

Ethical Leadership and Public Accountability

GSDPP, UCT

Institutionalising ethical practice and transparency

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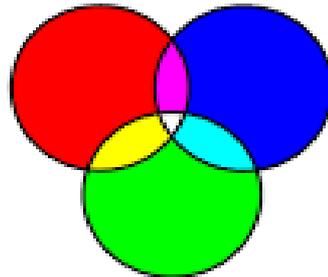
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Why institutionalise?

- Legal advice to a couple before marriage –
“We’re all human, so hope and work for the best,
but plan for the worst – sign an ANC”
- It all starts with the Constitution - SA’s ANC
 - Supreme law
 - Equality before the law
 - Values, principles
 - Consistent, depersonalised standards
 - Checks and balances
 - Institutions / remedies

How to institutionalise ethics and transparency?

- Comprehensive and coherent legal frameworks
- Cross-cutting, mutually reinforcing systems, mechanisms, institutions: personal, internal and external



- Comprehensive programme: systems and mechanisms – risk constantly monitored, reviewed and effectively managed
- Lifecycle: checks and balances, implement, monitor, oversight, enforce, report / account, evaluate, adjust/remedy; and implement, etc - dynamic

Institutionalising ethics

- **Personal** – values – increasingly different – divided society - class, culture, post-modern relativism – clarity and certainty
 - Stewardship of common good above self- or partisan interest
 - Integrity: honest and having strong moral principles; whole and undivided; internal consistency; unified or sound in construction – Oxford Dictionary
- **Internal** – systematic programme; consistent management ethos and practice; compliance culture – routinised
- **External** – laws & institutions – monitor, enforce, report
 - Is SA ethics over- or under-institutionalised, or just over-bureaucratised?
 - Key appointments: centralised in Presidency, uneven criteria

Institutionalising transparency

- Why? Is transparency the currency of trust? Game of 2 circles
- Constitution
 - Preamble: 'democratic and open society'
 - s.32: RTI
 - PAIA (CC in *MVC v President* June 2018 – party funding)
 - s.195(1) -
 - f. Public administration must be accountable.
 - g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - Democracy's 'terrific twins'
- Minister Kader Asmal complaint to PPSA (1997) – registry – basic record-keeping

Transparency vs Openness

- Transparency vs 'openness' – reactive vs proactive
 - Constitution s.1d. 'Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'
 - Brown Act: California's 'sunshine laws'
 - Gauteng govt: 'open procurement'
- "All who do evil hate the light and refuse to go near it for fear their sins will be exposed. But those who do what is right come to the light so others can see that they are doing what God wants." John 3:20-21 NLT

TI Corruption Perceptions Index

- Measures perceptions of corruption – because in many countries, reliable ‘white collar’ crime stats are unavailable – because corruption is by its nature secret and hard to detect, and often not prosecuted in either public or private sector
- Measure private sector corruption by NDAs?
- Often criticised because it measures perceptions - intangible
- Legitimate if accepted for what it is, and because perceptions often ‘are’ reality
- Assess extent of correlation with other similar assessments, eg SASAS, AfroBarometer, Ibrahim Index, Global Integrity
- And the outcome/impact of ethical conduct is equally intangible – **trust** in institutions

Leadership

- Ethics Resources Centre "Ethical Leadership: Every Leader Sets a Tone" (2014): Employees in every size of organisation judge leaders primarily on the same three factors –
 - Personal character as experienced through interactions (behaviour/actions)
 - How leaders handle crises
 - Policies and procedures leaders establish to manage the organisation.
- Leadership – at all levels
- Personal buy-in / commitment
- Can state capture be characterised as a failure of leadership?

Constitutional Values - Preamble

We, the people of South Africa,

Recognise the injustices of our past ...

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 ...'.

Constitution: Founding provisions = leadership values

1. Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- 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.

Legislative branch: ethics and transparency

➤ **Parliament**

S.59 Public access to and involvement in National Assembly

S.72 Public access to and involvement in National Council

➤ **Provincial legislatures**

S.118 Public access to and involvement in provincial legislatures

➤ **Municipal Councils**

Local Government Municipal Systems Act 32 of 2000

S.4(2)(c) – participation / involvement

S.5(1)(b) – openness and disclosure

➤ **MPs' Gifts:** 2016: 55 of 400 MPs failed to meet the deadline to declare gifts.

