

**Address by  
Honourable Mr. Justice Tshabalala**

**1<sup>st</sup> KZN Association of Public Sector Lawyers Colloquium  
Date: 08 October 2010**

Members of KZB Association of Public Sector Lawyers,

Distinguished guests,

Ladies and Gentlemen,

I am very honoured to have been invited here to today to share some of my thoughts on this very controversial topic.

The first question is whether public servants and office bearers should be allowed to have business interest in companies that do business with the State.

The Public Service ought to be seen as a key institution through which government can realise its commitment to bettering the lives of citizens. The public in general rely on, indeed expect of, public servants to perform their duties honestly, openly and transparently. However, when the public servants start to regard a public office as an opportunity to work for personal gain, the public becomes aggrieved.

A report to Parliament in 2009 from the Auditor General and the Public Service Commission has confirmed that public officials do enrich themselves at the expense of the public. It is my view that one way in which this is done is when public servants and public office bearers are allowed to have business

interests in companies that do business with the State. Auditor General Terence Nombembe further drew attention to the fact not all is above board with public servants' business interests.

We all are aware of the numerous tender and procurement deals that have been procedurally flawed. This has since proven to be the situation because the Auditor General, in his report tabled in Parliament last year, revealed that more 2 000 government officials were involved in tender rigging and corruption worth more than 610 million. One reason for this is that it is very easy for public officials to influence the awarding of tenders; and public servants do actually adjudicate government tenders.

Despite individual disclosure requirements, it may not be the public servant or the public office bearer himself that benefits from doing business with the State but it could also be his relatives and friends that derive benefit. Unfortunately sometimes these very people who are awarded the contracts and tenders are not suitable for the job and we, as the public, are left with a situation where for example a road, that is not properly constructed, collapses when it rains.

I therefore find myself in agreement with Zwelinzima Vavi, General Secretary of COSATU, when he said:

“It is not good enough for ministers and public officials to hide behind the argument that they have ‘declared an interest’ in the companies they and their family own. Even if they are not benefiting directly or corruptly from government tenders, the fact that they are in business to make money creates an inevitable conflict of interest when they are legislating in parliament, a provincial legislature or municipal council”

But we also need to look at the other side of the coin which is that it could be considered unfair to bar a member of the public from procuring for legitimate government work which has no conflict whatsoever with the public office held by those they are related to. Therefore we must ask ourselves at what point does a conflict of interest arise?

We must also consider the effect that this entire situation has on the public and service delivery. It cannot be denied that an equally disturbing consequence of abusing public office for personal gain relates to service delivery. When public officials are distracted from their jobs by paying more attention to their private business interests, resources are diverted away from service delivery, with the poorest in our society bearing the consequences.

Corruption has often been described as “an ever – present threat to our ambitions”. At the end of the day it is my view that public servants and public office bearers should not be allowed to have business interests in companies that do business with the State because the potential for corruption is too great. Having to make a financial disclosure is simply not enough anymore. I would like to reiterate what was once said by Collette Schultz-Herzenberg that “the success of our democratic institutions in meeting their obligations to citizens depends largely on a dedicated and incorruptible team of public officials who embrace the spirit of public service”.

Secondly we ask ourselves whether the decision to bar public servants and public office bearers from having private business interests is unconstitutional.

It must be reaffirmed that our Constitution lays the foundation for an open society based on democratic values, social justice and fundamental human rights and is hailed worldwide as very progressive. The argument in favour of public officials having private business interests is that public officials are also private citizens and are thus free to engage in economic activity. And then it must be remembered that our Constitution places great emphasis on the rights of citizens and the effective, efficient and economic delivery of public services.

While we all enjoy the protection of the Constitution, some rights may be limited in terms of the section 36 limitation clause. I firmly believe that barring public officials from having business interests is a reasonable and justifiable limitation on the right to free economic activity. Public servants and public office bearers are getting paid their salaries and by trying to get more money with private business is simply not reasonable. They should choose to either be public officials or to be in private business.

This topic is definitely going to be fiercely contested but we should all remember that the Constitution is there for everyone and not a select few. Individuals should not be able to receive benefits because of the positions they hold.

I commend each and every one of you on your dedication to preventing corruption.

I thank you.