

Speech on the occasion of the retirement of Justice XM Petse, former Justice of the Supreme Court of Appeal, and Pius Langa Memorial Lecture (19 July 2024)

[Protocol and greetings to colleagues].

I must mention from the outset that the initial impression given to me was that I was only expected to say a few words about Deputy President Petse's retirement. I only learnt this morning that I am also expected to give remarks on the topic 'the impact of judicial leadership and its contribution to the maturation of democracy'. Given that I had to top-up my speech at the eleventh hour, please bear with me if the packaging is haphazard. I'm however, confident that the content, as a combo of a farewell speech and remarks on 'the impact of judicial leadership and its contribution to the maturation of democracy', is fit for purpose. Having given this preamble, let me confess that it is an honor for me to be able to say a few words about Deputy President Petse.

Deputy President Petse served the legal profession in many capacities. He was admitted as an attorney in 1982 and served the profession in that capacity until his elevation to the bench as a puisne judge in July 2005. He served in the Eastern Cape Division for about seven years, and had occasion to be appointed as its Acting Judge President. In 2011, he was appointed as an acting Justice of the Supreme Court of Appeal. In May 2012 he was elevated to the Supreme Court of Appeal, where he served as a Judge of Appeal until his appointment as the Deputy President of that court in 2019. One of the highlights of Justice Petse's career on the bench was his appointment to the Constitutional Court in an acting capacity during 2018. He wrote several judgments for that court. Justice Petse acted as the Acting President of the Supreme Court of Appeal from August 2022 until 31 May 2023. It is exceptional that Justice Petse's retirement on his 70<sup>th</sup> birthday on 10 July 2024 was a milestone marking the end of a period of almost twenty years of loyal service exclusively to the judiciary, twelve of which were served at the penultimate Appellate Court of South Africa. His leadership capabilities as a member of the judiciary are therefore beyond reproach.

I could have called Justice Petse DP (for Deputy President) or simply Xola, as some of the colleagues do, but I followed the lead of a few colleagues who preferred to fondly address him as XP. So, XP, as you embark on a well-deserved retirement, Nadel deemed it appropriate, and rightly so, to let us all gather here to express our deepest gratitude for your exceptional service and to celebrate your achievements.

XP, your time with us as a Judge has been invaluable. We are particularly grateful for the contributions you've made to the Supreme Court of Appeal. As you embark on your well-deserved retirement journey, we express our deepest gratitude for your exceptional service to the legal profession and the judiciary. We celebrate not just the end of a distinguished career spanning four decades, but the enduring impact you have made on the administration of justice and also on the colleagues, in general. There can be no doubt that you were indeed a good leader. That said, this brings me to the topic that I was requested to touch on which is 'the impact of judicial leadership and its contribution to the maturation of democracy'.

Judicial leadership plays a critical role in the maturation of democracy in any country and South Africa is no exception. South Africa's judiciary has been instrumental in protecting the constitutional rights of individuals and in keeping other branches of the state in check, thus preventing the abuse of power.

From my point of view, one cannot speak about the impact of judicial leadership on the maturation of democracy in South Africa without recognising the independence of the judiciary and the rule of law as the cornerstone of our democracy. It is noteworthy that the very first value mentioned in the Bangalore principles on Judicial Conduct state that 'Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial'.<sup>1</sup> The independence of the judiciary is enshrined in s 165(2) of the Constitution of the Republic of South Africa 108 of 1996.<sup>2</sup> It is fundamental to ensuring

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<sup>1</sup> The Bangalore Principles of Judicial Conduct 2002 at 3 (endorsed at the 59<sup>th</sup> session of the United Nations Human Rights Commission at Geneva in April 2003).

<sup>2</sup> Section 165 of the Constitution provides:

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(1) The judicial authority of the Republic is vested in the courts.

that the rule of law is maintained. It is this independence that allows courts to make decisions that are free from political or other external pressures thereby safeguarding democratic principles. It is also important that public officials and private individuals be held accountable to the law and in this regard the judiciary ensures that no one is above the law reinforcing the concept of equality before the law which is so central to democratic governance. We are all aware of a plethora of judgments of our courts emphasising the rule of law and the independence of the judiciary. There can be no doubt that these judgments contributed to the quicker maturation of our relatively young democracy. For purposes of illustrating that point, I now mention a few judgments that underscore the crucial role that has been played by the judiciary in that regard.

