**Speech Delivered by Judge Thokozile Masipa**
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Title*: "REFLECTIONS ON THE INDEPENDENCE OF THE JUDICIARY IN THE NEW SOUTH AFRICA"* ***

INTRODUCTION

The subject of this talk is the independence of the judiciary in the new South Africa. Much has been said and written about the independence of the judiciary. To a non-South African this may seem like a subject that has been long exhausted. It may also seem like nothing to write home about since many countries boast of an independent judiciary. However, given our murky history, especially in the area of human rights, the independence of the judiciary is not something that we can take for granted. Like our hard-won democracy judicial independence is not to be taken lightly but is to be cherished and protected. Hence the need for us to regularly, do an introspection, with a view to making adjustments were necessary. This is important since judicial independence is pivotal to the protection of human rights. Without it, we, may easily go back to where we come from. And that something we do not want to contemplate. When members of the judiciary take the oath to adjudicate matters without fear or favour or prejudice they do so knowing that they, and mostly they alone, have to be forever vigilant to ensure that nothing impedes on their independence, whether as individuals or collectively as an institution.

WHAT EXACTLY IS MEANT BY JUDICIAL INDEPENDENCE?

Judicial independence is a concept that the judiciary needs to be kept separate from and insulated from the other branches of government. Such separation is necessary as the government, through its officials or agents often appear in the courts of law as litigants. More importantly courts should not be subject to improper influence from other branches of government, or from private or partisan interests. (Wikipedia, the free encyclopaedia).

There are two components of judicial independence, namely, institutional independence and individual independence. Institutional independence refers to the existence of structures and guarantees that protect courts from interference by other branches of government. Some of the essential conditions that ensure judicial independence are, mainly, security of tenure, financial security and administrative independence. On the other hand individual independence refers to judicial officers acting independently and impartially. Judicial impartiality is shown when a judicial officer is able to adjudicate matters fairly - something which can only happen when the adjudicator has no interest or stake in the particular matter. It is this ability on the part of a judicial officer to adjudicate maters fairly without favour or prejudice; that gives the disputing parties and the general public confidence in the justice system.

My task this evening is to talk mainly about this component of judicial independence, that is, individual independence and how this independence can be interfered with by what I call external private influences as opposed to influences by the government or its officials. Although I shall touch on apparent interference with judicial independence by the government it is really not my intention to go into detail as that would really be repeating what others have said about the matter. I know, for example, that our Chief Justice, other colleagues as well as many legal scholars have been outspoken about what still needs to be done by our government to ensure that we have a completely independent judiciary and I believe we are steadily moving in the right direction.

WHAT MAY INFLUENCE JUDGES IN THEIR WORK AND INTERFERE WITH INDIVIDUAL JUDICIAL INDEPENDENCE?

Judges have an onerous task to make decisions over life, freedoms, rights, duties and property of people. It is, perhaps, precisely for this reason that there is often a desire or an attempt from external sources to try to influence the outcome of a particular case or to neutralize what may, unfortunately, and (I might add) unjustifiably, be seen by others, to be too much power in the hands of the judiciary. I think this perception stems from the fact that under the old government Parliament had a final say as no court of law could strike down a statute whereas under the current government the Constitution is supreme and any law that is not aligned to the Constitution can be struck down by a court .

Improper influence can come from any source, namely, pressure from the government, pressure by individual litigants, particular pressure groups, the media, individuals with clout either because they are prominent in society or because they have financial muscle. Inappropriate influences can also arise from large powerful companies, self-interest or other judges, in particular more senior judges. The list is not exhaustive. It shall also not be possible to say something about every item on the list.

INFLUENCE FROM THE GOVERNMENT

Judicial officers, for instance, are not beholden to the government of the day nor are they in office to please anyone. If a certain decision happens to please the government or anyone it should purely be by coincidence. Unfortunately not everyone understands the role of a judicial officer. Some people think that because judges and magistrates are paid from the tax payers money just like officials in any other branch of government, they should function as officials in other branches of government and strive to please the people. This thinking overlooks the fact that unlike politicians in the government, judges are not there because someone voted them into office. They are in office because they are believed to be fit and proper persons who are expected to adjudicate matters with integrity and in line with their oath of office.

