

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**THE INDEPENDENCE OF THE NATIONAL PROSECUTING  
AUTHORITY OF SOUTH AFRICA: FACT OR FICTION?**

**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE  
M PHIL**



**BY**

**BUSANI CARLSON SELABE**

**3180276**  
UNIVERSITY of the  
WESTERN CAPE

**SUPERVISOR**

**PROFESSOR LOVELL FERNANDEZ**

**DEPARTMENT OF CRIMINAL JUSTICE AND PROCEDURE**

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## DECLARATION

I declare that *The Independence of the National Prosecuting Authority of South Africa: Fact or Fiction?* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

**Full Names:** Busani Carlson Selabe

**Signature:** .....



**Date:** 14 NOVEMBER 2015

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## DEDICATION

To the Almighty God, for this far you have brought me and this work you have guided me to achieve. I dedicate this work to my parents, the late Mbhurini George Xilavi and mother Gabanang Tryphinah; my lovely wife Truddy and daughter Ntsumi Genevive Selabe, my late brothers Xisiku Johnson and Mbhatlana Given Mayimele, as well as my sisters, the late Josephina Qalamuni and Ruth Sinah, Thoko Olivia, Phigness and Roseth Amukelani Mayimele; for their love, encouragement, care and support.



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## ABSTRACT

The National Prosecuting Authority (NPA) is critical in the proper functioning of South Africa's criminal justice system and upholding of the rule of law. And for it to play this critical role it must be independent from any external influence and manipulation and carry out its functions without fear, favour and prejudice. Once it allows external interference in its prosecutorial function it runs the risk of functioning with fear and favour of powerful forces in the society, thereby losing its independence. This may result in loss of trust in and support by the public of the rule of law.

However, in recent history the NPA has taken decisions that raise questions about its independence. These questionable decisions involve high profile politicians and government officials who are, allegedly, involved in illegal and corrupt activities and practices, but are either not prosecuted, or credible cases against them are being suspiciously withdrawn. This state of affairs has caused uncomfortable allegations and counter allegations, all of which question the independence of the NPA, and these can no longer be ignored. State institutions, especially the security cluster, are allegedly heavily involved and the judiciary is threatened overtly when certain decisions go against some politicians.

The study, therefore, is designed to investigate the extent to which the alleged interferences impact negatively with the administration of justice. It then assesses and evaluates the constitutional and legislative safeguards guaranteeing the independence of the NPA in order to determine if they are adequate enough to prevent the NPA from external executive and political interference in its prosecutorial decision-making function. To achieve this, the charging, prosecution and dropping of charges against Jacob Zuma, on various counts of corruption and other related matters will, *inter alia*, be the primary focus of the study. The study comes up with set of recommendations aimed at strengthening the integrity of the NPA, in particular, and the criminal justice system in general.

## KEYWORDS

National Prosecuting Authority; Attorney-General; Constitution; National Prosecuting Authority Act; National Director of Public Prosecutions; Minister of Justice; criminal justice system; prosecutorial independence; executive and political interference; interest of justice and public interest.



## List of Abbreviations

|               |  |
|---------------|--|
| <b>Adv.</b>   | Advocate   |
| <b>ACPCC</b>  | African Convention of Preventing and Combating<br>Corruption |
| <b>AFU</b>    | Asset Forfeiture Unit  |
| <b>ANC</b>    | African National Congress                                    |
| <b>ANCWL</b>  | African National Congress Women's League                     |
| <b>ANCYL</b>  | African National Congress Youth League                       |
| <b>AG</b>     | Attorney-General / Attorney General                          |
| <b>ANC</b>    | African National Congress                                    |
| <b>APA</b>    | Africa Prosecutors Association                               |
| <b>AU</b>     | African Union  |
| <b>CASAC</b>  | Council for the Advancement of South African<br>Constitution |
| <b>CC</b>     | Constitutional Court of South Africa                         |
| <b>CCMA</b>   | Commission for Conciliation, Mediation and Arbitration       |
| <b>CJ</b>     | Chief Justice  |
| <b>COSATU</b> | Congress of South African Trade Union                        |
| <b>CPS</b>    | Crown Prosecution Services                                   |
| <b>CPSA</b>   | Crown Prosecution Services Act (UK)                          |
| <b>DA</b>     | Democratic Alliance  |

|                 |   |
|-----------------|---|
| <b>DCEC</b>     | Department of Crime and Economic Corruption<br>(Botswana) |
| <b>DEIC</b>     | Dutch East Indian Company                                 |
| <b>DCJ</b>      | Deputy Chief Justice                                      |
| <b>DJCD</b>     | Department of Justice and Constitutional Development      |
| <b>DoJ</b>      | Department of Justice (UK)                                |
| <b>DPCI</b>     | Directorate of Priority Crime Investigation               |
| <b>DPP</b>      | Director of Public Prosecutions                           |
| <b>DSO</b>      | Directorate of Special Operations                         |
| <b>EU</b>       | European Union  |
| <b>FUL</b>      | Freedom Under Law   |
| <b>GDP</b>      | Gross Domestic Product                                    |
| <b>IAP</b>      | International Association of Prosecutors                  |
| <b>J</b>        | Justice / judge   |
| <b>JIT</b>      | Joint Investigative Team                                  |
| <b>JSC</b>      | Judicial Service Commission                               |
| <b>KZN</b>      | Kwa-Zulu Natal (province)                                 |
| <b>INTERPOL</b> | International Criminal Police Organisation                |
| <b>MoJ</b>      | Minister of Justice (USA)                                 |
| <b>NCOP</b>     | National Council of Provinces                             |
| <b>NDPP</b>     | National Director of Public Prosecutions                  |
| <b>NIA</b>      | National Intelligent Agency                               |

|              |  |
|--------------|--|
| <b>NPA</b>   | National Prosecuting Authority   |
| <b>NPAA</b>  | National Prosecuting Authority Act   |
| <b>PSC</b>   | Public Service Commission  |
| <b>SA</b>    | South Africa   |
| <b>SACP</b>  | South African Communist Party  |
| <b>SADC</b>  | Southern African Development Community   |
| <b>SADC</b>  | Corruption Protocol) Southern African Development<br>Community Protocol against Corruption |
| <b>SANDF</b> | South African National Defence Force   |
| <b>SAPS</b>  | South African Police Services  |
| <b>SC</b>    | Senior Counsel   |
| <b>SCA</b>   | Supreme Court of Appeal  |
| <b>SCCU</b>  | Special Commercial Crime Unit  |
| <b>SIU</b>   | Special Investigative Unit   |
| <b>SWAPO</b> | South West African People's Organisation   |
| <b>TRC</b>   | Truth and Reconciliation Commission  |
| <b>UK</b>    | United Kingdom   |
| <b>UN</b>    | United Nations   |
| <b>UNCAC</b> | United Nations Convention Against Corruption   |
| <b>US</b>    | United States (of America)   |
| <b>USA</b>   | United States of America   |

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# CHAPTER 1

## Introduction

### 1. Background to the study

In very general terms, corruption is 'the abuse of entrusted power for private gain.' In a narrower sense, it is defined as 'dishonest or fraudulent conduct and abuse of power by those acting within the public sphere for self-benefit or for the benefit of others.'<sup>1</sup> Corruption is a global phenomenon that affects states, governments, businesses, organised civil society and the public at large. However, its effects are most damaging in the developing world.<sup>2</sup> In African states, corruption is one of the three top national problems, besides poverty and unemployment, which undermine economic development.<sup>3</sup> According to estimates of the African Union (AU), African economies lose more than US\$ 148 billion dollars a year as a result of corruption. This amount represents roughly 25 per cent of the continent's GDP.<sup>4</sup> In its judgment in the matter of *Hugh Glenister and the President of the Republic of South Africa and Others*, the Constitutional Court (CC) stated as follows:

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1 Art 1 of the SADC Protocol Against Corruption, Sec 3 of the Prevention and Combating of Corrupt Activities Act.

2 See *Hugh Glenister v the President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 (17 March 2011) paras 124 and 167 (hereafter *Glenister*).

3 J P Gashumba *Anti-corruption agencies in Africa: a comparative analysis of Rwanda, Sierra Leone and Malawi* (unpublished LLM research paper, University of the Western Cape, 2010) 2.

4 M Khemani *Anti-Corruption Commissions in the African State: Burying the Problem or Addressing the Issue?* (unpublished LLM thesis, Georgetown University Law Centre, 2009) 2.

There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.<sup>5</sup>

In recent years there has been a trend amongst African governments to establish anti-corruption commissions for purposes of combating corruption. These state-funded anti-corruption commissions or agencies are the result of the increased world-wide attention being paid to corruption in the wake of the adoption of international and regional instruments such as the United Nations Convention against Corruption (UNCAC) and the African Convention on Preventing and Combating Corruption.<sup>6</sup>

South Africa, as a relatively new democracy and one of the fast developing countries in the continent, grapples constantly with high levels of perceived and actual corruption within both the public and the private spheres. In 1992, parliament enacted a comprehensive law against corruption, namely, the Corruption Act 94 of 1992, which replaced the common-law crime of bribery and the statutory types of

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<sup>5</sup> *Glenister* para 166.

<sup>6</sup> See *Report of the High Level Panel on Illicit Financial Flows from Africa* (2015) 32 (hereafter IFF).

corruption which were criminalised by earlier enactments. The Corruption Act of 1992 contained only a single, broad crime of corruption. However, in 2004 Parliament enacted the Prevention and Combating of Corrupt Activities Act 12 of 2004 which replaced the broad definition of corruption with the general crime of corruption, complemented by various specific forms of corruption.

Anti-corruption laws and regulations make sense only if they are implemented in practice. It is, therefore, incumbent on the investigating and prosecution authorities, namely, the South African Police Service (SAPS) and the National Prosecuting Authority (NPA), respectively, to ensure that corrupt individuals are brought to book. The prosecution service, in particular, needs to perform its work without political interference. For this reason, the South African Constitution provides unequivocally for the creation of an adequately independent National Prosecuting Authority (NPA). The Constitution empowers the prosecuting authority 'to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.'<sup>7</sup> The National Prosecution Authority Act<sup>8</sup> (NPA Act), which gives effect to this provision, further provides in section 32 that the NPA must exercise its functions impartially, in good faith and without fear, favour or prejudice, subject only to the Constitution and the law.<sup>9</sup> In practice, the phrase 'without fear, favour or prejudice means that the NPA must show no favours, not only to the weak and the powerless in the society, but also, and importantly, to the mighty and powerful in government.

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7 Sec 179(2) of the Constitution.

8 National Prosecution Authority Act No.38 of 1998 (hereafter NPA Act).

9 Sec 32(1)(a) of the NPA Act.

To safeguard the independence of the prosecution service, the National Prosecution Authority Act (NPA) states categorically that ‘no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.’<sup>10</sup> Instead, the Constitution, the supreme law of South Africa, obliges organs of state to assist and protect the NPA by way of legislation and other measures to ensure its independence, impartiality, dignity, accessibility and effectiveness.<sup>11</sup> Since 1994, when South Africa became a democracy, the NPA has instituted several criminal prosecutions against prominent political figures and state officials, the most prominent being Jackie Selebi, the then incumbent Commissioner of Police and president of the International Criminal Police Organisation (INTERPOL), who was subsequently convicted and sentenced to 15 years’ imprisonment for corruption. The NPA has prosecuted prominent political luminaries also, including Toni Yengeni, the then Chief Whip of the ruling African National Congress (ANC) in parliament, Winnie Mandela, ex-wife of the then President Nelson Mandela, and Allan Boesak. The present, incumbent president Jacob Zuma, too, was prosecuted but acquitted on rape charges in 2005 before he became president of the country.