In my view, the first attestation of the independence of the judiciary in South Africa came in the form of the *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*<sup>3</sup> judgment. That was a landmark judgment in which the Constitutional Court reviewed the Constitution's provisions to ensure that they met the requirements laid out in the interim Constitution. The court's ability to critique and mandate changes to the draft Constitution underscored its independence and pivotal role in the democratic process. Since then, there have been many landmark judgments that attest to the independence of the judiciary. The *Glenister v President of the Republic of South Africa and Others*<sup>4</sup> is one of the seminal judgments that comes to mind. In that judgment, the Constitutional Court held that the impugned legislation<sup>5</sup> is constitutionally invalid to the extent that it fails to secure an adequate degree

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(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

'(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.'

<sup>3</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

<sup>4</sup> *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

<sup>5</sup>Constitutional invalidity of various provisions of the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008, which created the Directorate for Priority Crime Investigation (DPCI) and disbanded the Directorate of Special Operations.

of independence for the DPCI. First, it held that the Constitution's scheme, taken as a whole, and the international law agreements which are binding on the state impose a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. Section 7(2) of the Constitution imposes a duty on the state to "respect, protect, promote and fulfil" the rights in the Bill of Rights. When read with section 8(1) (which provides that the rights in the Bill of Rights bind all branches of government), section 39(1)(b) (which provides that Courts must consider international law when interpreting the Bill of Rights) and section 231 (which provides that an international agreement that Parliament approves "binds the Republic"), this provision places an obligation on the state to create an independent corruption-fighting unit. Second, the Court found that the DPCI did not meet the constitutional requirement of adequate independence because it was insufficiently insulated from political influence in its structure and functioning. The Court granted leave to appeal, declared the impugned legislation invalid and suspended the declaration for 18 months.

In relation to the judicial review of executive power, the judgment of the Constitutional Court of *President of the Republic of South Africa and others v South African Rugby Football Union and others*<sup>6</sup> is one of the groundbreaking judgments that come to mind. In that matter the Constitutional Court reaffirmed its authority to review actions by the President and other executive decisions emphasising the rule of law. The court held that the exercise of executive power was bound, like the exercise of every other public power, by the doctrine of legality. Accordingly, the President must act in good faith and must not misconstrue his or her powers.<sup>7</sup>

In *Economic Freedom Fighters and others v Speaker of the National Assembly and another*,<sup>8</sup> commonly referred to as the Nkandla judgment, the Constitutional Court held that the former President of South Africa had failed to uphold, defend and respect the

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<sup>6</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).

<sup>7</sup> Para 148.

<sup>8</sup> *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017).

Constitution as the supreme law of the Republic by failing to comply with or enforce the Public Protector's remedial action thus violating his section 181(3) obligation to assist and protect the Public Protector in order to guarantee her dignity and effectiveness. This case was pivotal in asserting judicial review over executive actions and holding the President accountable. A landmark judgment which significantly influenced the understanding and enforcement of socio-economic rights in South Africa is the well-known *Grootboom*<sup>9</sup> judgment. In that seminal judgment, the Constitutional Court ruled that the State had to take reasonable legislative and other measures to ensure access to adequate housing for all.<sup>10</sup>

The Constitutional Court's judgment in *Democratic Alliance v President of South Africa and others*<sup>11</sup> was fundamental in maintaining public confidence in the judiciary by demonstrating the court's commitment to ensuring that public officials meet the highest standards of conduct. The Court found that the decision taken by the President was thus constitutionally invalid.

Clearly, judicial leadership has been demonstrated by how judges emphasise the protection of human rights in their cases. Justice Petse's passion in protecting human rights was demonstrated in *Mlungwana and Others v S and Another*,<sup>12</sup> in which the Constitutional Court had to consider whether failure to give written or adequate notice to a responsible officer of a local municipality when convening a gathering of more than fifteen people constituted a criminal offence within the contemplation of s 12(1)(a) of the Regulations of Gatherings Act 205 of 1993. The Constitutional Court confirmed the High Court's declaration of s 12(1)(a) as unconstitutional in its entirety. It held that the criminalisation of convening gatherings without notice was unconstitutional, regardless of whether the subsequent gathering is violent. At a personal level, I was pleasantly surprised to learn that in that judgment, Justice Petse had quoted with approval several

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<sup>9</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

<sup>10</sup> Section 26 of the Constitution requires the State to put in place a reasonable programme for the progressive provision of adequate housing for all.

<sup>11</sup> *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012).