Executive branch

Sec.96 Conduct of Cabinet members and Deputy Ministers

1. Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
2. Members of the Cabinet and Deputy Ministers may not
 - a. undertake any other paid work;
 - b. act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - c. use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Executive Members Ethics Act

- EME Act of 1998 and Ethics Code of 2000
 - Prevent and manage conflicts of interest
 - Ministerial Handbook (2007)
- Enforced by PPSA
- 2009 - President Zuma failed to lodge disclosure of interests – PP Report 1 of 2010/11: Recommended standardised code
 - ‘Interim’: sanctions increased
- 2004-9 Zuma failed to file tax returns - *President’s Keepers*
- Nkandla – *Secure in Comfort* – PP Report 25 of 2013/14
- CC (*EFF & DA v Speaker*, 2016) confirmed binding nature of PP’s remedial action

Administrative branch

➤ Section 195 of the Constitution ‘Basic values and principles governing public administration’

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a. A high standard of professional ethics must be promoted and maintained.

b. Efficient, economic and effective use of resources must be promoted. **[Stewardship]**

c. Public administration must be development-oriented.

d. Services must be provided impartially, fairly, equitably and without bias. **[Equality before the law]**

Section 195 (contd)

- e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- f. Public administration must be accountable.
- g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
- h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

[But cadre deployment...?]

Section 195 (contd)

2. The above principles apply to
 - a. administration in every sphere of government;
 - b. organs of state; and
 - c. public enterprises.
 3. National legislation must ensure the promotion of the values and principles listed in subsection (1).
- **Sec. 237** of the Constitution **also** requires diligent performance of obligations - 'All constitutional obligations must be performed diligently and without delay.'

Public Service Regs, 2016

➤ Chapter 2: Conduct, Financial Disclosure, Anti-Corruption and Ethics Management

Part 1: Code of Conduct (link with Batho Pele Principles)

➤ Sec 11. Adherence to Constitution and other laws

An employee shall –

(a) be faithful to the Republic and honour and abide by the Constitution and all other law in the execution of his or her official duties;

(b) put the public interest first in the execution of his or her official duties; **[Stewardship for the common good]**

(c) loyally execute the lawful policies of the Government of the day in the performance of his or her official duties;

[Nuremburg trials: You can and must refuse]

Code of Conduct - fairness

➤ 12. Relationship with public

An employee shall –

- (a) promote the unity and well-being of the South African nation in performing his or her official duties;
- (b) serve the public in an unbiased and impartial manner in order to create confidence in the public service; [= **Trust**]
- (c) be polite, helpful and reasonably accessible in his or her dealings with the public;
- (d) have regard for the circumstances and concerns of the public in performing his or her official duties and in the making of decisions affecting them;

Code of Conduct - transparency

- (e) be committed through timely service to the development and upliftment of all South Africans;
- (f) not abuse his or her position in the public service to promote or prejudice the interest of any political party or interest group;
- (g) respect and protect the dignity of every person and his or her rights as contained in the Constitution; and
- (h) recognise the public's right of access to information, excluding information that is specifically protected by law

= Transparency

Code of Conduct - Ethics

Sec 13. Ethical conduct

An employee shall –

- (a) not receive, solicit or accept any gratification (as defined in PRECCA) in return for performing or not performing his or her official duties;
- (b) not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties;
- (c) not conduct business with any organ of state or be a director of a public or private company conducting business with an organ of state, unless such employee is in an official capacity a director of a company listed in schedule 2 and 3 of the Public Finance Management Act;

Code of Conduct – Ethics (2)

- (d) recuse herself or himself from any official action or decision-making process which may result in improper personal gain, and this shall immediately be properly declared by the employee;
- (e) immediately report to the relevant authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law (including, but not limited to, a criminal offence) or which is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service;
- (f) refrain from favouring relatives and friends in work-related activities and not abuse his or her authority or influence another employee, nor be influenced to abuse his or her authority;
- (g) not use or disclose any official information for personal gain or the gain of others;

Code of Conduct - Ethics (3)

- (h) not receive or accept any gift from any person in the course and scope of his or her employment, other than from a family member, to the cumulative value of R350 per year, unless prior approval is obtained from the relevant executive authority;
- (i) if he or she has permission in terms of section 30 of the Act to perform outside remunerative work, not –
 - (i) perform such work during official work hours; and
 - (ii) use official equipment or state resources for such work.
- (j) deal fairly, professionally and equitably with all other employees or members of the public, irrespective of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language; and
- (k) refrain from party political activities in the workplace.

Gifts to public servants

- DPSA: PSIMF
- 2009/10 Minimum Anti-corruption Capacity audit –
 - Hardly any ‘active’ gift registers were found
 - Mostly in DGs’ / HoDs’ offices, and included only gifts they themselves received
 - “Few departments have gift registers, and even fewer actively manage those gift registers”
- Rules vague, conflicting and not properly applied / enforced – SA Ethics Institute, 2012

DPSA implementation of ban on public servants doing business with the state

- Report to Parliament, 14 June 2017
 - Remunerative Work: Status at 30 April 2017
 - Doing business with organ of state: Status at Feb 2017
- Nov 2016: Directive on Other Remunerative Work issued
 - Directive also prohibits employees from using approved remunerative work to undertake business with organ of state
- Jan 2017: Directive on Conducting Business with Organ of State.
 - Clarifies defn of organ of state; excludes certain activities not be considered as doing business with organ of state, e.g. lecturing and examination marking.
 - National Treasury & DPSA identified employees currently registered on Central Supplier Database and who were conducting business with an organ of state.