However, since 2008, when the former head of the NPA, Vusi Pikoli, was sacked from his position as National Director of Public Prosecutions (NDPP), questions have been raised publicly as to the genuine independence of the NPA from political meddling. Mistrust has grown since then, particularly in the light of the rapid

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10 Sec 32(1)(b) of the NPA Act.

11 Sec 179(4) of the Constitution.

succession of heads of the NPA and the high turn-over of key personnel within the prosecution service. Since the prosecutorial function is so critical to the effective workings of the criminal justice system and for upholding the rule of law, any doubt concerning ability of the prosecution service to discharge its constitutional obligations in accordance with the law, affects the entire image of the administration of justice in the eye of the public. Prosecutors are, therefore, called 'gate keepers'<sup>12</sup> of the criminal justice system, without which judicial sanctions cannot occur. In *S v Yengeni*, the Court stated that:

[t]he independence of the judiciary is directly related to, and depends upon, the independence of the legal professions and of the NDPP. Undermining the freedom from outside influence would lead the entire legal process, including the functioning of the judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.<sup>13</sup>

It is therefore evident that the prosecution service has a crucial role to fulfil in the administration of criminal justice. The discretionary powers enjoyed by public prosecutors are considerable. In fact, it is said that no other official in the administration of justice exercises more influence over the liberty of the individual

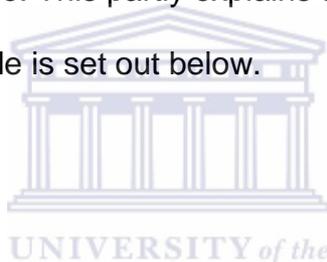
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<sup>12</sup> The prosecution service is referred to as a gate keeper because its decisions have an enormous impact on everyone experiencing the criminal justice system, whether victims, witnesses or accused. Prosecutors determine what happens to the work of the police, and of other investigative agencies, and they influence also the workload of the courts. Their decisions also have an effect on the workload and size of the prison population and also impact See House of Commons Justice Committee, Ninth Report of Session published on 6 August 2009 by authority of the House of Commons London (The Stationery Office Limited, 2009) 5 (hereafter House of Commons Justice Committee).

<sup>13</sup> *State v Yengeni* 2006 (1) SACR 405 paras 52 - 53.

than the public prosecutor.<sup>14</sup> It is the prosecutor who decides whether or not to institute a prosecution, which charges to bring forward and which to dismiss, whom to charge, what evidence to present, which witnesses to call, and whether or not to enter into a plea bargain. These powers derive from the doctrine of separation of powers, and in South Africa, as in other common law jurisdictions, courts are reluctant, in practice, to interfere with prosecutorial discretion.

However, given the suspicion that in South Africa there is political meddling in the discretionary powers of prosecutors, it is necessary to enquire into the legal framework that regulates the role and function of the prosecution in the administration of criminal justice. This partly explains the rationale for this study, but a more comprehensive rationale is set out below.



## 2. Rationale

The transformation of the criminal justice system was amongst the foremost points on the reform agenda of the new democratic government under Mandela when it assumed office in 1994. The new government was under no illusion that unless the criminal justice system was made transparent and accountable, democratic institutions would lose their credibility fast. This realisation stemmed from the fact that it was the criminal justice system in particular which had been used by the *apartheid* regime to enforce its obnoxious racially discriminatory policies. The cutting edge of the criminal justice system was no doubt the prosecution service, for it was the public prosecutors who hauled the violators of the *apartheid* laws before the

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14 See House of Commons Justice Committee 5. See also V E Beety 'Pivoting Accountability in the Criminal Justice System' (2015) 80 *Missouri Law Review* 1 at 18.

courts. Prosecutors paid scarce attention to the fact that confessions were at times elicited through torture, and the courts, too, tended not to exclude evidence obtained through torture.<sup>15</sup>

There was to be no room for such abuses in a democratic South Africa which is based on a constitution with a bill of rights and founded upon the rule of law. The need to cultivate a culture of human rights necessarily entailed setting up a criminal justice system in which the quality of justice dispensed enjoys public confidence and is consistent with human rights norms. This meant making the prosecutorial decision-making process transparent and placing the prosecution beyond the sphere of political influence. The arrangement in most commonwealth jurisdictions, according to which the head of the country's prosecution service, the Attorney-General (AG), is either a Member of Parliament or a member of Cabinet, did not lend itself as a useful example for a democratic South Africa, for practice has shown that even if 'the Attorney-General is expected to take his prosecutorial decisions without interference and control, ...the public often suspects that the practice seldom accords with principle.'<sup>16</sup> The pre-democratic South African practices as well, according to which the Attorney-General was accountable to the Minister of Justice, had shown itself to be vulnerable to political abuse.<sup>17</sup> As a result of these

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15 See *Mthembu v S* (64/20070 [2008] ZASCA 51 para 22.

16 O Ayoola 'The Decision to Prosecute' (1991) 17 *Commonwealth Law Bulletin* 1032 at 1036.

17 See Sec 45(3) of the General Law Amendment Act 46 of 1957 which empowered the Minister of Justice to reverse decisions taken by an Attorney-General. See also B Van Niekerk and E Mathews 'Eulogising the Attorney-General – A qualified dissent' 89 (1972) *SALJ* 292; J van der Westhuizen 'A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy' (2008) 8 *African Human Rights Law*

considerations, the Constitution has come up with an alternative structure, which is uniquely South African. Section 108 provides for the establishment of an NPA, which is directed by the NDPP, who must exercise the prosecutorial function without fear, favour or prejudice, and that '[t]he cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.'<sup>18</sup> This wording constitutes the bare skeleton that defines the relationship between the NPA/NDPP and the Executive.

### **3. Research question**

The primary question that the study seeks to answer is how sufficient (or insufficient) are the constitutional and legislative safeguards that guarantee and protect the independence of the NPA against any interference.



### **4. Limitations of the study**

This study covers the period from the early 2000s, when Jacob Zuma, the incumbent president of South Africa at the time of writing, was first investigated by the NPA until July 2015. The period under discussion covers the time when the charges against Zuma were dropped in 2009 and extends through the period during which the Directorate of Special Operations (DSO) was disbanded in 2010 and replaced by the Directorate of Priority Crime Investigations (DPCI). The discussion will include the dismissal of Vusi Pikoli as NDPP and subsequent developments, up till the time of the appointment of Mxolisi Nxasane as the NDPP.

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*Journal 25 at 252-253.*

18 Sec 108 of the Constitution,

## 5. Research methodology

Given the nature of the research question, the study will proceed by way of an analysis of the circumstances that prompted the NDPP to make certain decisions in cases involving high-profile persons, as these are the decisions that have attracted widespread public attention and controversy. As there are no academic studies relating to the controversial events around the NPA since 2007, the study will rely on the facts and judgments in court cases and in media reports, including analyses and commentaries by scholars and political analysts that have been published in the newspapers and other public fora. Even though this is not a comparative study, the study will refer, in passing, to how prosecutorial discretion is exercised under the inquisitorial criminal justice systems, especially in Germany, where the principle of mandatory prosecution applies. However, as South Africa has an adversarial system of criminal justice, reference will be made to the powers pertaining to the prosecutorial function in other common law jurisdictions, namely, Botswana, the United States and the United Kingdom as well. In addition, the width of prosecutorial discretion which South African prosecutors can exercise will be evaluated against the standard enunciated in the UN Guidelines on the Role of Prosecutors and other international and regional guidelines.

The purpose of assessing the regulation of the prosecutorial function in other jurisdictions is to ascertain the extent to which prosecutors, and by implication, the national head of the prosecution service is answerable to the Executive; or put otherwise, the boundaries of prosecutorial discretion. However, the author appreciates that whatever new insights are gained from an enquiry into other legal systems cannot be transplanted to South Africa, given that arrangements in foreign

countries is dictated by their respective political and legal cultures and by their national constitutions and domestic laws. The comparative study will serve therefore merely as rough guide for whatever reform could be contemplated for South Africa.

## 6. Literature survey

There is hardly any literature on the prosecution service in South Africa. This is partly due to the fact that public prosecutors were recognised as a professional group only in 1979.<sup>19</sup> Before then, public prosecutors were a marginalised group, relegated to occupy the status of Cinderella of the legal profession.<sup>20</sup> As a result, the office of the Attorney-General, the former provincial head of the prosecution service, attracted scant academic attention, It was not until South Africa began its transition to democracy that the prosecution service came under closer academic scrutiny, mainly because the law provided for one single prosecution service, unified under one national prosecuting authority. The first, most searching survey of the prosecution service was a monograph by Martin Schönteich, entitled *Lawyers for the People: The South African Prosecution Service*, which traces the history of the prosecution service from colonial times until the late 1990s, following the newly-established NPA.<sup>21</sup> Schönteich's study is enlightening for the fact that it discusses in great detail the problems besetting the day-to-day work of public prosecutors and which hamper them from performing optimally. The study contains useful and practicable suggestions on how to improve the effectiveness of prosecutors. However, as the monograph appeared at a time when the NPA had just begun to

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19 *Report of the Department of Justice* 1 July 1979-30 June 1980 at 6.

20 J H Hugo 'The Prosecutor: Cinderella in a Black Gown' (1971) 12 *Codicillus* 25 at 27-28.

21 Monograph 53 (Institute of Security Studies 2001 (unpaginated)).

take shape under the first NDPP, it discusses none of the issues that cropped up only subsequently and which are the focus of this study.

Van Zyl Smit and Steyn's article on the new prosecuting authority in South Africa, which was published in 2000, sets out the structure of the NPA and defines its relationship to the Minister, warning about the potential vulnerability of the NPA to political manipulation. The authors suggested that the new dispensation left the NDPP more open to political interference than the provincial Attorneys-General in the days of the Union, before the Minister of Justice assumed ultimate responsibility for the prosecution service in 1926.<sup>22</sup>

Sarkin and Cowen critiqued the present NPA structure when it was still in the form of a Bill, before the NPA Act was passed. They argued, too, that political interference in the work of the NPA must be restricted, but that the NDPP not be given untrammelled powers and that 'checks and balances offered by mechanisms of accountability should be built into the system.'<sup>23</sup>

Writing in 1995, Bekker, on the other hand, in an article titled '*National or Super Attorney-General: Political Subjectivity or Juridical Objectivity?*' went to the other extreme, advocating that the then proposed NDPP be totally independent of any

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22 D Van Zyl Smit and E Steyn 'Prosecuting authority in the new South Africa' (200) 8 *CILJ* 137-155.

23 J Sarkin and S Cowen 'The Draft National Prosecuting Authority Bill 1997: A critique' (1997) *SAJ CJ* 64 at 74.

political authority, pledging allegiance only to the Constitution and not be 'subject to the caprices of a politician....'<sup>24</sup>

Fernandez's article titled '*The National Director of Public Prosecutions in South Africa: Independent Boss or Party Politician?*' which was published in 2007 dealt with the theme of this study, but at a time when the alleged political interference in the decision-making of the NDPP was just beginning to be reported on in the media? The article pointed to the fact that the controversial prosecutorial decision-making in relation to the corruption charges against Zuma had begun to show worrying signs that the NPA was, after all, not as independent as the law promised. The article suggested that law governing the appointment of the NDPP be amended to provide for a more transparent appointment procedure.<sup>25</sup> Redpath's monograph *Failing to Prosecute?* published in 2012, refers to how the successive NDPPs have 'been integrally involved in political events, often creating the perception of a compromised independence.'<sup>26</sup> Redpath contends that the strongest factor affecting the credibility and effectiveness of the NPA 'is the inappropriate exercise of the discretion not to prosecute' in politically sensitive matters and on weak grounds – a state of affairs that has the effect of casting doubt on the independence of the NPA.<sup>27</sup> She recommends that the prosecution policy be revised and that clear criteria be

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24 P M Bekker 'National or Super Attorney-General; Political Subjectivity or Juridical Objectivity' (1995) 8 *Consultus* 27 at 30.

