



International Symposium on Corruption – “Corruption: A threat to our Constitutional Democracy”

University of the Free State, Centre for Judicial Excellence (24 & 25 January 2013) Mogoeng Mogoeng, Chief Justice of the Republic of South Africa

The Acting Judge President of the Free State High Court, Judge Faan Hancke; The Chairperson of the University Council, Justice Ian van der Merwe; The Dean of the Faculty of Law, Prof Johan Henning; The Honourable Justices of the Supreme Court of Appeal and the Free State High Court; Colleagues in the Judiciary and the Legal Fraternity; Colleagues in Academia; The University Community; Ladies and Gentlemen, Good afternoon!

When South Africa got born again as a constitutional democracy, thousands had already paid the ultimate price in pursuit of the political, social and economic freedom, that democracy was supposed to usher in. It bears emphasis that apartheid had successfully condemned Black people, Africans in particular, to the state of abject poverty, landlessness, inferior education and powerlessness, to mention but some of its most painful effects.

The expectations of Black South Africans were therefore not surprisingly very high, that political freedom and political power would facilitate the speedy delivery of the much needed social services and access to land and the wealth of their motherland.



The National Planning Commission's assessment of the situation is as follows:

“For those South Africans who are excluded from the formal economy, live in informal settlements, depend on social services which are either absent or of very poor quality, the political transition is yet to translate into a better life.”

No wonder, they are the only or major participants in most of the campaigns designed to bring about better service delivery and a better life. A multiplicity of civil and labour unrests, the attendant violence and destruction of property that characterise them, provoked by the potholes; the desperation for land as evidenced by the Lenasia incident; lack of meaningful access to economic opportunities and in sum the ever-increasing volume of complaints about poor service delivery across the board; all cry out for urgent and effective intervention. And timely and truly difference-making intervention requires an understanding of what lies behind the paralysis of systems which ought to make a difference in the lives of the suffering masses.

Let me hasten to say that all of the above arguably bear testimony to the people's inability to enjoy their constitutional rights to dignity, privacy, education, health, housing, land, freedom and security of the person, to mention but some. Minister Trevor Manuel said:

“We have gained much and reached extraordinary political milestones over the past 18 years. But we haven't arrived at the Promised Land and we are woefully behind delivering economic freedoms and rights to the majority of South Africans. Put simply, we have yet to make our magnificent Constitution a living reality for millions of South Africans.” So, why then is the overwhelming majority of the previously disadvantaged South Africans experiencing life as if the only benefit



following from the demise of apartheid was political freedom? Corruption has a major role to play in the betrayal of the aspirations of many, which are embodied in our Constitution.

When huge amounts are paid to fix roads and not long thereafter the same road surfaces need even more attention than before; vehicles are damaged and people's limbs are broken or they even die in accidents occasioned by those unacceptable road conditions; houses are built at great expense and suddenly show signs of very serious structural defects, people who have no knowledge whatsoever of how things in a highly specialised field work; are given the responsibility to do those things, when government, just because it is government, has to pay many times more for an item or service than it is worth, apparently to accommodate all the players in the chain of corruption, then corruption has truly entrenched itself and urgent action and efficient measures are called for to arrest this scourge, for the sake of our constitutional democracy.

When corruption becomes endemic in any given country, then the lifespan of a true constitutional democracy can no longer be guaranteed. It evokes anger; frustration and a don't-care-anymore attitude, that often manifest themselves in protracted widespread protest actions, which is often accompanied by deaths, destruction of much-needed property and sometimes the overthrow of governments. The bite of the preservation of benefits and power for a few and the exclusion of many by the apartheid system, cut so deep and for so long that the people purposed to put an end to it.

Similarly, the gap between the rich and the poor is becoming wider by the day. The virtual impenetrability of the shell around land ownership and access to the commanding heights of the economy, and poor service



delivery by reason of corruption, has become a source of great concern. A few have benefitted immensely from measures designed to open up opportunities, to all.

And many of the previously disadvantaged people have, as I said, not therefore experienced the practical difference and effect of migrating from the era of exclusion by the apartheid system to the times of inclusivity in the democratic system. Hence the repeat of virtually the same response to the hardships they endured under the previous regime. And that does not auger well for our constitutional democracy.

South Africans ended the struggle for political freedom and for the attainment of socio-economic rights; because they believed that practical expression would be given to our Constitution, which is the embodiment of their aspirations. And they have given all of us who bear the responsibility to make their dream come true, the opportunity to breathe life into the Bill of Rights, in a more meaningful way.

When we exhaust the trust they have reposed in us, through our failure to serve them as well as we should; they will predictably feel constrained to resort to some of the more radical measures that proved to be effective in their struggle for freedom. And it does look like they have already begun to do so.

