferably be in writing. It can be in the form of a letter, it can be in the form of an affidavit – the Act enables me to take a complaint in a form which I deem appropriate. In urgent cases a person can even complain telephonically provided we can deal with the case in that manner. I can, on the basis of that information, contact a government official and if the alleged facts are confirmed, I don't need any letter. This has actually happened in a case involving the Department of Home Affairs where a certain newspaper reporter wanted the names of the Aliens Board. After a quick investigation of the matter and after establishing that there were neither legal nor contractual reasons for denying the information, I obtained the information from the department within three days and furnished it to the news-

## ***The editor talks to...***

### **Selby Baqwa SC** **The public protector**



*Selby Baqwa SC*

paper. It appeared that the information had been withheld purely because traditionally the department had not imparted such information to third parties. I found that this was improper and unfair particularly when viewed in the light of the provisions of section 32 of the Constitution Act 108 of 1996.

### ***What are the advantages of the Public Protector system?***

The Public Protector system demonstrates how the rule of law should be implemented and is based on the idea of protection of the rights of the people as set out in the Constitution and in legislation which governs the abuse of power, arbitrariness, error and neglect on the part of the authorities and their officials.

The advantages of the Ombudsman system have been expressed by writers and researchers in various ways. For instance the Ombudsman has been said to be a concept entrenched within a democratic system as a safeguard against governmental abuses of individual liberties.

The institution has been recommended by the International Committee of Jurists (ICJ) as a necessary mechanism for enforcement of the rule of law. In public administration Ombudsmen have a very valuable role in offering informal methods for resolving disputes which are free to the complainant and relatively quick and inexpensive, compared to litigation. Although

it is commonly accepted that the Public Protector is not a substitute for the courts of law, it is common knowledge that the law courts in many instances are congested, slow, bogged down by technicalities and expensive for ordinary litigants, and therefore, the Public Protector complements the courts in dispensing quick and just remedies to the people.

The Public Protector has an added advantage in that it is an easier avenue for redress of certain grievances compared to the court system. The procedures used by the Public Protector are simple, speedy and usually effective. In many cases grievances may not be justifiable as to found an action in court and yet the person is actually aggrieved. For instance, many cases of discrimination, nepotism in the work-place or excessive authoritarianism by employers may not be in breach of written law and yet a person is aggrieved by such acts and may require a remedy.

The Public Protector stands on the middle ground between the complainant and government. Where a government official is found to have acted correctly and fairly, in fact and in law, his action will be upheld by the Public Protector even if it is perceived to be prejudicial to the individual.

The institution of the Public Protector is an external remedy or rather an extension of Parliament. Using the constituency model, a member of Parliament should be the person to whom constituents could turn to complain about, say, the granting of health or welfare benefits. But it is physically impossible for a member of Parliament to attend to all the ills in his/her constituency. The Public Protector, as a functionary of Parliament, is equipped to attend to such complaints – to perform as it were the function which a member of Parliament would do in assisting his constituents. >

### **Why was the Duarte case not referred to you for investigation?**

Although such an enquiry falls under my jurisdiction, I can explain the situation. Commissions of enquiry can still be appointed under the Commissions Act. With the Public Protector government sought to create an inexpensive institution which could be equally as effective if not better than commissions. Commissions of enquiry are, however, expensive, e.g. the Duarte commission was chaired by senior counsel in private practice, assisted by the chairperson of the Public Service Commission. An administrative structure to support the commission had to be established. Due to the public interest in the matter the provincial government decided that the matter was urgent and needed to be dealt with expeditiously. A commission of enquiry which would deal with the Duarte issue was accordingly appointed as the problem-solving mechanism. You may find that even when a matter is referred to me the investigation may take a long time because I deal with other such issues. In such a case I may recommend to the President to appoint a commission as I do not have the resources to sit for two or three years on one matter. The corollary to that is that government does not easily appoint commissions on matters I can attend to. Commissions are draining government resources. The way to do it is to give this office sufficient resources in all the provinces so that whenever there is a problem at government level the Public Protector can attend to it. The whole idea behind commissions is that government should not investigate itself. The Public Protector operates outside government and is recognised to be independent and credible. Also, we already have an infrastructure to investigate and follow-up. The fact that the Public Protector is permanent and can follow-up is another advantage vis-a-vis commissions, particularly where you are talking about administrative reforms. A commission might recommend administrative reforms which might imply changing the relevant law or procedures within a department. Once it completes an investigation and makes its recommendation it dissolves