25 L Fernandez 'The National director of Public Prosecutions in South Africa: Independent Boss or Party Politician?' (2007) 1 *Speculum Juris* 129 at 145.

26 J Redpath *Failing to Prosecute? Assessing the state of the National Prosecuting Authority in South Africa* Monograph No 186 (ISS 2012) at 19.

27 Redpath (2012) at 19 and 55.

delineated which determine when the discretion not to prosecute should be exercised. In 2014 Schönteich went a step further by suggesting that the NPA be made more accountable to the public through the establishment of oversight bodies, such as an Inspectorate or a complaints directorate, or even a kind of review body through which the public can scrutinise the decisions made by the NPA.<sup>28</sup>

What is striking about the few writings surveyed above is that they have been authored by only a handful of South African scholars who have visited the topic of the NPA repeatedly and the thrust of whose writings has tended to revolve around the issue of the independence, or lack of it, of the NPA from political meddling. However, the authors mentioned avoid engaging with specific situations; their arguments are expressed more generally. However, in an article published in 2009, a Canadian academic, Stenning, looks at how the exercise of prosecutorial discretion in favour of not prosecuting a high-profile, politically sensitive case is overridden by extraneous factors such as 'national security' and 'public interest.' However, what constitutes national security or public interest is a matter for the government to decide.<sup>29</sup> Stenning comes to the conclusion that, contrary to accepted wisdom, laws designed to insulate prosecutorial discretion from political interference promise more than they can fulfil, for they do not provide neat solutions to all cases. He cites the two South African cases of *Selebi* and *Zuma* to substantiate his contention.

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28 M Schönteich *Strengthening Prosecutorial Accountability in South Africa* ISS Paper 255 (ISS 2014) at 19.

29 P C Stenning 'Discretion, Politics, and the Public Interest in "High-Profile" Criminal investigations and Prosecutions' (2009) 24 *Can JL & Soc* 337-366.

While Stenning's article covers some of the points canvassed in this thesis, it is somewhat dated, for the NPA has experienced considerable convulsions and fluctuations since 2009, especially with regard to the position of NDPP and court actions pertaining to the incumbents of the office. The NPA has in the meantime also become a contentious subject of public debate and media scrutiny. This thesis engages with the issues raised by these developments and deliberates on the constitutional and jurisprudential considerations that weigh on the topic under discussion.

## **7. Conclusion**

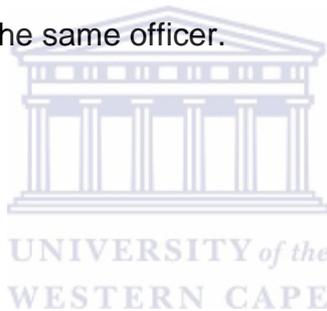
This introductory chapter has sought to give context to this study. It sketched the factual and legal background to the topic and delineated the issues that emerge and the question which the study will seek to answer. The next chapter studies the evolution of the prosecution service in South Africa from the colonial era to the advent of democracy. The history is important, for it informs us of the role the prosecution service played in the political history of the country and the reason why the prosecution service is so critical to the development of the rule of law and a culture of human rights.

## CHAPTER 2

### The History of the Prosecution Service in South Africa from 1652 to 1992

#### 1. Introduction

This chapter deals with the way in which the office of the prosecutor evolved from the colonial era during Dutch rule in the 17<sup>th</sup> and 18<sup>th</sup> Centuries and under British rule from the early 19<sup>th</sup> Century until Union in 1910 and from then until 1992. The terminology used for 'prosecutor' and 'Attorney-General' in this chapter is not consistent, for the Dutch brought with them the continental European nomenclature and the British used the appellation used in England, hence the interchangeable designation or labels given to the same officer.



#### 2. Dutch rule (1652-1794)

The struggle for the independence of the prosecution services from the executive could be traced back to the Dutch colonial rule of the Cape, starting in the mid-17<sup>th</sup> century. In 1652, when the Dutch East India Company (DEIC) occupied the Cape, the office or position of the fiscal (Dutch: *fiskaal*, meaning a shrike) was established. The fiscal was responsible for conducting prosecutions, as well as investigating crimes and punishing civil servants who were corrupt or neglected to perform their duties.<sup>1</sup> In 1688, the fiscal received the title of Fiscal Independent and was made directly accountable to the Council of Seventeen, the directors of the DEIC.<sup>2</sup> While

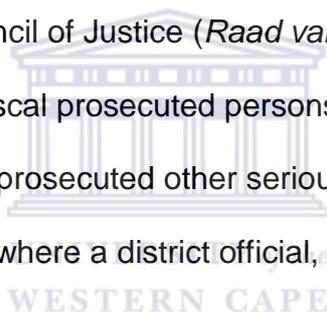
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1 M Schönteich *Lawyers for the People: The South African prosecution service* (ISS Monograph Series No 53 March 2001) 27.

2 Schönteich (2001:27).

the fiscal sat on the Council of Policy, the political governing body, he did not have to account for his actions to the Council. Not even the governor at the Cape could give him orders.<sup>3</sup> In addition, he acted as public prosecutor in criminal trials, prevented smuggling, and was in charge of the police. In 1688 the Independent Fiscal was given vast powers to punish officials for dereliction of duty, including the right to report the Governor to the Council of Seventeen in Holland, with whom he corresponded directly.<sup>4</sup> During this period, the Fiscal Independent functioned independently of the executive, meaning the Governor and the Council.

In 1783 the Council of Seventeen created a new high court of justice at the Cape. The court, also called the Council of Justice (*Raad van Justitie*), had jurisdiction over criminal and civil cases. The fiscal prosecuted persons whose conduct harmed the interests of the DEIC. He also prosecuted other serious criminal cases, unless they originated in outlying districts, where a district official, the *landdrost*,<sup>5</sup> arrested the



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3 Schönteich (2001:28).

4 Schönteich (2001:28).

5 In 1957 the title of “Landdrost” was officially and legally recognised. In terms of section 7 of the General Law Amendment Act of 1957 (Recognition of official title of 'landdrost' and amendment of certain laws), any reference in the Afrikaans or Dutch version of any law or document to the official title-

(a) of 'magistraat' or 'addisionele magistraat' or 'assistent-magistraat' shall be construed to include a reference to the official title of 'landdros' or 'addisionele landdros' or 'assistent-landdros' respectively; and

(b) of 'landdros' or 'addisionele landdros' or 'assistent-landdros' shall be construed to include a reference to the official title of 'magistraat' or 'addisionele magistraat' or 'assistent-magistraat' respectively. See General Law Amendment Act 68 of 1957 available at

<http://www.justice.gov.za/legislation/acts/1957-068.pdf> (accessed 5 June 2012).

suspects and arraigned them before the council, thereby acting as a prosecutor before the council.<sup>6</sup>

The fiscal was paid a fixed salary, which ensured his independence. In addition, he had the right to claim a commission on all fines he imposed on offenders, a circumstance which motivated him to pursue all law breakers. When fines could not be paid, it was not uncommon for the fiscal to confiscate the property of transgressors of the law. Some fiscals were also entitled to tax agricultural produce that was delivered to foreign ships by the burgher community at the Cape.<sup>7</sup> This rapidly led to an abuse of his position and the fiscal became a despised official among the early settlers at the Cape.<sup>8</sup> As a result, the settlers named the fiscal the shrike (a butcher bird which is a small bird of prey with a strong hooked and toothed bill with the habit of impaling its prey of small birds and insects on thorns).<sup>9</sup> This suggests that the reputation and professional integrity of the fiscal was potentially damaged and that the society's respect, confidence and support for the criminal justice system in general and the prosecution services in particular, were fatally compromised.

### **3. British rule (1795 – 1802)**

In 1795 the British assumed control at the Cape. The administration of justice remained in the hands of the Council of Justice. The fees and additional earnings

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6 Schönsteich (2009:29).

7 Schönsteich (2001:29).

8 Schönsteich (2001:29).

9 Schönsteich (2001:29).

that previously formed a large and obscure part of many officials' income were eliminated. But only the fiscal was still entitled to part of the fines imposed by the Supreme Court. However, the fiscal lost the independence he enjoyed before 1795, and his position was made subordinate to that of the Governor at the Cape.<sup>10</sup> His role remained the same but was cut down to ensuring that the laws of the colony were carried out, that transgressors of the law were punished, and that he prosecuted criminal trials before the Council of Justice.<sup>11</sup>

#### **4. The Batavian Republic (1803-1805)**

In 1803 the Batavian Republic (as the United Netherlands had become known) took possession of the Cape, giving it the status of a Dutch colony.<sup>12</sup> Important changes were undertaken in the colony's administration of justice. The judicial and executive authorities were separated. The judicial authority was entrusted to the Council of Justice, consisting of six members with legal qualifications, a secretary and an Attorneys-General who replaced the fiscal, and who was no longer entitled to benefit from the fines imposed as was the case under the previous Dutch rule.<sup>13</sup>

#### **5. Second British Occupation from 1806 onwards**

In 1806 when the British occupied the Cape for a second time, the new British governor at the Cape was granted extensive powers. All legislative and executive

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10 G Botha 'The Public Prosecutor of the Cape Colony up to 1828' 1918 (SALJ) 400.

11 Schönreich (2001:29).

12 Schönreich (2001:29).

13 H R Hahlo and E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (London, Stevens 1960) 201.

powers were vested in him, and the Council of Policy was abolished. The judiciary was subordinate to him in that he could appoint and dismiss all members of the Council of Justice except its president, and all authority in both criminal and civil courts was vested in him. The office of the fiscal as crown prosecutor was reinstated. The fiscal held a position in the Council of Justice and could claim a commission of one-third of all fines imposed.<sup>14</sup>

The fiscal's abuse of power prompted an investigation which resulted in the fiscal being replaced by an Attorneys-General.<sup>15</sup> The governor lost his judicial powers, making way for an independent judiciary. The Council of Justice was replaced by a High Court of Justice consisting of a chief justice and three judges, all appointed from Britain.



## **6. The Prosecution Service in the Boer Republics and after Union**

### **6.1 Boer republics**

In both the Transvaal Republic and the Orange Free State Republic the Attorneys-General were at first independent officials, but were later made subject to their respective Executive Councils.<sup>16</sup> In the Free State the change was necessitated because of widespread dissatisfaction with the implementation of prosecutorial

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<sup>14</sup> Schönteich (2001:29).

<sup>15</sup> See letter of Goderich to Bourke of 5 August 1827 in Theal 1827 (32) *Records of the Cape Colony* 266 at 268.

<sup>16</sup> Ordinance No 2 of 1867 *Wetboek* (1891); *Volksraad* Resolution of 18 February 1864, Art 20 *Volksraadnotule Staatscourant* I March 1864.

policies.<sup>17</sup> In the Transvaal Republic there was a high fluctuation of Attorneys-General, presumably on account of the fact that they lacked security of tenure, despite the fact they performed numerous other administrative duties not connected with the prosecutorial function.<sup>18</sup> In the English-speaking colony of Natal, Attorneys-General were shouldered also with cumbersome executive functions, and they also ran private practices, which created considerable conflict of interests, much to the anger of citizens.<sup>19</sup>

## **7. The prosecution service from 1910 to 1996**

From the end of the second Anglo-Boer war and 1910 each of the four provinces which later became the Union of South Africa had its own Attorneys-General who was a member of cabinet and who prosecuted in the name of the British Crown. With the establishment of the Union of South Africa in 1910 prosecutorial authority was vested in the Attorneys-General of each of the four provinces.<sup>20</sup> As elected members of the colonial cabinets they were directly accountable to the electorate, with the risk

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17 Scholz *Die Konstitusie en Staatsinstellings van die Oranje-Vrystaat 1854-1902* (NV Swets & Zeitlinger, Amsterdam 1937)180.