When the realisation and enjoyment of constitutional rights is beginning to look like a pipedream and the people are becoming manifestly unhappy and impatient with the service delivery machineries; then our constitutional democracy is under threat. The far-reaching implications of corruption have a tendency to drive its victims to boiling point. It moves the populace to the level of desperation that renders even their resort to



life-threatening measures or responses to corruption look like they are worth the sacrifice. Former United Nations Secretary-General, Kofi Annan, once said:

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human security to flourish . . . Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign aids and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.”

The undermining of democracy and the rule of law, the violation of human rights, the erosion of the quality of life, the consequential promotion of organised crime and crime in general, the paralysis of service delivery, the perpetuation of injustice and poverty, as well as the scarring off of potential investors by corruption alluded to by Secretary-General Annan, make the point that our vibrant constitutional democracy will not and cannot survive in the face of rampant corruption.

Appropriate measures must be put in place to curb corruption and decisive steps taken to arrest this disgraceful “profession” called corruption. Corruption by the way is, in my view; the engagement in a particular conduct by a duly authorised person, in the public and private sector, with a view to illegitimately advancing self, relational or sectoral interests, to the prejudice of the interests of others including the public.

The very nature of the apartheid system dictated that Black and White



South Africans be on opposing sides of the warring line. Those who suffered under that system felt constrained to fight it and its beneficiaries. We were at war with ourselves.

We now face a common enemy and its name is corruption. When corruption is left to run wild, White people who had a fairly decent life even if they were not wealthy, will see their standard of living decline drastically before their very eyes. And Black people who were hoping for some improvement with the advent of freedom will see the situation deteriorate even more.

South Africans, irrespective of race or creed, must identify and focus on their common enemies and find a conciliatory and unifying way of dealing with what divides them, including the lingering prejudices of the past. Corruption, unemployment, poverty, landlessness, crime in general, and challenges relating to education, the justice system, the road infrastructure, conservation, etc, are some of the areas that we the people of South Africa must find a way to address together. Let us not only say what is wrong about our country, but also what is good and what needs to be done to correct those wrongs. Let us not only be fault-finders, but also solution-bearers.

Policies, structures and legislation, however good, cannot of their own deliver on what they promise. They are never self-executing. Otherwise a lot would have been achieved already simply because we have one of the most progressive Constitutions in the history of humanity. But, as we know, much of what it promises is yet to be realised. It takes the commitment of those charged with the responsibility to implement policies, administer legislations and execute plans of action, duly supported and encouraged by their principals, to deliver on their mandate.



The State must not only ensure that corruption-busting measures are even-handedly implemented, against all perpetrators, irrespective of their station in life, race, influence or wealth, they must also ensure that only men and women of skill, integrity and solid character are appointed to the relevant agencies and are given the space to perform their duties unaffected by undue interference. To win this war, nobody and no sector should be spared the full brunt of the negative publicity that comes with corruption.

Similarly, if there be any form of corruption in the Judiciary and the media as recently reported in the UK, no effort should be spared to uproot it completely. An effective way must therefore be found of identifying and dealing with corruption within the private sector, the media, the Judiciary and any other institution of importance.

Efforts of the moral regeneration agencies or bodies must be fortified so that allegiance to a known and understood national moral code can be secured. Faith-based organisations must wake up to their key responsibility of being the conscience of the nation. Religious leaders must be united and live out, in private and in public, the principles they teach in their places of worship. None of them should collude with the corrupt dispensers of favours.

Turning to the private sector; Advocate Willem Heath SC says that, “the private sector is the main instigator of corruption – this is a fact. The corrupt elements of the private sector remain wealthy and continue to do business”. Efforts to uproot corruption would be greatly boosted if reporting on private sector corruption and the personalities involved must be as enduring and merciless as it is with public sector institutions and functionaries.



Fronting, price-fixing, procurement of tenders by underhand methods, inflation of fees and prices when government is a party to a contract, etc, media coverage that is influenced by unprofessional arrangements that cannot be openly declared, like the so-called brown envelopes, court outcomes that are meant to solicit favours or have been agreed to before the hearing; must all be dealt with decisively. A way must be found to ensure that we all observe the constitutional provisions that confer power on us to the letter. Proper training, peer review and an effective appeal to our sense of patriotism would make a profound impact in the advancement of the course of eradicating corruption.