DPSA implementation of ban on business with the state (2)

- Registered on Central Supplier Database (not conducting business, but able to do so in future): 11 516
- Existing contracts of public service employees conducting business with an organ of state: 893
- Employees registered on Central Supplier Database but resigned from the Public Service by end Feb 2017: 2 536
 - Some cleaning out of the stables

Part 2: Financial disclosure

17. Register of designated employees' interests

18. Disclosure of designated employees' interests

- Annual disclosure
- Transactional disclosure – possibly our greatest weakness?

21. Conflict of interest

- (1) In so far as conflict of interest relates to members of the SMS:
 - (a) The Commission shall verify the interests disclosed [and follow up to ensure they're managed effectively, ie prevented / avoided]
- (2) In so far as conflict of interest relates to designated employees who are not members of the SMS:
 - (a) The head of department shall verify [and follow up ...]

Disclosure Framework: PSC compliance report to Parliament 15 June 2017

- Submission by 31 May 2016 by national depts: 10 001 of 10 237 forms.
- 5 provinces achieved required 100% submission rate by the due date: FS, KZN, Limp, NC, WC.
- 13 national depts did not achieve 100%.
- 827 SMS members failed to disclose their involvement in companies during 2015/16, incl 19 DGs / HoDs, 52 DDGs.
- 297 SMS members in national and provincial depts failed to make full disclosure of property ownership.
- 493 SMS members received gifts - combined value of R6.3 million.
- PSC has requested Office of the State Legal Advisor to advise on implementing a policy on lifestyle audits.

Part 3

Anti-corruption and ethics management

22. Anti-corruption and ethics functions

A head of department shall –

(a) analyse ethics and corruption risks as part of the department's system of risk management;

(b) develop and implement an ethics management strategy that prevents and deters unethical conduct and acts of corruption;

(c) establish a system that encourages and allows employees and citizens to report allegations of corruption and other unethical conduct, [ie **whistleblowing**] and such system shall provide for –

(i) confidentiality of reporting; and

(ii) the recording of all allegations of corruption and unethical conduct received through the system or systems;

Part 3 (contd)

- (d) establish an information system that –
 - (i) records all allegations of corruption and unethical conduct;
 - (ii) monitors the management of the allegations of corruption and unethical conduct;
 - (iii) identifies any systemic weaknesses and recurring risks; and
 - (iv) maintains records of the outcomes of the allegations of corruption and unethical conduct; and
- (e) refer allegations of corruption to the relevant law enforcement agency and investigate whether disciplinary steps must be taken against any employee of the department and if so, institute such disciplinary action.

23. Designation of ethics officers

- (1) An executive authority shall designate such number of ethics officers as may be appropriate, for the department to –
 - (a) promote integrity and ethical behaviour in the department;
 - (b) advise employees on ethical matters;
 - (c) identify and report unethical behaviour and corrupt activities to the head of department;
 - (d) manage the financial disclosure system; and
 - (e) manage the processes and systems relating to remunerative work performed by employees outside their employment in the relevant department.
- (2) The head of department shall establish an ethics committee or designate an existing committee, chaired by a Deputy Director-General, to provide oversight on ethics management in the department.

Progress with ethics institutionalisation?

- DPSA report to PC PSA, PME 30 May 2018
 - PSC – CVP assessment tool (& TGI)
 - Office of Standards in DPSA
 - DPSA's Ethics, Integrity and Anti-corruption Unit which had been launched in the past, but had failed to gain traction, would be looked into again
 - DPSA reviewing implementation of Batho Pele

Progress with ethics & T/P institutionalisation?

- DPME: Management Performance Assessment Tool (MPAT) 2012/13 national depts.:
 - 76% non-compliant in ensuring they had policies and systems for promoting professional ethics
 - 64% were non-compliant with the legal requirements for fraud prevention
- DPME: MPAT 2016/17 national depts. (score out of 5):
 - Professional ethics: 2.5-3.0
 - Fraud prevention: 2.4-2.9
 - Discipline management: 2.0-2.4
 - PAIA / ATI: not measured (ODAC Golden Key/Rusty Padlock)

Public Service Commission – s.196

- Sec 196, Chap 10 of Constitution
- Similar to Chapter 9 institutions

2. Public Service Commission (PSC) is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.

3. Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

Public Service Commission (2)

4. The powers and functions of the Commission are -
 - a. promote s.195 values and principles
 - b. investigate, monitor and evaluate organisation, administration, and personnel practices, of the public service
 - c. propose measures to enhance effectiveness and efficiency
 - d. give directions to ensure personnel procedures comply with the values and principles set out in s.195
 - e. report on its activities, functions, findings and advice, and evaluate compliance with s.195
 - f. either of its own accord or on receipt of any complaint, investigate, monitor, advise, recommend ...

