



University of Fort Hare
Together in Excellence

**Address by Sibongile Muthwa on the Occasion of the Launch of the
book “Government Liability”, 26 May 2010, East London**

The Vice Chancellor, Dr Tom
Deputy Vice Chancellor, Professor Midgley
Members of the University Council present
Professors and the Academic Fraternity
Students
Distinguished guests

Ladies and gentlemen

I am humbled by the honour of being requested to speak on an occasion of this nature. The launch of a book on government liability provides us an opportunity to reflect on the quality of the services provided by the government to our people, and to ponder on the viability of all available avenues for redress in the event that such services are not provided in an efficient manner.

Indeed the authors, Professors Chuks Okpaluba and Patrick Osode have placed before us a comprehensive and path-breaking piece of work, which further embeds our Constitution by acknowledging its centrality as we continue to internalize the reality that indeed we are free. For those of us operating at the coalface of state programmes and

in interface with our people, this book will indeed be very useful in helping us to render the government machinery more conscious of the need constantly to put people first.

We have spent the last fifteen years establishing the foundation of our democracy. This was a necessary phase in the quest to establish what Former President Mandela called a “people centred society”. The task of undoing the legacy of three centuries of colonialism and apartheid required a patient, slow and painstaking process of building the institutions which would serve democracy for centuries to come. Our work over the last fifteen years included passing a number of pieces of legislation, covering the full spectrum of service delivery areas, by both the national and provincial legislatures. A great number of discussion documents, Green Papers, and White Papers were released by many departments and entities covering a variety of policy areas, and research studies covering a wide variety of service delivery areas were also commissioned.

Yet a great deal more work needs to be done to further strengthen our democracy. This includes the critical matter relating to the development of a comprehensive knowledge base upon which the social discourse on our democracy is anchored. To this end, Professors Chuks Okpaluba and Patrick Osode have produced a decisive work which contributes significantly to our quest to evolve a rights-based culture, reflective of the principles of our commanding Constitution.

While the book may have as one of its central tenets, the empowerment of individuals in society to initiate various courses of action against public authority, its true value lies in its ability to further develop

consciousness about our rights. For example, I have no doubt that this book will also serve to remind us that as part of our commitment to create a people centred society, we adopted the Batho Pele principles, where we pledged that at all material times we would:

- Consult users of our services;
- Set service standards;
- Increase access to information and services;
- Be courteous
- Provide information
- Be open and transparent
- Ensure that there is value for money; and
- We would create a context where public servants are encouraged to welcome complaints as an opportunity to improve services and to deal with complaints so that weaknesses can be remedied quickly for the good of the citizen, and where there would be redress.

One of the issues noted in the Ten Year Review of the South African Government published at the end of the First Decade of Freedom, was that the first ten years were characterised by a deliberate and systematic programme to “dismantle apartheid social relations and create a democratic society based on the principles of equity, non-racialism and non-sexism.” While much of the legacy we committed to dismantle still remains, the focus now surely has to be on supporting the qualitative enjoyment of all the rights provided for in our Constitution. The publication of this book, fifteen years after attaining democracy, is therefore a basis for us to reflect on what has been achieved, but more importantly on what can be accomplished in the future. This will require the State to continue to play its role of creating conducive conditions of open engagement with all sectors of society, thus creating a situation where contextual scholarship will thrive.

Post 1994 we have noted that citizens in the Province and elsewhere in our country have become acutely aware of their fundamental rights as enshrined in the Constitution. This is demonstrated by a number of cases brought against government, particularly Constitutional Court challenges on decisions taken by government.

Notably the Grootboom case, where government's inability to provide adequate housing in line with the socio economic rights contained in section 26 of the Constitution was successfully challenged in the Constitutional Court, is perhaps one of a few examples where ordinary people made full use of the rights entrenched and remedies available in our Constitution. They used a section in our Constitution which provides that "everyone has the right to have access to adequate housing; the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right; and that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

Yet the failure to implement successfully the court's decision in this regard illustrates the fluidity of liability in the public sector. This book is therefore a critical intervention as it advances our understanding of the applicability of liability in the state sector, and it will enable government in particular and the public sector generally to relate better to the very notion of liability.

Also worthy to mention is the recent Nyathi case which ultimately landed in the Constitutional court wherein the court was required to

pronounce on the constitutionality of section 3 of the State Liability Act. To touch briefly on the facts of the matter:

In June 2006 Mr Nyathi instituted action in the High Court claiming damages for R1,4 million for pain and suffering caused by the negligence and improper care by a provincial hospital. Pending the hearing of the matter, the court ordered an interim payment of R313 thousand to enable Mr Nyathi to acquire treatment and medication as his health was deteriorating and he had no means to afford medical treatment. The state failed to satisfy the court order.

Section 3 of the State Liability Act prohibits the execution or attachment of State assets for purposes of satisfying judgment against the State. Mr Nyathi was rendered powerless to execute the court order for interim relief.

As a result of the State failure to comply with the court order, the applicant successfully applied in the High Court for an order declaring section 3 of State Liability Act inconsistent with the Constitution. The constitutional challenge was based on the fact that section 3 precludes the execution or attachment of State assets and that there are no provisions and express procedures for the satisfaction of judgment debts.

In June 2008 the Constitutional Court confirmed an order declaring section 3 of the State Liability Act inconsistent with the Constitution. The Court also found that non-compliance with court orders by the State through its officials amounts to a breach of its Constitutional obligations.

The effect of the Nyathi judgment is that movable State property may be sold in execution to satisfy a court order. One therefore does not even want to imagine the consequences of that on service delivery. What this judgment requires therefore is for the public service to return to the fundamental values that underpin the manner in which public servants relate to the citizens (Batho Pele). The essence of the judgment for public servants in particular, and government in general, should not be so much about satisfaction of or compliance with court orders, but to critically examine the underlying reasons giving rise to litigation.

We know too that one of our challenges has, and continues to be our weaknesses relating to implementation. Many people have suggested that the main cause of this is poor capacity, both in terms of the paucity of skills as well as lack of financial resources. What is abundantly clearly is that we know the problem already, and our concern must therefore shift from seeking to understand why people are protesting about poor or absent service delivery (where such has occurred), to a culture of ensuring that government realizes the fundamental rights of our people as enshrined in the Constitution .

The issue therefore for us should not start at the point where we have to pay damages, but rather from taking steps to prevent, or at least minimize, the rise of liability. This includes posing and answering a number of practical questions, informed not so much by a self-serving quest for knowledge, but by a determination deliberately to seek new theories and discourse on implementation. These include: how do we actually communicate with our people? What language medium do we use to conceptualize government policies? What is the quality of our public participation mechanisms? What have we done to inculcate a

culture of community ownership of public goods? What campaigns are in place to popularize constitutional rights?

The book, which we are launching today, may not directly be responding to these questions, but it will definitely be part of a framework used to respond meaningfully.

I invite you to join me in congratulating the University of Fort Hare for providing an environment that has enabled work of this calibre to be researched; Juta's for their role in publishing this important work, and particularly Professors Chuks Okpaluba and Patrick Osode on their sterling scholarly work. I wish them every success with this book.

I thank you