Government influence may come in different forms, namely, in laws, in policies and in traditions that threaten to interfere with the independence of the judiciary. An example is the Criminal Law Amendment Act No 105 of 1997 first introduced as a temporary measure to curb the spiralling rate of serious crimes in South Africa. The minimum sentence Act (as it is commonly referred to) prescribes minimum sentences for certain serious crimes. Such crimes include murder, armed robbery, rape etc. In some cases such as the rape of a youngster under the age of 16 and in premeditated murder the prescribed minimum sentence is life imprisonment. In terms of the Act in such cases the imposition of a prescribed minimum sentence is mandatory unless there exists 'substantial and compelling circumstances' which justify a lesser sentence than the prescribed minimum sentence. I use the word 'threaten' deliberately because the wording of the Act allows a judge some leeway to use his discretion. It is only when, in the mind of the particular judge, there are no substantial and compelling circumstances, that justify a lesser sentence, that the judge must impose the minimum sentence.

At the beginning there was a lot of unhappiness and resistance on the part of judges who had to apply this law. The general feeling was that this was one of the worst examples of government interference in the affairs of the judiciary. This is because sentencing is a discretionary function of a trial court that is usually treated with deference by other courts. A court sitting as a court of appeal, for example, cannot interfere with this discretion even though that court would have imposed a different sentence. It can only interfere with the sentence if the trial court committed gross misdirection or if the sentence imposed is disturbingly inappropriate or induces a sense of shock. It

was, therefore, to be expected that such legislation would be viewed with suspicion by members of the bench. However, a closer scrutiny of the Act, and the fact that each case is judged on its own merits will re-assure even the worst sceptic that the Act has not taken away a judge's discretion. A judge, who takes the time to familiarize himself with the facts of the case before him, for purposes of sentencing, will find 'substantial and compelling circumstances' where such do exist. This is especially so because the Act does not even define the phrase, 'substantial and compelling circumstances'. This is left to individual judges to decide. And judges have shown ingenuity in this area. So in my view the minimum sentence Act cannot be said to be interfering with the independence of the judiciary. It cannot be denied that it may, however, in the eyes of many, be perceived as such interference.

I alluded earlier to the fact that certain traditions may give an impression that the judiciary, no matter what it does, is not so independent. As recent as 1998, when I was elevated to the bench, judges of the High Court in Johannesburg shared a building with prosecutors. It was, therefore, not surprising that a few prosecutors took advantage of this by being openly overfamiliar with some judges. This gave one a very uncomfortable feeling if one was counsel representing an accused. They had tea or lunch together or found other ways to socialize after hours. Years ago when I went to do circuit court in Potchefstroom I was horrified when I was invited by a group of police officers to attend a braai in honour of a police captain who was retiring. It was not the invitation that horrified me but the fact that the person who was inviting me was the investigating officer in the very criminal trial that was before me and that he saw nothing wrong with this. Of course I courteously declined the invitation then I learnt to my even greatest horror that this was tradition dating back to the apartheid era when judges were regularly hosted by either the local police or prosecutors, and obviously to the exclusion of lawyers who represented the accused. That tradition is, thankfully, no more. Today, a judge will go to great lengths to avoid communicating with individual counsel outside court hours. This is irrespective of whether such counsel represent the state or the accused. A judge does not talk to one counsel in the absence of his opponent, even if the conversation has nothing to do with the case before him.

In small towns where accommodation is often at a premium this can be quite a challenge. Often a judge may find himself sharing a hotel with counsel who are representing parties in his court. Such a judge may have to bear the discomfort and inconvenience of having his meals sent to his room rather than run the risk of socializing with counsel and later being forced to recuse himself. Some of these examples may seem ridiculous but merely illustrate how important it is for judges to be extremely careful in their dealings with the public inside and outside court to avoid creating an impression, however remote it may be, that they are not independent.

Another area of concern is that until recently, in the Johannesburg High Court, criminal cases were allocated to individual judges by and directly from the office of the Director of Public Prosecutions known as the DPP. The public's perception, and rightly so, in my view, was that the DPP carefully selected judges on the basis of how important it was for the prosecution to secure a conviction and how important is was to get a stiff sentence. It appears that this manner of doing things was a relic from the apartheid era. Political cases and other serious crimes were often allocated to executive minded judges some of whom were hanging judges. This was to make sure that no matter how thin the evidence was an accused, once arrested, did not get away. This was the era when, in the eyes of the court, a police officer could never lie, and an accused was sometimes convicted solely on an alleged confession. This was the case even where there was evidence that an accused had been tortured by the police to extract the confession. One case made headlines when it was discovered that the accused who had been convicted on the basis of their confessions and sentenced to death had in fact been innocent of the crime. Fortunately the accused had not been hanged when the truth came out.

Now criminal cases are allocated either by the Judge President or the most senior judge who is doing criminal trials for the term. This has gone a long way to remove the perception, in the minds of the public, that judges, the police and the prosecution are in cahoots and have the same agenda.