<sup>12</sup> *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018).

passages from a judgment that I had authored while I was a Judge of the Free State Division of the High Court in *Tsoaeli and others v S*.<sup>13</sup> In the *Mlungwana* judgment, Justice Petse inter alia said:

'The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly by 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully and unarmed. And this limitation not only applies to conveners, but also those wanting to participate in an assembly. ... To limit the right to freedom of assembly therefore poses a real risk of this proliferating into indirect limitations of other rights.'<sup>14</sup>

It is clear from all these judgments that by adhering to high ethical standards, judges in South Africa have helped to ensure that justice is administered fairly and impartially, thus upholding the rule of law and protecting the rights and freedoms enshrined in the Constitution and the Bill of Rights. Bearing in mind the litigation concerning various aspects of the recent elections, one can say that we are at the stage where almost every constitutional provision has been tested in our courts. I mention all these judgments to illustrate just how well the judiciary has done in upholding constitutional imperatives and the impact these judgments have had on the maturation of democracy. We therefore can ill-afford to gamble with the independence of the judiciary and public confidence in the judiciary.

It bears emphasising that efforts to improve access to justice for marginalized and disadvantaged communities help to ensure that the benefits of democracy are more evenly distributed across society. It is this area of access to the courts that I wish to focus on in the context of XP's retirement as a leader in the judiciary. XP, you brought a level of dedication to access to courts that will be greatly missed. Personally, I shall forever remember the bold step you took in March 2023 when you openly spelt out our court's challenges relating to its lack of adequate resources in respect of library services, legal research and allocation of human capital and pleaded for interventions that will enable it

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<sup>13</sup> *Tsoaeli and others v S* [2016] ZAFSHC 217; 2018 (1) SACR 42 (FB) (17 November 2016).

<sup>14</sup> Fn 13 para 69 and 106.

to effectively and efficiently fulfill its constitutional mandate. These challenges have become common knowledge.

It is for that reason that I, too, will never shy away from confronting the challenges that, if left unattended, will continue to stand in the way of the achievement of the goals that the judiciary has publicly set for itself in the Norms and Standards for the performance of judicial functions<sup>15</sup>. In the interests of transparency, the challenges that are besetting the judiciary and impeding its efficient performance must be laid bare. Doing so does not mean that the heads of the various courts who expose them are crybabies, nor does it amount to a betrayal of other arms of state. It is simply, telling like it is, and is part of ethical governance. Failure to be transparent about these challenges will have dire consequences as people might lose confidence in the judiciary and form the impression that the judiciary is not up to the task of adjudicating cases in an effective and expeditious manner.

As recently mentioned by one of my colleagues, Deputy Judge President Sutherland, the lack of adequate resources in the judiciary results in it having to rely on the benevolence of third parties, for example, like legal practitioners who agree to act as judges on a pro bono basis for extended periods of time in order to eradicate the case backlogs in some of the courts. For the judiciary to rely so heavily on these considerate professionals is an indictment, considering that s 165(4) of the Constitution obliges organs of state to, through legislative and other measures, assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and also that in terms of s 54(1) of the Superior Courts Act 10 of 2013, the Minister of Justice must consider and address requests for funds needed for the functioning and administration of the courts.<sup>16</sup>

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<sup>15</sup> Norms and Standards issued by the Chief Justice of the Republic of South Africa in terms of section 8 of the Superior Courts Act 10 of 2013 read with section 165(6) of the Constitution. GG No 4 37390, 28 February 2014.

<sup>16</sup> Section 165(4) of the Constitution provides

‘COURTS AND ADMINISTRATION OF JUSTICE (ss 165-180)

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(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

Given that the judiciary's source of resources is exclusively from parliament,<sup>17</sup> it is simply inexplicable why the judiciary has had to face endless budget cuts, being interpreted to having to do more and more with less and less. Budget cuts are an impediment to the achievement of access to justice, as they create backlogs in the courts, thus delaying finalisation of cases. This is highly undesirable considering the fact that the judiciary is widely considered the last bastion in any democracy. This is because the judiciary serves as the ultimate protector of democratic principles ensuring that the rule of law prevails, and that individual rights and freedoms are upheld. It is this area that assists in maintaining public confidence in the democratic system an efficient judiciary fosters public confidence in the justice system and the broader democratic framework when people believe that they will receive fair treatment expeditiously from the courts and they are more likely to support and participate in democratic processes.

In *Chief Lesapo v North West Agricultural Bank and Another*,<sup>18</sup> Mokgoro J stated as follows regarding the right of access to courts "the right of access to courts is indeed foundational to the stability of an orderly society. It ensures peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance."<sup>19</sup>

And in *Barkhuizen v Napier*,<sup>20</sup> Ngcobo J, writing on behalf of the majority of the Constitutional Court stated:

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(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.'

<sup>17</sup> Section 10 of the Superior Courts Act 10 of 2013 provides:

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Expenditure in connection with the administration and functioning of the Superior Courts must be defrayed from moneys appropriated by Parliament.'

<sup>18</sup> *Chief Lesapo v North West Agricultural Bank and another* [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999).