18 Hahlo and Kahn (1960:230).

19 P Spiller *The Natal Supreme Court; Its origins (1846-158)* (unpublished PhD thesis, University of Natal 1982) 207-208.

20 See Sec 139 of the South Africa Act and Sec 17 of the Criminal Procedure and Evidence Act 31 of 1917. The Solicitor-General of the Cape Eastern Districts and the Crown Prosecutor of Griqualand West retained their previous authority, but the office of the latter was abolished in 1912 and vested with the Attorneys-General for the Cape Province. See Sec 13 of the Administration of Justice Act of 1912.

that their decisions would be influenced by their desire to be re-elected.<sup>21</sup> There was also concern about the far-reaching powers of Attorneys-General and their independence and freedom from political control.<sup>22</sup> This resulted in the amendment of the law in 1926 which gave the minister of Justice final control of all prosecutions in the country.<sup>23</sup> This was done because public servants were not responsible to Parliament and, on high grounds of policy it was deemed necessary that the government should have control over prosecutions.<sup>24</sup>

As a result, the Attorneys-General lost all their independence, with the authority to prosecute being assigned to them by the Minister of Justice.<sup>25</sup> This amendment of the law sought to guarantee Parliamentary responsibility for prosecutorial decisions. In motivating for the curtailment of the Attorneys-General's powers, the then Minister of Justice, Tielman Roos, stated as follows:



'The Chief reason why it is necessary to put this bill (the 1926 Amendment Act) on the statute books is, in my opinion, that there is no authority whatsoever over, and no responsibility of the Attorneys-General. Parliamentary responsibility is completely absent.'<sup>26</sup>

Despite Roos's giving assurances that the independence of the Attorneys-General's office would still be respected, two Attorneys-General resigned in protest against this

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21 Van Zyl Smit and Steyn (2008:138).

22 Schönreich (2001:32).

23 Bekker (1995:27).

24 Bekker (1995:27).

25 JC Keuthen *The South African Prosecution Services: Linchpin of the South African Criminal Justice System?* (unpublished LLM mini-dissertation, University of Cape Town, 2007) 10.

26 See Schönreich (2001:32).

legislation.<sup>27</sup> The effect of the 1935 legislation, and the subsequent versions contained in the Criminal Procedure Act until the early 1990s, was that there was no formal separation of powers between an Attorneys-General and the executive, and that direct or indirect political influence was possible.<sup>28</sup> While, in practice, the Minister seldom interfered with the decision of the Attorneys-General, in law, this provision ensured that the Minister had ultimate control over the prosecutions.<sup>29</sup>

However, as the strain of shouldering both political and prosecutorial responsibility weighed too heavily on the Minister of Justice, in 1935 the Attorneys-General were once again vested with the power of prosecution, but under the control of the Minister of Justice.<sup>30</sup> This meant ‘the Minister was entitled to issue directions to Attorneys-General to exercise their powers directly in any specific matter and reverse any decision arrived at by an Attorneys-General.’<sup>31</sup> The Attorneys-General needed only to give reasons for his decisions if asked by the Minister of Justice.<sup>32</sup>

After the Nationalist Party came to power in 1948, it introduced its *apartheid* policies and therefore regarded the criminal justice system as a useful tool to enforce its laws. It found the manner in which the relationship between Attorneys-General and the Executive somewhat loose and in need of tighter arrangement, with more political control. In 1957 Parliament accordingly passed a law, giving the Minister of

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27 Keuthen (2007:10).

28 Schönreich (2001:32).

29 Schönreich (2001:32).

30 See Sec 1 of the General Law Amendment Act 46 of 1935.

31 Keuthen (2007:10).

32 Schönreich (2001:32).

Justice the power to direct an Attorneys-General, to reverse his decision, and exercise his authority function.<sup>33</sup> This amendment was introduced during the period that the Treason Trial was being held, and ostensibly because the Attorneys-General of the then Transvaal had in fact declined to prosecute the 156 persons on charges of treason, but that the Minister had insisted that the trial should go ahead.<sup>34</sup> This meant that thenceforth the Minister had the legal right to take over the role of Attorneys-General and Solicitors-General at his own discretion.

While in law the Minister of Justice had the final say, Bekker, a former Attorneys-General of that era, has stated that in practice, the Minister did not interfere with the prosecutorial discretion of Attorneys-General. According to Bekker, the Minister accepted, as a rule, the decisions they took.<sup>35</sup> Bekker states furthermore that, while this 'did not apply as a rule', '[t]he back-door for Ministerial interference in the exercise of the functions of the Attorneys-General was, it seems, always left open.'<sup>36</sup> He concludes therefore that '[t]he Attorneys-General (or for that matter his representatives: state advocates in the Supreme Court and prosecutors in the lower courts), enjoyed a very wide and unfettered discretion. Even the courts showed a marked disinclination to control, or even to comment on, the exercise of this discretion.'<sup>37</sup> Bekker relates an instance in which the court refused to issue a mandamus to compelling a prosecution, while in another case the court refused to interdict an Attorneys-General from prosecuting where he had decided to do so. In

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33 Section 45 (3) of the General Law Amendment Act 68 of 1957.

34 See Fernandez (2008:134).

35 Bekker (1995:27).

36 Bekker (1995:27).

37 Bekker (1995:27).

yet another case, the court refused to direct the Attorneys-General to decide within a specified period whether or not he intended indicting certain accused. The court saw no reason to interfere as the Attorneys-General acted within his powers. A court would interfere only if the Attorneys-General acted in bad faith.<sup>38</sup>

However, Nico Horn relates a case where executive interference by the South African government took place in the then South African-controlled South West Africa.<sup>39</sup> This related to the South West Africa People's Organisation (SWAPO) activist, Ishmail Shifidi, who was brutally murdered by the South African National Defence Force (SANDF) at a political rally in Windhoek. The Attorneys-General for the then South West Africa instituted criminal proceedings against the five members of the SANDF. The South African government tried unsuccessfully, through the Minister of Justice, to put pressure on the Attorneys-General to stop the prosecution. Then the then State President of South Africa resorted to Section 103 of the Defence Act No. 44 of 1957 to issue a certificate stopping any prosecution against the members of the SANDF for acts committed in their operational area. As a result, the Administrator-General of the South West Africa, succumbing to pressure, issued a separate certificate to halt the prosecution.<sup>40</sup> Other than the Namibian case,

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38 Bekker (1995:27).

39 N Horn ` *The independence of the prosecutorial authority of South Africa and Namibia: A comparative study* ' (internet/comm articles 2008) available at [http://www.kas.de/upload/auslandshomepages/namibia/Independence\\_Judiciary/horn2.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/horn2.pdf) (accessed 20 June 2013).

40 Horn (2008).

anecdotal evidence suggests that Ministerial interference hardly ever occurred, and in any case, the legal provisions allowing it were often strongly criticised.<sup>41</sup>

In 1992 the position of the Attorneys-General underwent another radical transformation. The Attorneys-General Act No 92 of 1992 elevated Attorneys-General from the status of civil servants and gave them security of tenure.<sup>42</sup> They could be removed from office only with the consent of Parliament, and only on the grounds of misconduct, continued ill-health or if the incumbent was incapable of carrying out his or her duties efficiently.<sup>43</sup>

The Minister's power to interfere with an Attorneys-General's decisions was removed and the authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free of Ministerial interference. They were accountable only to Parliament, but only in the limited sense that Parliament could question them about their annual reports. The function of the Minister of Justice was therefore reduced to that of tabling the annual reports of the provincial Attorneys-General in Parliament. As regards how an Attorney-general performed his or her function, all that the Minister could require was that an Attorneys-General report to him on the handling of certain cases, not more.

Of course, the question that crops up is why was the law transformed so radically? Given the fact that this change was effected only two years after Nelson Mandela's release from prison and just two years before the holding of the first free democratic elections in South Africa, it would not be unreasonable to argue that the outgoing

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41 Horn (2008).

42 Sec 4 of the Attorney-General Act 92 of 1992 (hereafter Attorney-General Act).

43 Secs 3 and 4 of the Attorney-General Act.

*apartheid* government wished to insulate Attorneys-General once and for all against any potential interference in prosecutorial discretion by a prospective ANC government. The ANC viewed this move as an attempt by the old regime to protect the entrenched position of the incumbent Attorneys-General.<sup>44</sup> They believed that some of the Attorneys-General played a significant role in the aggressive prosecutions of political cases during the *apartheid* era.<sup>45</sup> This point of view is substantiated in the judgment of the Supreme Court of appeal handed down by Harms DP, which reads as follows:

‘The daunting prospect of the Minister of Justice, in the new South Africa, giving directions for prosecutions against the architects and executioners of the *apartheid* policy, galvanized the mostly white legislature to pass the Attorneys-General Act, No 92 of 1992, (the AG Act), in its death throes. The AG Act took away all political control over prosecutions ....Section 108(1) of the Interim Constitution repeated the notion of an absence of political interference, when it vested Attorneys-Generals with the power to institute prosecutions on behalf of the State.’<sup>46</sup>

The change brought about by the 1992 law remained in place until the adoption of the Constitution in 1996.

## **8. Conclusion on the pre-1994 status of the Attorney-General**

The historical review shows that throughout the successive colonial administrations and during *apartheid* era, the prosecution service was, except for the first 26 years into Union, not entirely free of political control. The lesson that can be drawn from this historical enquiry is that where the heads of prosecution services are aligned to the Executive, or where the line between the exercise of the prosecutorial function

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44 Keuthen (2007:11).

45 Keuthen (2007:11).

46 *Zuma v NDPP* [2009] 1 All SA 54 (N) at para 80.

and performance of executive duties overlaps, the image of justice is blemished and public resentment becomes manifest. The Attorney-General Act of 1992 made a significant break with the past and granted the prosecution services true independence to carry out their functions free from increased executive control. However, as indicated, the timing of the passing of the legislation – at the dawn of the democratic South Africa – made the sudden change of heart by the Nationalist government suspicious and resulted in the ruling ANC government’s denouncing of the Act, which is discussed in the next chapter.

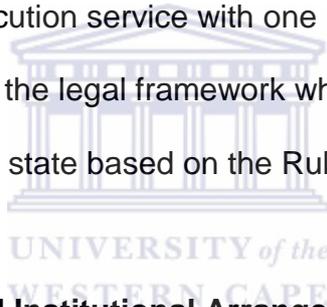


## CHAPTER 3

### The National Prosecuting Authority at Present

#### 1. Introduction

The adoption of the Constitution in 1996 brought about sweeping changes in the administration of criminal justice in South Africa. Fundamental changes had become necessary, not least because of the myriad of criminal justice systems that were spawned under the *apartheid* homeland policies, each with its own prosecution service and Attorney-General. The Constitution now makes provision for one criminal justice system, with one prosecution service with one National Prosecuting Authority (NPA). This chapter discusses the legal framework which establishes the NPA and its significance in a democratic state based on the Rule of Law.