Financial misconduct cases – PSC report 2012/13-2016/17:

- Amount involved escalated from R184 305 710.31 (2015/16) to R524 353 075.76 (2016/17)
- 51.3% of the amount involved was not recovered
- Completed with guilty findings: R1 192 446.06 (0.6%) was recovered.
- 574 disciplinary proceedings not completed at 31 March 2017
- “Fraud” highest number of cases at 190 (33.1%)
- “Misappropriation and abuse” at 92 (16%)
- “Theft” at 81 (14.1%) cases.
- “Unauthorised expenditure” at 3 (0.5%) cases.

Protected Disclosures Am Act 2017

- Broadened scope of application to include ‘workers’, eg temporary employees, contractors and many outside parties
- Approved WB institutions – expanded beyond PP and AG to include SAHRC, CGE, CRL and PSC
- Stronger protections –
 - No occupational detriment includes immunity from civil action and criminal liability
 - Duty on employer to establish WB mechanism and inform employees
 - Duty of employer, agent (eg hotline manager), investigating agency to inform WB of receipt, decision, outcome
 - Joint liability of employer & client for occup. detriment
 - Unfairly prejudiced worker can claim damages
- New offence of intentional disclosure of false info.

PRECCA, 2004 (1)

- Sec 1: **Defns** - ‘public officer’, ‘public body’ - includes performing a public function - wider than ‘organ of state’, and includes SOEs
- Sec 2: **Interpretation** = ‘knowledge’ – actual knowledge, or ‘ought reasonably to have known’ and failed to try to confirm it; ‘reasonably diligent and vigilant person’ with actual ‘general knowledge, skill, training and experience’
- Section 3: **General Offence of Corruption** – wide: in/-directly, abuse of power or breach of trust, violation of duty or rule, for anyone’s benefit, etc
- Section 4: **Public officers**
- Section 17: **Private interest in public body** – through a contract, without prior consent to Code of Conduct

PRECCA (2)

- Section 24: **Presumptions** –
 - If the state can show that it took reasonable steps to link the payment to any unlawful excuse, but it cannot
 - then court can presume, in absence of evidence to the contrary, it was done for a corrupt reason
- Commentary: Assists prosecutions
- Section 34: **Duty to report** - Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence, involving an amount of R100 000 or more, must report (or ensure it is reported) directly to the designated police official in the Directorate for Priority Crime Investigation (DPCI).

PRECCA Draft Am Bill 2017

- Some key issues -
 - Immunity if report allegations in good faith – to encourage reporting
 - Duty to implement an internal compliance programme – but what consequences for failure?
 - Offence of ‘facilitation payment’ included in defn of gratification – new corporate liability

Auditor-General of SA

Oct 2017: The financial health of State-owned Entities (SoEs) regressed in the 2016/17 financial year, “most often as a result of inadequate controls, monitoring and oversight”, AG’s *Consolidated Report on National and Provincial Audit Outcomes*

- Irregular expenditure in national and provincial government entities reached R45bn in 2016-17.
- Irregular expenditure by municipalities increased over 50% to R16bn, and increased 75% to R28.376bn in 2017.
- Makwetu: “[N]o significant positive change toward credible results; instead we are witnessing a reversal in audit outcomes”
- AG’s frustration about repeat audit offenders and lack of action over repeatedly identified root causes, eg no prosecutions.
- AGSA – Public Audit Amendment Bill 2018 – AG will have new remedial powers: civil asset recovery and direct referral to SAPS.

Hawks

Proposed 'pillars' of NACS (2017)(1)

1. Support citizen empowerment in the fight against corruption, including increased support for whistle-blowers.
2. Develop sustainable partnerships with stakeholders to reduce corruption and improve integrity management.
3. Improve transparency by government, business and civil society sectors.
4. Improve the integrity of the public procurement system to ensure fair, effective and efficient use of public resources.
5. Support the professionalisation of employees.
6. Improve adherence to integrity management and anti-corruption mechanisms and improve consequence management for non-compliance with these across government, business and civil society sectors.

Proposed pillars of NACS (2017)(2)

7. Strengthen oversight and governance mechanisms in the government sector.
8. Strengthen the resourcing, cooperation and independence of dedicated anti-corruption agencies.
9. Build specific programmes to reduce corruption and improve integrity in sectors particularly vulnerable to corruption (vulnerable sector management), with an initial focus on the Justice, Crime Prevention and Security Cluster
 - Terrible indictment of law enforcement agencies SAPS, Hawks, NPA post-State Capture

THANK YOU
QUESTIONS ARE WELCOME