PRESSURE FROM INDIVIDUAL LITIGANTS

Individual litigants have an interest in the outcome of the cases where they appear as parties. It is rare for an accused in the high court to be without legal representation. In civil matters, however, one often finds quite a number of litigants appearing in person. As we all know litigation is not cheap. Yet that rarely keeps people away from our courts. Some litigants, though indigent, for some reason, do not qualify for free legal aid from the state. A number of those who do qualify for such legal aid prefer not to use it, sometimes because they do not believe that counsel who is paid by the state can do a good job on their behalf. Others still prefer representing themselves as they think that the quality of Legal Aid is inferior, which belief is misplaced.

Unscrupulous litigants, especially those who are respondents in foreclosure matters or in eviction matters, usually give judges of the high court quite a headache. We call this group 'people who play the system'. These litigants are those who will come to court, not once, but several times and ask for a postponement on the basis that they want an opportunity to engage a lawyer. Although they are quick to remind the court that they have a constitutional right to legal representation, often they have no intention of employing the services of a lawyer. Their aim is to delay the case as long as possible to the prejudice of the applicant. Such litigants usually manage to get a postponement, sometimes up to six times in a row for the same reason. When they do get a legal representative he or she will invariably withdraw a few days before the day of hearing. Judges, sometimes, go out of their way to assist such litigants thus unwittingly creating an unfortunate perception that individuals who are not legally represented have an advantage over those who have legal representation.

PRESSURE FROM POWERFUL INDIVIDUALS OR COMPANIES

Judges have to watch against all modes of external private influences. I deliberately chose to use the word "watch" for a judge who is not watchful might have difficulty identifying the influences and therefore may have problems dealing with them properly. Some influences are direct while others are indirect; some are unintentional while others are deliberate; some are subtle while others are brazen. But whatever mode or form they take there is a need to deal with them promptly and firmly. More importantly, however, a judge must be fearless and not be swayed by partisan interests or fear of criticism. According to Justice Harms, "without an independent mind, approach and attitude [on the part of a judge], judicial independence is worthless. Structures and constitutions cannot create this state of mind, they can only provide its framework and support it" (Harms 1998).

There is a lot of truth in this. Our Constitution is held in high esteem both inside and outside our country. However, it does not matter how good the structures are and how progressive our Constitution may be if an individual judge does not take advantage of such existing framework by acting independently and fearlessly within the enabling environment, the structures are worthless and the public will be short changed. In fact without an independent mind, approach and attitude a judge is likely to do a lot of disservice and injustice to himself and to the public that he serves.

Because of the nature of their job judges live very structured and restricted lives. They spend much of their lives working whether this be at work or home and hardly have time for anything else. However, even if they did have the time it would really not assist for they cannot, for example, render services to companies and individuals and then get remuneration for those services as this

would be highly improper. It would also be improper for a judge not to disclose a relationship or connection that the judge might have with a litigant company or individual in his court. Generally I think it is advisable for a new appointee to cut ties with any institution or anyone that might later appear to affect a judge's independence.

New judges often bemoan the fact that life on the bench is very lonely. However, I think quite a number of judges would not have it any other way. Most judges I know have neither the time nor the inclination to attend the events and social functions that they get invited to. Generally they avoid any friendship or association that may lead to controversy. Those that find the time or have the inclination to attend, especially high profile events, often regret as they sometimes create a wrong impression about their suitability as judges.

In the past judges of the high court were former advocates (I believe what you call barristers in this country). Since they had practiced in the courts for years before they were elevated to the bench their transition was mostly smooth as they were familiar with the traditions and practices of the courts. With the new dispensation the pool from which judges can now be appointed has widened to include attorneys, academics and legal advisors from a variety of companies. New challenges have come up as not everyone is familiar with the traditions and practices in the court environment. A new judge with a corporate background was horrified to learn that now that he had been appointed as a judge it was no longer desirable that he visits his favourite shebeen, (a township name for a pub). He learnt very quickly that he had to scrutinize every invitation to a function thoroughly before he could decide whether to accept it or decline it. He also found that while in the corporate world networking may be the cornerstone of most businesses on the bench networking is unknown, unnecessary and would possibly be frowned upon.

INFLUENCE AND INTERFERENCE FROM COLLEAGUES

Judges consult one another about their work and about decisions they take quite often or about orders they want to grant. Judges discuss cases, they bounce off ideas on colleagues, they discuss scenarios and possible outcomes. However, there is an unwritten law and it is always understood that the judge who presides on a particular matter will remain independent and give a decision which is his and his alone. All this shows that notwithstanding that judges work together very closely, individual judges can and in fact are, mostly independent.