#### 2. The Legal Framework and Institutional Arrangement regulating the NPA

##### 2.1 The broad provisions of the law

The NPA is governed by both the Constitution and the National Prosecuting Authority Act (NPA Act).<sup>47</sup> Section 108 of the Constitution provides for the establishment of a NPA under the direction of a National Director of Public Prosecutions (NDPP). The constitutional tenets governing the prosecution system were implemented through the NPA Act, which provides that the power to institute

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<sup>47</sup> NPA Act, 38 of 1998.

and conduct criminal prosecutions on behalf of the state, 'vests in the prosecuting authority.'<sup>48</sup>

### **3. Appointments of the NDPP and Directors of Public Prosecutions (NDPPs)**

The Constitution provides for the appointment of the NDPP by the President.<sup>49</sup> The President sets the remuneration and terms of service of the NDPP, and the NPA Act provides that the NDPP's salary must not be less than that of a High Court judge.<sup>50</sup>

The law provides that the NDPP shall hold office for a non-renewable term of 10 years but must vacate office at the age of 65.<sup>51</sup>

The President appoints also up to four deputy NDPPs, in consultation with the Minister of Justice and the NDPP. The deputy NDPPs serve until the retirement age of 65 and have considerable influence in ensuring continuity in the national office of the NPA. The NPA Act prescribes that the deputy NDPP's salary shall not be less than 85 per cent of the salary of the NDPP.<sup>52</sup> The person appointed as NDPP must be legally qualified to practice in South African courts and must be a fit a proper person, 'with due regard to his or her experience, conscientiousness and integrity....'<sup>53</sup>

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48 Sec 20 of the NPA Act.

49 Sec (179(1)(a).

50 Sec 17(1).

51 Sec 12(1).

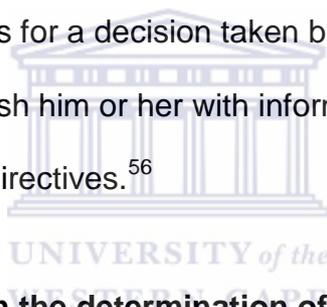
52 Sec 17(b).

53 Sec 9(a) and (b).

#### **4. The Relationship between the Minister of Justice and the NDPP**

In terms of the Constitution, 'the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.'<sup>54</sup> The Minister of Justice's role is confirmed by the NPA Act, which further provides that, when the Cabinet Minister exercises this final responsibility, he or she must do so in accordance with the Act.<sup>55</sup>

To enable the minister to exercise such final responsibility, the Constitution lays down that the Minister is authorised to request the NDPP to (a) furnish him or her information or a report relating to any case dealt with by the NDPP or a DPP; (b) provide him or her with reasons for a decision taken by the NDPP in carrying out the prosecutorial function; (c) furnish him or her with information regarding the prosecution policy and policy directives.<sup>56</sup>



##### **4.1 Ministerial involvement in the determination of the prosecution policy**

The Constitution directs that the prosecution policy must be determined by the NDPP *in consultation* (own emphasis) with the Minister and *after consultation* (own emphasis) with the Directors of Public Prosecutions (DPPs), of which there is one for each province.<sup>57</sup> The NDPP must adhere to the prosecution policy and the policy directives issued by him or her in the prosecution process. The NPA Act requires

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54 Sec 179(6).

55 Sec 33.

56 Sec 33(a) to (d).

57 Sec 21(1).

also that the NDPP, in consultation with the Minister and after consultation with the DPPs, frame a code of conduct which must be observed by members of the NPA.<sup>58</sup>

## **5. The NPA's and NDPP's Accountability to Parliament**

In terms of the NPA Act, the NPA is accountable to Parliament for its statutory powers and responsibilities, '*including its decisions regarding the institution of proceedings*' (own emphasis).<sup>59</sup> The NDPP must submit an annual report to Parliament. The report is tabled by the Minister.<sup>60</sup> From the above, it is clear that the NDPP's responsibility to the Minister, as political head of the Department of Justice and Cabinet member, is confined to furnishing him or her with information relating to cases dealt with by the NPA and to hand over to him or her the NPA's annual report.

## **6. Independence of the NDPP**

The Constitution and the NPA Act guarantee the independence of the NPA in regard to its performance of the prosecutorial function. Both the Constitution and NPA Act require also that the NPA do its work 'without fear, favour and prejudice' and subject only to the Constitution and the law.<sup>61</sup> This obligation was confirmed by the Constitutional Court in the certification of the Constitution in 1996. Again, both the Constitution and NPA Act prohibit and make it a crime for any person, politician and government official alike to interfere in the work of the NPA, including the decision to

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58 Sec 22(6).

59 Sec 35(1).

60 Sec 35(2).

61 Sec 179(4) of the Constitution and Sec 32(1)(a) of the NPA Act.

select which cases to prosecute and not to prosecute.<sup>62</sup> Such prohibition is in line with international standards<sup>63</sup> confirmed by the UN Guidelines and other international soft-law standards.<sup>64</sup>

Further protection for prosecutorial independence is found in section 22 (4) (f) of the Act, which requires the NDPP to bring the *United Nations Guidelines on the Role of the Prosecutors* to the attention of all prosecutors and to 'promote their respect for and compliance with [the Guidelines] within the framework of national legislation.'<sup>65</sup> These Guidelines mandate that '[i]n performance of their duties, prosecutors shall protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.'<sup>66</sup>

How the law and institutional arrangements function in practice is the subject of the next chapter, which addresses concretely whether the functional independence of the NDPP applies also in high-profile cases which are politically sensitive. However,

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62 See Sec 32(1) (b) of the NPA Act.

63 Redpath (2012:1).

64 *United Nations Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990). See also International Association of Prosecutors found at <http://www.iap-association.org/> (accessed on 15 November 2013).

65 Sec 22 the NPA Act.

66 Sec 13(b) of the United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990).

before going on to answer the question whether the legal provisions insulate the NPA against political interference, it is useful to compare first the manner in which the prosecution service is regulated structurally in three other common law jurisdictions. The comparison will limit itself to the theoretical basis on which the prosecution service in the compared countries is constructed. The countries chosen are Botswana, the United Kingdom (UK) and the United States (US).

The comparison is based on the founding legislation, mandate, appointment of the head of the agency, institutional and structural arrangement and the prosecutorial independence of the agency from the executive. These jurisdictions were chosen, first because they share a similar common law background with South Africa and second, on account of the fact that their adjective law derives from English law. A comparison of South Africa, Botswana and the US is significant also because all three countries were English colonies. It is, therefore, worthwhile to understand how in each country as strategic an entity as the prosecution service, which plays a crucial role in enforcing criminal laws authored by the politically powerful, has evolved in the post-colonial period. Furthermore, these jurisdictions, including South Africa's, will be tested against other international instruments regulating prosecutors and prosecution services. The chapter will end with a brief excursion into the soft law standards on the matter of prosecutorial independence.

## **7. The Situation of the Prosecution Service in Comparative Perspective**

### **7.1. The United Kingdom**

In the UK, the main public prosecution service, established in terms of the Prosecution of Offences Act of 1985, is the Crown Prosecution Service (CPS), which is headed by a Director of Public Prosecutions (DPP). The DPP is superintended by

the Attorney-General to whom he is accountable. The Attorney-General is, in turn, accountable to Parliament. The office of the Attorney-General is a Ministerial Department, which means the Attorney-General is effectively part of the Executive and is a member of Cabinet Committees.<sup>67</sup>

In the UK, the CPS is a non-Ministerial government department or agency. A non-Ministerial government department is a department or ministry of a government that is not headed by a Government Minister or Government Secretary, and answers directly to a legislature. Such departments are created to remove political interference in public affairs such as prosecution, charities, human rights and racial equality. They carry out executive functions as stipulated by the legislature. The head of the department is often appointed by a government Minister. In terms of this arrangement, the CPS' decisions whether to prosecute or not should be taken independent of any interference particularly by the executive. To this effect, the CPS has two policies to ensure its operational independence. These are the *Core Quality Standards*<sup>68</sup> and the *Code for Crown Prosecutors*.<sup>69</sup> However, only the Code is

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67 *The Governance of Britain: A Consultation on the Role of the Attorney General Cm 7192*

Presented to Parliament by Command of Her Majesty Xxxxx (2007) at 9.

68 The *Core Quality Standards* policy is akin to the Policing Pledge. It was launched when the Director of Public Prosecutions, Keir Starmer QC, publicly announced its introduction in 2009. available at

[http://www.cps.gov.uk/publications/core\\_quality\\_standards/preface\\_and\\_introduction.html](http://www.cps.gov.uk/publications/core_quality_standards/preface_and_introduction.html)

(accessed 15 December 2012).

69 The Prosecution of Offences Act 1985 mandates the DPP in Sec 10 to issue the Code for Crown Prosecutors to assist prosecutors in their decision-making function. See the Prosecution of Offences Act of 1985 and also the Code for Crown Prosecutors para 1.2.

issued by law.<sup>70</sup> The *Core Quality Standards* guides and protect prosecutors<sup>71</sup> in their decision-making function. It is a set of twelve standards which outline what the service does, how decisions are made, and the service that the public can expect.

The *Code for Crown Prosecutors* set out the basis upon which prosecutions are refused, discontinued or proceeded with. It provides that '[t]he DPP exercises his functions independently, subject to the superintendence of the AG who is accountable to Parliament for the work of the prosecution service.'<sup>72</sup> The Code emphasises that 'the independence of prosecutors is of fundamental constitutional importance.'<sup>73</sup> It states further that a case will only be prosecuted firstly, if there is sufficient evidence to provide a realistic prospect of conviction against each defendant on each charge, and secondly, if it is in the public interest to prosecute. For CPS to determine whether or not to charge a person on the basis of availability of evidence balanced with the public interests, the *Code for Crown Prosecutors* provides that the CPS must first decide, after evidence is gathered by the police, whether there is sufficient evidence for the case to be prosecuted. Officers provide

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70 The Code for Crown Prosecutors para 1.9.

71 The term 'prosecutors' in this Code, is used to describe members of the prosecution service who are designated as Crown Prosecutors; prosecutors who are members of the RCPO; Associate Prosecutors who are designated under Sec 7A of the Prosecution of Offences Act 1985 and who exercise their powers in accordance with the instructions issued by the DPP; and other members of the RCPO who are designated by the DPP in his capacity as the Director of the Revenue and Customs Prosecutions under section 39 of the Commissioners for Revenue and Customs Act 2005. See The Code for Crown Prosecutors para 1.3.

72 The Code for Crown Prosecutors para 1.1.

73 The Code for Crown Prosecutors para 1.5.

the prosecutor with the evidence gathered and although there may be a decision not to charge<sup>74</sup> at that stage, the prosecutor will assist the officer by explaining what additional work or evidence could raise the case to the required standard. If further evidence is not available, no further action may be taken against the suspect. However, even if there is sufficient evidence to prosecute, the Crown Prosecutors must still decide whether a prosecution would be in the public interest

## 7.2 United States

The US criminal justice system authorises that states may prosecute only crimes that are committed within their boundaries. Most significantly, most local prosecutors are elected to serve as the principal prosecuting authorities in their jurisdictions and are, accordingly, broadly responsible to the electorate for the effective enforcement of criminal law. In contrast, the prosecutorial power of the US government extends over the entire federation of the United States. All federal prosecutors are therefore part of the United States Department Justice, whose employees are all overseen by the Attorney General. The Attorney-General has the primary responsibility of conducting all litigation in the Supreme Court in which the US government is

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74 Charging decisions involve the prosecutor applying his or her knowledge of the law to the facts before them; in some cases there may be more than one criminal offence that applies to the circumstances of the case. In order to achieve consistency in the decision-making process, prosecutors refer to *Charging Standards* for offences, agreed between the CPS and Police. In addition, they may refer to current CPS policy and guidance on the prosecution of certain types of offences, such as domestic violence and hate crime available at

[http://www.cps.gov.uk/publications/core\\_quality\\_standards/preface\\_and\\_introduction.html](http://www.cps.gov.uk/publications/core_quality_standards/preface_and_introduction.html)

(accessed 15 December 2012).

concerned. He advises also on questions of law when required to do so by the President or when requested by the heads of any of the government departments.