Singling out the Judiciary; it is important to remind ourselves that although the Judiciary is one of the branches of government; there is a fundamental difference between its members and members of the other two branches, made up of politicians. Judges and Magistrates; unlike members of the Executive and the Legislative arms of the State in this country; are not elected. This was a deliberate choice designed to ensure that they do not have a constituency to be answerable to. They owe allegiance only to the Constitution and the law of this Republic. The developing trend of organisations and individuals inside and outside the country openly lobbying for the appointment or promotion of some candidates to judicial office should therefore be a source of great concern. Their actions sometimes border very close on campaigning against the appointment of some judicial officers, particularly those who pose a threat to the appointment of their preferred candidates. This should be conducted or managed with great circumspection for it could otherwise give rise to unintended corruption. It ought to be enough that interested parties make representations to the Judicial Service Commission (JSC).



Imagine the public outcry that would stem from a campaign by members of any ruling party; for and against candidates for judicial office, to ensure that when those they do not want are not appointed, no successful court challenge could be launched against the appointment of their preferred candidates since the “unwanted” one would have been effectively eliminated. Special interest groups and lobby groups seem to be attempting to achieve exactly what they are accusing the politicians of doing, in relation to judicial appointments. All South Africans would do well to allow constitutionally established structures to do their work without attempts at intimidations or pressure. That is how to insulate the Judiciary from any indebtedness and possible corruption. We should reflect seriously on politicising judicial appointments as much as possible, so that no judicial officer is ever made to feel like one day he or she will have to return the favour to his or her sponsors.

The love of power, the pursuit of populism and the addiction to being approved by the powerful, in the public or private sector; is the surest recipe for corruption. For this reason, any judicial officer who would perform his or her duties with eyes set on the benefit that would follow from securing a place in the good books of any powerful force or personality; is corrupt and should be exposed. The voice of our oath of office or affirmation must always be allowed to sound loud in our heads and hearts.

All of us have a contribution to make towards the eradication of corruption and crime in general. The National Development Plan proposes measures which would, in my view, go a long way to uproot corruption in our country. A well coordinated war must be waged on corruption in both the private and the public sectors. The private sector must rid itself of corrupt elements and practices. The media must expose corruption in both sectors,



even in the media. Subject to accurate, objective and fair reporting, the media must always be left to execute its constitutional mandate freely. An integrated approach to challenges within the justice system would make a profound impact in boosting efforts to eradicate corruption in our country. In recognition of the need to make a radical paradigm shift in their approach to their duties; functionaries, Departments and bodies in the criminal and civil justice system have taken steps to consolidate efforts to fight corruption among others. On 13 October 2012, the Chief Justice, President of the Supreme Court of Appeal, Judges President, Regional Court Presidents, Chief Magistrates, National Commissioner of Police, National Director of Public Prosecutions, Chair and CEO of Legal Aid South Africa, Director-General of Social Development, Director-General of Public Works, Director-General of the Department of Justice & Constitutional Development and representatives of the Bar and the side Bar formed a National Efficiency Enhancement Committee (NEEC).

The objective sought to be achieved through the NEEC is to ensure that none of us function in isolation from others in circumstances where much could be achieved through cooperation. Together we will identify impediments to good performance, imposed by some role-players in the justice system, to others, and find solutions to them together, under the auspices of the NEEC.

Broadly speaking, the NEEC was established to enhance the efficiency and effectiveness of every unit or entity within the broader justice system. Individual and collective performance monitoring and evaluation, and some kind of a peer-review mechanism will be in place just to keep one another in check on a regular basis. This national body will, subject to appropriate modifications, be replicated at provincial, regional and district levels. Members are very keen to ensure that service delivery is



improved. This will contribute significantly to the eradication of corruption and crime in general, in our country.

Institutions and instruments for the elimination of corruption and corrupt practices will enjoy legitimacy and be effective if they target all corrupt people and entities irrespective of who is involved. The exemptions of self, friends and the powerful, from scrutiny, due process and condemnation would undermine severely, the effect of those bodies. The motive must be pure and our actions beyond reproach.

Posterity will judge us mercilessly or compassionately, depending on what steps, if any, we take or advocate for preparing a brighter, prosperous and peaceful life for all. We must destroy the stubborn racial prejudices that continue to mar the beauty of this rainbow nation and seek to create a truly united and reconciled nation.

I learnt with much appreciation and some relief, that this international symposium is held under the auspices of the Institute for Judicial Excellence. My positive reaction stems from the fact that judicial excellence is an objective that all South Africans would do well to help us achieve. It would also be interesting to know what the views of this Institute are on judicial independence.

Should court administration remain in the hands of the executive or should it be migrated in its entirety to the Judiciary or only some of the functions, and if only some which should those be? Are there views on judicial education, quality assurance in the form of, among others, performance monitoring and evaluation as well as the overall strengthening of the Judiciary?



Thank you for inviting me for this auspicious event to deliver the inaugural keynote address. I wish you well in your deliberations and congratulate you on a well-organised symposium. I look forward with great optimism to more symposia on corruption and other important issues that strike at the nerve-centre of the well-being of our country, in the years to come.

I thank you all!