and the members return to their occupations. It is then up to government to implement the recommendations. What is going to happen if the government is not happy with these recommendations? Many commissions have fallen foul of that situation. Nothing is done about recommendations and they are left gathering dust on some government shelves. The Public Protector on a measured basis goes back to the official(s) concerned, to ensure that the recommendations are followed and can report on what has happened about implementation.

Some examples:

- *The Sarafina II debacle of the Health Department.* After an investigation I established that money had been expended improperly by the Health Department to the tune of R14 million. The department had entered into a contract with a certain playwright to stage a play propagating the AIDS message. When my institution came into the picture the department had already expended an amount of R9 million. I recommended an immediate stop to any further payments to the playwright concerned. A sum of R5 million of the taxpayers' money was saved by that action. Further assets were seized from the playwright and all in all plus minus R7 million of taxpayers' money was saved. I also recommended disciplinary action against the responsible chief director and he was subsequently demoted to the level of a director. Further corrective action was taken within the department, e.g. by appointing more senior staff where this was necessary. Apart from this I regularly follow-up the progress by asking for reports with regard to implementation of recommendations.
- *Irregularities pertaining to the issuing of degrees and courses at the University of Zululand.* I found in more than a hundred cases that degrees and courses had been improperly awarded to students and I made recommendations to the University Council to reverse the award of such courses and degrees. This was done. The curious result of this investigation was that in some instances people were already employed either as teachers or even

within the Justice Department on the basis of the qualifications they had fraudulently obtained. I have been in contact with the university to find out how far the implementation process has gone and I am presently awaiting a report.

This institution can therefore give value for money at much less cost than the commissions. So this institution must be viewed as part of an armoury of mechanisms to solve problems in the field of public administration. Commissions are not excluded and should be appointed where it is appropriate and where no other structure or mechanism can be utilised.

### **Tell us about yourself. Why do you do the job?**

As you might see from the Constitution and the Act the requirement for appointment to this job is that the incumbent must have worked in public administration, or as a judge or an attorney or an advocate. The latter two must have practised for a period of not less than ten years, and a person in public administration must also have worked for a period of not less than ten years. Whilst practising as an advocate and, especially as an attorney, I had the opportunity to see at first hand the problems of what you can call the 'small person' – I practised in all the so-called lower courts – maintenance and magistrates' courts, criminal courts, the civil courts and the 'commissioners courts' of that time. That gave me insight into the problems a person can experience when he is faced by the bureaucracy – financial problems must not be underestimated. Attorneys have to be paid. I developed an acute sense of the dilemma that confronts an illiterate and indigent person. I also worked with other structures like commissions of enquiry. I participated in the well-known Browde Commission (now known as the 'White Commission') which investigated irregularities in public administration and the civil service. I also participated in the investigation task force which investigated assassinations in the province of Kwa-Zulu Natal and worked with members of the SA Police Services. So one has an insight

not only from working as an attorney or as an advocate but also from working as a commissioner and in other similar structures. That equipped me with the knowledge and experience about how to conduct investigations in an effective manner. I find this very beneficial in my work as Public Protector.\*

### **What is your staff situation?**

Almost all of the professional staff in the Public Protector's office are persons who have been legal practitioners and advocates, or who have legal qualifications. Without suggesting that the repository of wisdom to solve problems is confined to lawyers, it is, however, true that investigations in this office consist of information gathering, testing and evaluation before a finding or recommendation is made. Accordingly it is easier for legally-trained persons to function effectively and efficiently in this office. They report to me in the sense that I have to keep in touch when a final decision has to be made. Needless to say I have to deal personally with some of the cases, as in the case of the University of Zululand. At the moment there is a waiting period because I am required to service the whole of the Republic of South Africa and it is necessary for my office to have investigators and support staff in each and every province.