The US Attorney-General serves as a member of the Cabinet. He is, therefore, also appointed by the President and confirmed by the Senate and can be removed by the President at any time. He accounts to the President. Below him in rank is the Deputy Attorney-General, followed by the Associate Attorney-General and the Solicitor-General, all of whom form the executive within the Office of the Attorney-General. Below them are the US Attorneys who reside within the DOJ. However, the AG does not have power to appoint the US Attorneys. This is still the prerogative of the President, with the confirmation of the Senate. US Attorneys are, therefore, also political appointees, although they are expected to serve impartially.

### **7.3 Botswana**

The Attorney-General's Chambers is an extra Ministerial department under the Office of the President and is headed by the Attorney-General (AG). In terms of Sec 51 of the Constitution the Attorney-General is the Principal legal adviser to the government. The Attorney General is also an ex-officio Member of Cabinet, and serves on various policy committees. Prior to the 2005 constitutional amendments, the Attorney-General was responsible for instituting and conducting prosecutions at the public instance. In 2005, the powers to prosecute were transferred to the Director of Public Prosecutions (DPP).<sup>75</sup> The DPP is supervised administratively by the Attorney-General. The DPP's independence is thus affected to the extent that he or

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<sup>75</sup> See Section 51A of the Constitution of Botswana of 1996 (as amended in 2006).

she is dependent for resources on the office of the Attorney-General, who also has the authority to authorise the budget of the DPP's office.<sup>76</sup>

Although section 51A (6) (a) of the Constitution states that the DPP 'shall not be subject to the direction or control of any other person or authority.' Subsection (b) has a sting in its tail in that it the DPP must consult with the Attorney-General in cases considered by the latter to be of national importance. However, there is no explanation of what is meant by 'of national importance.' What constitutes national importance is purely in the discretion of the Attorney-General.<sup>77</sup> The present DPP, Leonard Sechele, is of the view that the question of determining what is of national importance raises an important issue, namely: 'How is the Attorney-General to know a matter is of national importance before the DPP has instituted criminal proceedings?'<sup>78</sup> In practice, the process is started by the DPP, who prepares a summary of the case and then submits it to the Attorney-General for consultation. Sechele points out that for this arrangement to work, it is necessary that a mature relationship exists between the Attorney-General and the DPP, 'as the latter can frustrate determinations of whether a case is of national importance to be done [sic] before an institution of criminal proceedings.'<sup>79</sup>

It is still unclear whether or not the DPP's office is part of the Attorney-General's Chamber. The latter believes that this is the case, but the DPP disagrees. The DPP

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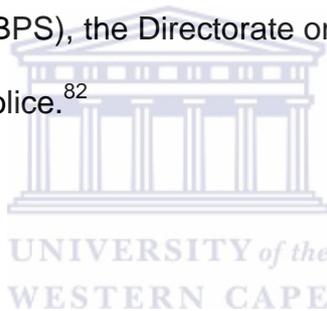
76 L B Sechele 'The Independence of the DPP (A Case of Botswana)' (Presentation by the Director of Public Prosecutions' at the Judicial conference held at Palapye 25-26 July 2013) at 4.

77 Sechele (2013:8).

78 Sechele (2013:7).

79 Sechele (2013:8).

insists that his independence is manifest in that his removal from office is the same as that of the removal of a judge's removal from office.<sup>80</sup> That is, it must be preceded by the investigation by a tribunal which then make recommendations to the president who, in turn, implements such recommendations. And this is despite the fact that the DPP IS a civil servant. However, this arrangement is not without complications. The inherent challenges are that the DPP's staff 'remains employees of the Attorney-General's Chambers and are appointed by the Attorney General. To this effect, the Attorney-General' also has power to decide whether or not to promotions the DPP's staff.'<sup>81</sup> In practice, and due to personnel shortages, most of the criminal prosecutions, except very serious cases, are delegated are delegated to the Botswana Police Service (BPS), the Directorate on Corruption and Economic Crime (DCEC) and the local police.<sup>82</sup>



## 8. Commentary

A common feature of the three common law jurisdictions compared is that, like South Africa, the head of the prosecution service of the country as a whole, is appointed by the political head of government. But unlike South Africa, where the political head of the Department of Justice is the Minister of Justice, in all three other countries it is the Attorney-General who heads up the Department of Justice, in addition to being a Government minister and a member of Cabinet. While in practice this model has

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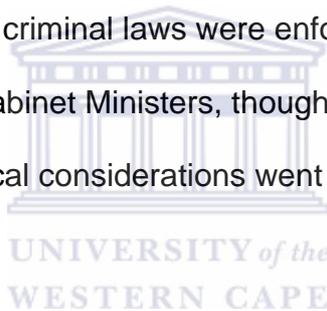
80 Sechele (2013:11-12).

81 Sechele (2013:13)

82 Attorney General's Chambers *Our History* available at

<http://www.landsandhousing.gov.bw/index.php/about-us/our-history.html> (accessed on 17 October 2015).

functioned over centuries, it is not without its problems, for it is hard to dispel the suspicion that in high-profile cases, political considerations do not impact on the decision whether or not to prosecute. As seen in the case of Botswana, although the DPP enjoys limitless prosecutorial freedom, the Attorney-General, a member of government, has a say whether a prosecution should go ahead in a case of national importance. South Africa has never subscribed to this model, except during the early Dutch period at the Cape and under the Boer Republics. Between 1926 and 1935, the Minister of Justice was also the chief Attorney-General of the Union of South Africa, but this arrangement was abandoned because the Minister found it onerous to perform both functions. Even during the *apartheid* era, when the regime had every reason to ensure that its racist criminal laws were enforced unflinchingly, the Attorneys-General were not Cabinet Ministers, though they were accountable to a Minister of Justice. What political considerations went into their appointment is another matter.



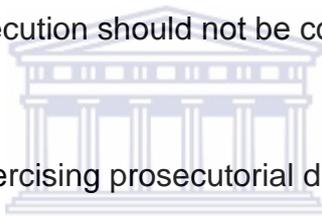
In comparison to the three other countries, the present South Africa set-up, according to which the NDPP does not account to the Minister of Justice, but to Parliament, makes the structure of South African prosecution service unique. The South African model thus differs radically from the classic Commonwealth model, as represented by the three common law countries used as comparators, in which Attorneys-General 'come and go with government.'<sup>83</sup>

But do these differences matter at all? This question cannot be answered in a straightforward 'yes' or 'no', needs to be answered in a differentiated way. The

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83 P S James *Introduction to English Law* 11th ed (London: Butterworths 1985) 56.

differences do not matter with regard to the prosecution of ordinary crimes. In such cases the decision whether or not to prosecute does not depend on the relationship between the country's chief of prosecutions and the government of the day. What is more, the decision not to prosecute someone caught shoplifting will hardly raise an eyebrow. Usually, where there is a *prima facie* case against the suspect, and there is sufficient evidence, a prosecution is instituted, whatever the jurisdiction. For example, the Prosecution Policy of South Africa's NPA states that, in deciding whether or not to institute criminal proceedings, the prosecutor must assess first 'whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.'<sup>84</sup>



WESTERN CAPE

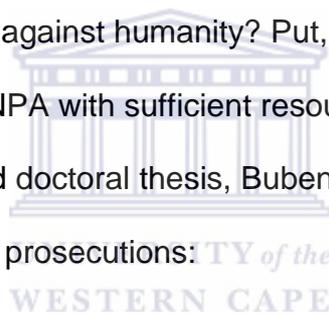
However, when it comes to exercising prosecutorial discretion in regard to high-profile, politically sensitive cases because prosecute in high-profile, politically sensitive cases, where the Attorney-General is a member of Parliament, or of the government Cabinet, the decision he or she takes with regard to whether or not to institute a criminal prosecution, is of huge public interest and subject to close public scrutiny. This is because of the closeness of the Attorney-General to the ruling political party. In the UK, for example, there have been several high-profile, politically sensitive cases in which the decision not prosecute has elicited much controversy.<sup>85</sup>

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<sup>84</sup> NPA *Policy Manual* para 4 at A3.

<sup>85</sup> See, for example, *Reform of the Office of Attorney General* House of Lords Select Committee on the Constitution 7th Report of Session 2007–08 at Paras 6-18. See also C Turpin Review of Jill J Edwards' *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell 1884) in (1985) 44 *Cambridge Law Journal* Review of Jill J Edwards' *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell 1884) 480 at 481.

In South Africa, it should not, in theory, the nature of the case should, in theory, not matter, for the NDPP operates outside Parliament and has no active role in it, except to report to it annually. Besides, nowhere does the law provide for political interference in the discretionary powers of the NPA; in fact, as noted above, the law criminalises such interference. Yet, despite these constitutional safeguards against political interference, there are worrying questions concerning the NPA's ability to act independently in politically sensitive cases. Why, for example, has the NPA failed to pursue the prosecutions of the hundreds of persons who were refused amnesty by the Truth and Reconciliation Commission (TRC) that looked into gross human rights violations perpetrated between 1960 and 1993, and this, despite South Africa's obligation to prosecute crimes against humanity? Put, differently, why has the government not provided the NPA with sufficient resources to pursue such prosecutions? In his published doctoral thesis, Bubenzer writes as follows with regard to the lack of post-TRC prosecutions:



‘The lack of a clear commitment and concentrated efforts after 1998 essentially reveal a lack of political will from the government to properly support post-TRC prosecutions....This lack of political will has found expression when the government intervened in a specific case and interrupted all proceedings for 13 months by imposing a moratorium without compelling reasons, thereby further delaying trials from taking place.’<sup>86</sup>

The same lack of political will is currently inhibiting the government from establishing a truly independent anti-corruption agency. The DPCI is still not complying with the court order to be properly insulated from political control. For the same reason the NPA is struggling to carry out its function free from political interference.

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86 O Bubenzer *Post-TRC Prosecutions in South Africa* (Leiden: Martinus Nijhoff 2009) at 230.

## 9. Conclusion

The various models discussed in this chapter present their own peculiar problems. The chapter has shown that whatever the relationship between the head of a country's prosecution service and the government of the day, the exercise of prosecutorial discretion does not mirror what the law envisages, for politics cannot be thought out of the equation. The next chapter pursues this subject with respect to concrete cases that have cropped up in South Africa.



## CHAPTER 4

### The Functional Independence of the NDPP

#### 1. Introduction

In terms of the constitution and the Act, 'independence' is fundamental in the NDPP's prosecutorial decision-making function. However, this is not always the case, particularly when it comes to high-profile and politically sensitive cases. This is revealed when tested against the corruption case of Jacob Zuma, in the main, and his associates. The case law that will be discussed in this chapter relates primarily to the court proceedings and judgments in the case of *Jacob Zuma and Others v the NDPP*, or alternatively, the *NDPP v Jacob Zuma and Others*.<sup>1</sup> This chapter will deal also with the legislation on the disbandment of the DSO or Scorpions and its incorporation into the South African Police Services (SAPS). This discussion necessarily entails a study of the case of *Glenister v the President of the Republic of South Africa and Others*, which deals with the issue whether the unit that succeeded the Scorpions, namely, the Directorate of Priority Crime Investigations (DPCI) can be said to be as independent as its predecessor.<sup>2</sup>

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1 *Thint Holding (South Africa) (Pty) Ltd v NDPP; Zuma v NDPP* 2008 (2) SACR (557) (CC), *Zuma and Another v NDPP and Others* 2006 (1) SACR 468 (D) and *Zuma v NDPP* 2008 HC (71) and *Zuma v NDPP* 2008 (2) SACR 421 (CC).

2 *Hugh Glenister v the President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 (17 March 2011). See also the NPA Amendment Act 58 of 2008.