<sup>19</sup> *Ibid* para 22.

<sup>20</sup> *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007).

'Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society like ours, [which] is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.'<sup>21</sup>

In *Mukkadam v Pioneer Foods Pty Ltd and others*,<sup>22</sup> Jafta J stated "Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State.'<sup>23</sup>

It is clear from all these judgments that cutting the judiciary's budget to the bone will weaken the effectiveness of the judiciary and impact public confidence in the judiciary. My plea is for this golden goose that the judiciary has proven to be through its landmark cases, not to be killed, as the consequences thereof are two ghastly to contemplate.

1. I came on board as the President of the Supreme Court of Appeal in June 2023 and inherited the problems that XP had tried to resolve in respect of the court's capacity for legal research and human capital, among others. The capacitation of our registry department is long overdue. No one can gainsay that the registry department is the engine room of all courts as it is the first link between the public and the court. And nobody can gainsay the key role played by law researchers within a legal system and the much-needed support facility they are for the judiciary. So when I went into the trenches as part of my own efforts of resolving the problems besetting our court due to inadequate human resource and other problems, you supported me every inch of the way. That's judicial leadership in the true sense of the phrase. So, XP, I thank you for your support.

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<sup>21</sup> Ibid para 31.

<sup>22</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013).

<sup>23</sup> Ibid para 29.

As you know, it's not yet Uhuru. The judiciary will try to limp along. Who knows? Perhaps the *Sangwa v Attorney General and Law Association of Zambia*<sup>24</sup> judgment of the Constitutional Court of Zambia on 31 July 2023 might well be a beacon of hope. In the *Sangwa* judgment, a decision strongly underscoring the principle of judicial independence, Zambia's Constitutional Court found parliament in breach of the Constitution by not passing legislation to ensure the full financial independence of the judiciary and that it is adequately funded. The court stated that the budget process for the judiciary had to be addressed to bring it in line with the Constitution. It considered that one of the key issues in ensuring financial independence of the judiciary was access to funds. It inter alia found that the financial independence of the judiciary had not been adequately addressed, that the Legislature had not passed appropriate legislation and that the Minister of Finance had failed to put in place policy measures that accorded with the relevant Constitutional injunctions. It concluded that that there was a contravention of the Constitution which needed to be addressed by Parliament and the Attorney General in consultation with the judiciary as a matter of urgency. The court ordered Parliament to ensure that the necessary laws were passed as a matter of priority and that the Minister should submit reports to Parliament every six months on the progress being made on the matter. Although the relevant provisions of the Constitution relied upon in the *Sangwa* matter are not identical to s 165 of our Constitution, this judgment is instructive, in my respectful view.

Reverting to you and the role that you have played in the judiciary, XP, you have dedicated twenty years of dedicated service to that noble institution. Having reached the retirement age of 70 years, you have undoubtedly paid your dues and therefore earned your retirement. A big thank you for having served our court with diligence and dignity. A bigger thank you to your lovely wife and your children for having given you all the support you needed in order to fulfill your tasks with distinction. It is truly hard to believe that you are retiring because you are still so fit and energetic. In that sense we, as colleagues who are

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<sup>24</sup> *Sangwa v Attorney General and Law Association of Zambia* (2021 /CCZ/0012) [2023] ZMCC 6 (31 July 2023) especially at para 54-56.

still in active service envy you; we will strive to remain 'spring chickens', or at least young at heart!

As I conclude, I consider it appropriate to quote from a speech made by the former American President, Theodore Roosevelt more than a century ago. It reflects how XP has dealt with challenges since his participation in the leadership of the judiciary and will hopefully serve as encouragement to those who continue to face these challenges. The speech was entitled '*Citizenship in a Republic*' but is popularly known as '*The man in the arena*'. It goes as follows:

'It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there's no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.'

Now, Justice Petse, it is time for you to get a well-deserved rest so that you can spend more time with your family. For the most part, you will be able to relax more than ever before, with no anxiety of alarm bells going off in the morning, impromptu heads of court meetings or routinely getting ready for work. I'm sure this is great news for your family. Having said that, my brother, I must remind you that the Judges' Remuneration and Conditions of Employment Act 47 of 2001 sees to it that the wisdom of retired Judges is harnessed and does not go to waste. That Act permits us to rope in retired Judges in for three months per year whenever circumstances so require; indeed, Judges are 'Judges for life'. So, XP, I'm giving you adequate notice, a heads-up, as it were. As the adage goes, forewarned is forearmed, so brace yourself for that 'call-up', my brother. For now, it is apt to bid you farewell in the Shakespearean way by saying: 'If we do meet again, why, we shall smile. If not, why, then this parting was well made.'

I thank you all.