When I came into the office I had a staff of eight. Right now the staff is about 30 people about half of whom are investigators. This staff component is far from adequate, if we are to safeguard the ± 40 million population of South Africa. I can by way of a quick statistical survey inform you that an equivalent office in Ghana, for example, has a staff of 420 – serving a population of about 20 million. An equivalent office in Uganda (with a population of about 18 million) has a staff of 110. And lastly, in a country like Senegal, which has a population of 7,5 million, a similar office has a staff of 40. That shows you how inadequate my staff resources are. I have conveyed this to government and I hope that this situation will be recti-

fied soon. I trust that the General Council of the Bar would support me in putting pressure on the government in this regard.

### **You are the first incumbent of this office. What are the challenges facing the office?**

My tenure is seven years and I am already in my third year in office. The first challenge is that the people of South Africa should know about the existence of the office, its role and the services that it offers. The second challenge is, of course, establishing credibility. Credibility can only be established, firstly, by the quality of service in terms of the turn-around time from the time that a person files a complaint and, secondly, by the motivation for decisions and recommendations which should show that a thorough investigation has been undertaken. In so far as credibility is concerned we would like to believe that we have already achieved some measure of success. The Public Protector does not have enforcement powers such as our courts have. He issues his findings in the form of recommendations to the authority or authorities concerned and the force thereof emanates from the motivation behind such recommendations. Thus far it has been noted that almost without exception authorities do respect and implement the Public Protector's recommendations. There is also a physical aspect. There has to be a physical presence to address the "access principle" in the Constitution. However good an institution may be, if it is not accessible to the small person then it is not serving its purpose. I would like to say it is the biggest challenge because we are not yet there. As far as access is concerned we are still literally at square one because the only regional office which I am going to be taking over is in the Northwest Province. Eight provinces are not properly serviced.

I have already submitted a plan to Parliament which requests that offices be established in all nine provinces because unless that is done accessibility will not be achieved. I think that is the greatest challenge.

### **What is the present waiting period for the disposal of complaints?**

The main office from which we are operating is in Pretoria and we are supposed to service the whole country with a staff of only 30. We have a serious back-log in the office which is caused by the fact that resources are wholly inadequate. The staff are prepared to break their backs in order to make sure that the turn-around time is kept to a minimum but I am afraid to say that the situation is not good. The problem is that the more we achieve the more complaints are filed. We started at a rate of less than 100 complaints per month. There are now between 300 and 400 complaints per month. And you can imagine what that means. The total number of complaints we have received is now approaching the 10 000 mark.

Although there is a waiting list in the sense that cases have not been disposed of we are trying to ensure that there is no file which has not been worked on. That is not satisfactory.

### **The judiciary in South Africa is presently exempted from the Public Protector's jurisdiction. Any comments?**

I undertook a five weeks judicial training course in Canada in 1993. The course took me to by three cities: Ottawa, Montreal and Toronto. It involved lectures and discussion groups within the universities in those cities, and also discussions with their judicial services commissions and sessions in courts with judges. I was dealing with actual cases. That was an eye-opener for me because I was also learning during that course that Canada already had a judicial Ombudsman-structure. Judges could be called to account before that body. My views and more information in this regard are set out in a separate contribution which I have prepared for publication in the next issue of your journal.

**Thank you very much for your time and co-operation in granting this interview. We wish you success as the country's first Public Protector.**



\* See 1998 May *Consultus* 16 for Mr Baqwa's curriculum vitae.