Also included in the compass of this chapter, and worth an analysis, are the controversial decisions taken by the NPA on criminal matters involving high-profile politicians and business people associated with Zuma. These include prominent figures such as the former Crime Intelligence head, Richard Mdluli, the former Premier of Kwa-Zulu Natal (KZN), Zweli Mkhize, the former Speaker of the KZN provincial legislature, Peggy Nkonyeni, and KZN's provincial Member of the Executive Council responsible for economic development, Mike Mabuyakhulu.

## **2. The Zuma corruption case**

Jacob Zuma's corruption case has its origin in the acquisition by the South African government in 1999 of strategic armaments for the Department of Defence (commonly referred to as the 'arms deal'). But while the case originates from the arms deal, the charges against Zuma are not arms deal-related. In September 1999, the then Pan African Congress Member of Parliament, Patricia de Lille, alleged in Parliament that the procurement process was riddled with improprieties. In response to these allegations, in 2000 a Joint Investigation Team (JIT) made up of the Auditor-General, the Public Protector, the NPA and the Special Investigative Unit (SIU) (which was later withdrawn) was appointed by Parliament to investigate De Lille's claims. The JIT found no evidence of corruption in the ultimate selection of the bidders, but said that 'there may have been individuals and institutions who used or attempted to use their positions improperly, within government departments, parastatal bodies and in private capacity, to obtain undue benefits in relation to these packages....'<sup>3</sup> Based on this finding, the DSO extended its investigation into possible criminal conducts relating to the arms deal. During the course of this

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<sup>3</sup> L McCarthy's answering affidavit in *State v Zuma and Others* Case No CC358/05, para 15.7.

investigation the corrupt relationship between Zuma and Shaik was uncovered.

In 2002 it emerged during the investigations against Shabir Shaik, Zuma's financial advisor, that Zuma was not only corruptly linked to Shaik but also with his group of companies and his private dealings.<sup>4</sup> This was further confirmed by the discovery in 2001 of an encrypted fax indicating that Shaik and Zuma concluded an agreement with the French company Thétard to the effect that in exchange for his protection of the electronics manufacturer Thomson-CSF against the investigation into the arms deal and support and lobby for Thomson-CSF in future projects, Zuma would receive R500 000 per annum.<sup>5</sup> The existence of this agreement was revealed by Thétard's former secretary, Sue Delique, and also confirmed under oath by the auditors for Thomson-CSF, Arthur Andersen.<sup>6</sup> Despite these averments, in 2003, the then NDPP, Bulelani Ngcuka, took a decision not to prosecute Zuma together with Shaik because, according to him, there was no prospect of a successful prosecution.<sup>7</sup> In 2005 Shaik was found guilty on two counts of corruption and one of fraud related to the arms deal and sentenced to 15 years' imprisonment by the Durban High Court.

Following Shaik's successful prosecution and conviction, Ngcuka's decision not to prosecute Zuma was reviewed in 2005 by Pikoli, Ngcuka's successor. Pikoli reached the conclusion that there was indeed a reasonable prospect of a successful prosecution. His decision to prosecute was based solely on his objective

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4 McCarthy paras 31 and 32.

5 McCarthy para 22.

6 McCarthy para 20.

7 Bulelani Ngcuka's supporting affidavit in *State v Zuma and Others* CASE NO: CC358/05 para 30.

assessment of the admissible evidence that emerged in the Shaik trial, among others, and the strength of the prospects of a successful conviction.<sup>8</sup> These prospects were based, *inter alia*, on the Durban High Court's judgment on the merits that there was a mutually beneficial relationship between Zuma and Shaik and his business enterprises which bordered on corruption. Between 1994 and 1999 Shaik and his companies paid Zuma a total sum of R1 340 078, which escalated to more than R4 million in July 2005. In the *Shaik* case, the Court reasoned that:

[i]f Zuma could not repay the money, how else could he do so than by providing the help of his name and political office as and when it was asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from. And Shaik must have foreseen and, by inference, did foresee that if he made these payments, Zuma would respond in that way. The conclusion that he realised this, even if only after he started the dependency of Zuma upon his contributions, seems to us to be irresistible.<sup>9</sup>

Zuma was then charged with two counts of corruption in June 2005, but these charges were reversed by the North Gauteng High Court when it found, per Nicholson J, that there was political interference in the prosecution of Zuma.<sup>10</sup>

In 2009 Zuma was re-charged with 783 counts of corruption, fraud and racketeering. Throughout the time that he was being investigated, Zuma said that he was innocent, claiming that he was the victim of political conspiracy hatched by the then President Mbeki, together with Ngcuka, former Minister of Defence, Ronnie Kasrils, and the NPA in general. This conspiracy, he maintained, was aimed at destroying

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8 Vusi Pikoli's supporting Affidavit in *State v Zuma and Others* CASE NO: CC358/05 para 12.

9 McCarthy para 83.6.

10 *Zuma v NDPP (8652/08) [2008] ZAKZ HC 71* (12 September 2008).

his reputation, undermining his political position, and preventing him from becoming the President of South Africa.<sup>11</sup> He called for his day in court to clear his name. However, despite his protestations as to his innocence and his calling for his day in court, Zuma did everything possible to avoid going to court, and used whatever appropriate platform for him to clear his name and expose his detractors. Zuma's claims of a conspiracy being plotted against him were found to be baseless, as by the National Executive Committee of his own party, the ANC, could not provide evidence to support his claims.<sup>12</sup> Furthermore, Zuma declined an invitation to testify before the Hefer Commission of Inquiry into Allegations of spying against the National Director of Public Prosecutions, Ngcuka, where he could have substantiated his claims and possibly have put the matter to rest.<sup>13</sup>

Notwithstanding Zuma's failure to refute convincingly and publicly the validity of the charges against him, in 2009, the then acting NDPP, Mokotedi Mpshe, dropped the charges against Zuma, citing as his reason the fact that there had been 'collusion' between the former NDPP, Ngcuka, and former head of the Scorpions, Leonard McCarthy. He said that McCarthy had abused the legal process for purposes extraneous to the prosecution, before and after the ANC's elective conference in Polokwane in 2007.<sup>14</sup> At the time of writing, Mpshe's decision is being challenged in

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11 Maduna, paras 5, 7 and 12.

12 Ngcuka para 6.

13 Maduna para 10.

14 NPA's full statement on the dropping of corruption charges against Zuma available at <http://www.bing.com/search?q=NPA+full+statement+on+dropping+of+Zuma+charges&FORM=AA&RBLB&PC=MAAR&MKT=en-za> (accessed 11 March 2011).

court by the official opposition party in Parliament, the Democratic Alliance, for being irrational and unconstitutional.

### **3. How independent is the NPA of political interference?**

The primary shortcoming in the legal framework governing the NPA is that neither the Constitution nor the NPA is explicit about the independence of the NPA. In fact, there is nowhere in the Constitution and the Act where the word 'independent' or 'independence' in relation to the NPA is mentioned. It is merely implied thereby being 'read into' the law. The fact that the Constitutional Court in the *Certification of the Constitution* held that the provision of 'without fear, favour and prejudice' and subject only to the Constitution and the law in the legal framework is 'a constitutional guarantee of independence' for the NPA is clearly not enough to strengthen the safeguards that guarantee and protect the NDPP from victimisation if he strictly observes his oath of office.<sup>15</sup> Bennum regards this interpretation as a missed opportunity by the Constitutional Court to clarify this implicitly in the law.<sup>16</sup> In relation to the case *S v Zuma*, Bennum argues, correctly it is submitted, that the word 'independent' as applied to the NPA must be used in a qualified sense when compared to the independence enjoyed by the courts. The Constitution states expressly that courts are 'independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'<sup>17</sup>

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15 *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 146.

16 M Bennum (2009) In 'S v Zuma: the implications for prosecutors' decisions' (2009) 22 *South African Journal of Criminal Justice* (371-390) 378.

17 Sec 165(2) of the Constitution.

Equally, the absence of the word 'independent' in the NPA's founding laws modifies the degree of independence it enjoys if compared to the so-called Chapter Nine Institutions, amongst which are the Office of the Public Protector and the Auditor-General and the Electoral Commission. Of these institutions, the Constitutional language guaranteeing their independence is unambiguous and is almost identical to the independence that the Constitution envisages for the courts.<sup>18</sup>

The question on the independence of the NPA cannot be divorced from, or discussed without reference to the structural and functional relationship between the NPA and the Minister of Justice and Constitutional Development. The Constitution and the NPA Act place the Minister of Justice at the highest echelon of the NPA and empower him to exercise *final responsibility* over the NPA. The NDPP is obligated to 'furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions', while at the same time having to observe the principle of prosecutorial independence.<sup>19</sup>

What 'final responsibility' means is not clear. Attempts by the courts to clarify this Ministerial role have not helped either. In the case of *National Prosecuting Authority v Zuma*<sup>20</sup> the SCA stated that:

[a]lthough the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse

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18 See Sec 181(2) of the Constitution.

19 Sec 33(a) of the NPA Act.

20 *National Prosecuting Authority v Zuma* (2009).

public interest or involve important aspects of legal or prosecutorial authority.<sup>21</sup>

The right accorded the Minister is meant to enable him or her to exercise final responsibility, as contemplated by Section 179 of the Constitution. This, it stated, does not in any way mean the Minister is interfering with the prosecutorial function of the NPA.

This is paradoxical in that, first, the Minister may not exercise his final responsibility effectively without infringing on the prosecutorial function of the NPA, intentionally or unintentionally. For instance, it is unthinkable that the NDPP could include in his report to the Minister that he is planning to charge the Minister or have him arrested, or that he intends to do so with the President or a fellow cabinet member, without the Minister being tempted to halt such action, more so because the NPA's prosecutorial independence is merely implied and not expressly defined in the Constitution.

A case in point is that of the former Minister of Justice, Bridget Mabandla, who interfered with Pikoli's prosecutorial discretion. She did through the letter in which she instructed Pikoli to stop the prosecution of former Police Commissioner, Jackie Selebi. The Minister ignored the fact that she lacked the 'effective political oversight responsibility in respect of the law enforcement elements of the work of the DSO.'<sup>22</sup> The Minister acted contrary to the Constitutional Court's ruling during the Certification of the Constitution and in spite of the fact that interference in the work of the NPA is punishable by law. The Ginwala Commission Report found that the

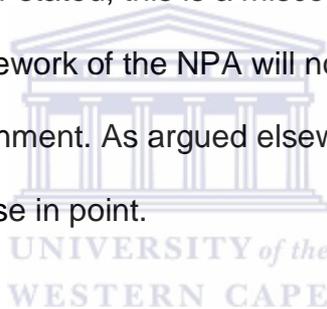
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21 *National Prosecuting Authority v Zuma* 2009 2 SA 277 (SCA) para 32.

22 Khampepe Commission Report (2006)132.

Minister's conduct had in fact breached section 32(1)(b) of the NPA Act, but she was never prosecuted.<sup>23</sup> Instead, Pikoli was dismissed for upholding the law and oath of his office.<sup>24</sup>

One of the possible reasons for not making the NPA independent, according to Mokoena, is that a wholly independent prosecutorial authority 'may become a vehicle for institutional oppression, if left unchecked by regulation and legislation, as evidenced in the Italian example.'<sup>25</sup> But on the other hand, 'democratic or hierarchical control' of the prosecution is an untenable alternative, especially when such control is imposed in order to exert influence on individual decisions on whether or not to prosecute.<sup>26</sup> As earlier stated, this is a misconception. Inserting the word 'independent' in the legal framework of the NPA will not make it wholly independent or autonomous from the government. As argued elsewhere in this thesis, the Chapter 9 Institutions are a case in point.