There are, however, exceptions where the independence of a judge may unintentionally be threatened or interfered with. More senior and experienced judges may, by the manner in which they communicate their views, about a dispute, unwittingly threaten the independence of a newly appointed junior judge who still feels very unsure of himself. In the High Court this may happen when two or three judges are sitting as a Court of Appeal. Judges are obliged to share their views before they go to court for a hearing. This is done to find out areas where there is agreement or disagreement. It is also done to curtail proceedings where this is possible. Depending on how the meeting is handled, there might be a danger that a forceful individual may, by the way he comes across intimidate others and stifle contrary views. This may not be deliberate but in such meetings, once the most senior judge, who is very forceful in his approach, has made his views known about a dispute, it cannot be easy to offer a contrary view or to write a dissenting judgment especially as judges often have time constraints. A few years ago I was sitting as one of three judges on appeal. Two of us agreed on the outcome while one had a contrary view. I remember this colleague calling one meeting after another in the hope that the two of us would ultimately agree with him. Unfortunately that did not happen and the colleague was reluctantly forced to find time to write a dissenting judgment. What I am saying is that where time constraints are an issue it may be a lot

easier to concur than to dissent but one would like to believe that such instances, if they do occur, are few and far between.

## COMMUNITY SUPPORT GROUPS

South Africa has numerous and diverse community groups which play a significant role in our society and in our courts. Some groups are very helpful in that they regularly get involved in cases before they get to court. They may often assists victims of crime (women in particular) by interviewing them, taking statements and preparing them for court. They also give them support generally, such as finding the displaced victim shelter. It is, therefore, understandable that they would have an interest in the outcome of a case they have been involved in. Depending on the kind of outcome expected by a particular interest group the judge presiding in the matter may be commended or condemned for his decision. The more militant groups are usually very vocal. Often when there is a big case in session these will often be found outside court precincts singing, dancing and waving placards with messages such as 'no bail for the murderer'. At the end of the case these groups usually do not hesitate to express their outrage or approval. A high court judge was called "progressive" when he found a rape accused not guilty and discharged him; another judge, in an equality court, was accused of trying to re-write history of the country when he made a finding that a struggle/liberation song was hate speech. Yet another judge was accused of being 'biased' when she discharged an accused at the end of the state's case for lack of evidence. Although there is no likelihood that a judge would be influenced in his work by public opinion, an unfortunate impression may be created in a case where public outrage and vigorous public demonstrations are followed by a decision which seems to please the public, that the judge may well have been influenced.

## JUDGING AND THE ROLE OF PUBLIC OPINION

Courts are subject only to the Constitution and to the law. Public opinion, therefore, should have no role in the judgments and orders handed down by courts of law. This simply means no matter how loud public opinion is about a matter, the judicial officer should be guided only by the Constitution and the law. There may of course be occasions when public opinion coincides with what is required by the Constitution but such occasions will be rare. A judicial officer who wants to properly discharge his responsibilities will decide a case solely on the law that applies to the facts of a particular case. The identity of a litigant, his social & political standing, his financial muscle or lack of it will play no part at all in the decision that he takes. However, that can only happen when a judge fully understands his role as a judge and takes the Judges' Oath seriously.

Proper education on the subject of judicial independence might assist judges not only to recognize potential threats to their independence but might equip them so that they are able to deal with such threats better both as an institution and as individuals. The role played by education and proper induction in reducing the impression that judges are not independent, therefore, cannot be overemphasized.

## CONCLUSION

Although it is generally accepted that independence of the judiciary entails that courts must be independent of the legislature and the executive and that judges must be placed in a position where they can discharge their functions free from interference of whatever source, the role played by ordinary people either consciously or unconsciously in interfering with judicial independence is often underestimated.

It is such threats or potential threats to the independence of individual judges that the judiciary should guard against. There is a lot that the judiciary can do to protect its independence and to eliminate any impression that might be created, especially by association, that judges are not independent. Judges who want to fulfil their responsibilities properly, will be slow to fraternize with politicians, government officials, powerful individuals in society or anyone whose friendship might create the wrong impression. They will also be slow to accept gifts or favours from members of the public, no matter how innocent the person or the gesture. It is only when judges themselves are active in protecting their independence that their Oath of Office will have a meaning.

I would like to end this talk by quoting once more from Justice Harms when he stated: "without an independent mind, approach and attitude [on the part of a judge], judicial independence is worthless".
In my view this statement is so important and the independent mind, approach and attitude of a judge such a necessary quality that it should form the main basis of appointment to the bench.

THANK YOU

Judge TM MASIPA