### **3.1 The role of Minister of Justice**

The NPA Act provides that the NDPP must, in accordance with section 179(5) of the Constitution, determine the national prosecution policy with the concurrence of the Minister of Justice.<sup>27</sup> This means that the Minister must agree with content of the prosecution policy before it is made public. However the phrase 'in concurrence'

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<sup>23</sup> Sec 32(1)(b) of the NPA Act.

<sup>24</sup> Tamukamoyo and Mofana (2013).

<sup>25</sup> MT Mokoena 'Taming the Prosecutorial Beast: of Independence, Discretion and Accountability' (2012) 2 *Stellenbosch Law Review* 297 at 303.

<sup>26</sup> Mokoena (2012:303).

<sup>27</sup> Sec 179(5) of the Constitution.

could also be interpreted in a way that suggests that the NDPP has an equal say as the Minister in matters relating to the prosecution policy. Wolf concurs with the view that the phrase 'in concurrence' with the Minister 'does not signal a relationship of subordination typical of an internal executive hierarchy.'<sup>28</sup> He contends that if the NDPP was meant to have a lesser say on the prosecutorial policy, the law would have been worded in a way which ensured this hierarchical status. For example, the wording in the law would have been that the Minister determines the prosecution policy 'in consultation with' or 'on the advice of' the NDPP. Based on the above, Wolf correctly concludes that, 'this can mean only that the prosecuting authority was conceived as a state organ in its own right and not as a part of the executive.'<sup>29</sup> But presently, the NPA is seen by the executive as being part of it and subservient to it.

### **3.2 The relationship between the NPA and the executive**

The Constitutional Court has made it clear that the NPA is not part of the judiciary, for public prosecutions are not a judicial function. The Court held that '[i]n any event, even if it were part of the Judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers.'<sup>30</sup> That the NPA is part of the executive is confirmed by Horn who states as follows:

'If the prosecutorial function of the state is not part of the judicial functions, and the NDPP is appointed by the South African president as head of the national executive,

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28 L Wolf (2011) 'Pre-and Post-Trial Equality in criminal justice the context of the separation of Powers' (2011) 14 *PER / PELJ* 74.

29 Wolf (2011:74).

30 *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 141 G.

there can be no doubt where the prosecutorial function of the state fits into the puzzle of the three powers of the state: prosecution is part of the executive functions.<sup>31</sup>

Consequently, not only the Minister but even the Presidents construes the prosecuting authority, by virtue of it being part of the Executive, to be performing administrative powers whereas it is in fact responsible for criminal justice.<sup>32</sup> This is clearly demonstrated in the cases involving politically and economically well-connected persons.<sup>33</sup> Former President Mbeki justified the suspension of Pikoli from office with the argument that there was a 'break-down of relations' between him and the justice Minister.<sup>34</sup> This is clearly not one of the grounds for the suspension and / or removal of the NDPP from office as envisaged by section 6(a) (i) to (iv) of the NPA Act.<sup>35</sup> It is normally a ground for dismissing only a director-general of a state department, who is a political appointee.<sup>36</sup> President Zuma also regards the prosecutors as being part of the executive branch, which must take orders from the executive.<sup>37</sup> In fact, Simelane, the former NDPP who was later dismissed from office, confessed that 'he did not believe that the NPA should be independent from the executive' and therefore that it should be subject to executive orders.<sup>38</sup>

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31 N Horn (2008:129).

32 Wolf (2011:59).

33 Redpath (2012:3).

34 Ginwala Commission Report para 11.1.

35 Sec 6(a)(i) to (iv) of the NPA Act.

36 See Wolf (2011:75).

37 News24 (2009-12-14) available at <http://www.news24.com/SouthAfrica/News/Government-is-NPAs-boss-Zuma-20091214> (accessed 15 July 2011).

38 Hlongwane S `Government finally drops Menzi Simelane for good' *Daily Maverick* 06 December 2012, <http://www.dailymaverick.co.za/article/2012-12-06-government-finally-drops-menzi-simelane-for-good/#.UjMipZYaLIU> (accessed 7 May 2013).

The danger with these misconceptions by both the executive and the prosecutors is that it provides a fertile ground for the ineffectiveness of, *inter alia*, key safeguards for the independence of the NPA. One of them is the provision that:

‘[s]ubject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.’<sup>39</sup>

This includes, primarily, the decision to select which cases to prosecute and not to prosecute, once prosecution is in progress, to discontinue any criminal proceedings.<sup>40</sup>

In *Democratic Alliance v The President of the RSA & Others*, the Supreme Court of Appeal said in its judgment that the realisation of the independence of the NPA as contemplated in the Constitution and the Act depends on the quality and integrity of the NDPP who serves as the conduit of the essence of the Act.<sup>41</sup>

It is clear that, the lawmakers did not find it easy to maintain consistency in ensuring the independence of the NPA from the executive inasmuch as ensuring some degree of oversight by the executive over the NPA. Section 179(6) contains an ambivalent provision that the Minister of Justice is ‘responsible for the administration of justice’ and ‘must exercise final responsibility over the prosecuting authority.’ In light of this provision, the NPA’s independence is merely functional, i.e. functional independence, since it is part of the executive branch of government. This is confirmed by Ngcobo CJ who concludes in the minority judgment that Sub-sections

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39 Sec 20(1)(c) of the NPA Act..

40 Sec 32(1)(b) of the NPA Act

41 See *DA v President of South Africa* (263/11) [2011] ZASCA 241 (1 December 2011).

(4) and (6) of section 179 do not intend prosecutors to be independent in a manner similar to that of judges.<sup>42</sup>

Judicial independence has to do with keeping the judiciary institutionally away from the other branches of government. Prosecutorial independence, on the other hand, has to do with the NPA being part of the executive institutionally, as is the situation at present in terms of the NPA Act, but must be accorded the independence to decide whether or not to prosecute. This decision has to be guided by the Constitution, the NPA Act, and the prosecution policy.

Judges are appointed by the President following recommendations from the Judicial Service Commission (JSC), while the NDPP is appointed directly by the President.<sup>365</sup> The JSC is chaired by the Chief Justice. It consists of the Chief Justice, one Judge President, two practising attorneys, two practising advocates, one teacher of law, six members of the National Assembly, four permanent delegates to the National Council of Provinces (NCOP), four members designated by the President as head of the national executive, and the Minister of Justice and Correctional Service. The practising attorneys and advocates and the teacher of law are designated by their respective professions; the Judge President is designated by all the Judges President; at least three members of the National Assembly must come from opposition parties.<sup>43</sup> The four delegates of the NCOP must be supported by the vote of at least six of the nine provinces. The four presidential appointments are made after consultation with the leaders of all the parties in the National Assembly.<sup>44</sup>

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42 See also Wolf (2011:75).

43 Sec 178(i) of the Constitution.

44 Sec 178(i) of the Constitution.

### 3.3 Appointment of the NDPP

The CC approved the provision in the constitution that empowers the president to appoint the NDPP. In so doing, the court, in effect, failed to acknowledge the fact that one state organ can indirectly control another through making such appointments and thus compromise the independence of such appointee<sup>45</sup> and eventually the NPA.

The constitution also provided (in section 179) the president and the executive with a passage to appoint in key positions of the NPA people who clearly do not have the necessary requirements as contemplated by the law, often with questionable integrity in the society. These people have often been pliable and tended to work hard in protecting corrupt politicians and their associate criminals from prosecution in apparent breach of their oath of office without any consequences. One such appointment, as earlier mentioned, is that of Simelane. His appointment was made despite the fact that the Ginwala Commission Report had earlier criticised him sharply for his disgraceful conduct and for the testimony he gave before the Commission, which it describes in its report 'highly irregular.'<sup>46</sup> The Public Service Commission (PSC) subsequently recommended that Simelane face a disciplinary hearing.<sup>47</sup> The PSC's recommendation was supported by the former Minister of Justice, Enver Surty, but controversially withdrawn in November 2009 through the intervention of the then Minister of Justice and Constitutional Development, Jeff Radebe and President Zuma. The latter and Radebe deliberately and conveniently

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45 Wolf (2011:76).

46 Ginwala Commission of Enquiry, para 43.2.

47 Redpath (2012:17).

ignored all the concerns raised both in the media and by opposition parties in Parliament and went ahead to appoint Simelane as the NDPP. Clearly, if Zuma was looking for a suitable person, as contemplated in the Constitution and the Act, why did he appoint as NDPP a person who had been discredited by the Ginwala Commission and instead jettison Pikoli who was found by the same commission to be a man of integrity, suitable, fit and proper to hold the office of the NDPP?

Simelane's appointment was eventually nullified by the SCA in 2011 in whose judgment both President Zuma and Minister Radebe were harshly criticised for mishandling Simelane's appointment.<sup>48</sup> However, at the time he was dismissed, Simelane had already done more damage to the NPA than good. For instance, during his tenure he forced Hofmeyr, 'one of the country's most powerful corruption fighters' to quit one of the two jobs he occupied as head of both the Asset Forfeiture Unit (AFU) and the Special Investigations Unit (SIU).<sup>49</sup> He also redeployed prosecutors Andre Lamprecht (Chief State Prosecutor of the West Rand to the lower court)<sup>50</sup>, Mutuwa Nengovhela (Deputy Director at the Johannesburg High Court and now moved to the family court)<sup>51</sup>, Retha Meintjies (chief state prosecutor to the family court) and George Baloyi<sup>52</sup> (chief state prosecutor to the

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48 See *DA v President of South Africa* (263/11) [2011] ZASCA 241 (1 December 2011).

49 N Davids and P Nombembe 'Simelane guns for crime buster Hofmeyr', available at <http://mybroadband.co.za/vb/showthread.php/224314-Simelane-guns-for-crimebuster-Hofmeyr> (accessed 2 July 2011).

50 M Mataboge 'Simelane: I helped get Jub Jub bail' available at <http://mg.co.za/article/2010-04-01-simelane-i-helped-get-jub-bail> (accessed 2 July 2011).

51 Mail & Guardian Staff Reporter, 'NPA defends the reshuffling of prosecutors' available at <http://mg.co.za/article/2010-03-30-npa-defends-reshuffling-of-prosecutors> (accessed 2 July 2011).

52 Lamprecht, Baloyi and Pretoria High Court advocate Retha Meintjies have since challenged their

family court). He further demoted Andre Loubser<sup>53</sup> from the position of chief prosecutor for the northern KZN to that of a normal prosecutor in the Pietermaritzburg Magistrates' Court.<sup>54</sup> He blocked Hofmeyr's AFU from implementing a preservation order to freeze £437 594 (pounds sterling) in one overseas bank account of Fana Hlongwane, known for his association with the arms deal mentioned above.<sup>55</sup>

In 2011 Zuma appointed Nomngcobo Jiba as an Acting NDPP to succeed Simelane. As in the case of Simelane, Jiba was appointed despite the damning allegations against her to the effect that she had misused her powers in an attempt to undermine the corruption investigation of the former police commissioner, Jackie Selebi.<sup>56</sup> Jiba was suspended for her conduct but later reinstated after charges against her were withdrawn for unknown reasons.<sup>57</sup> The charges against her were withdrawn after she allegedly 'made representations to Minister Radebe.'<sup>58</sup> Neither the Constitution nor the Act allows the Minister of Justice to take representations from any person being investigated by the NPA for crime. For Radebe to administer

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redeployment through the union. See N Davids and P Nombembe 'Simelane guns for crime buster Hofmeyr.' Sunday Times 4 April 2010.

53 Loubser died of heart attack just days after he had been demoted. See Broughton T 'Demoted' Prosecutor dies suddenly' available at <http://www.iol.co.za/news/south-africa/demoted-prosecutor-dies-suddenly-1.479155#.Uw5XsvBWHIU> (accessed 2 July 2011).

54 See Davids and Nombembe (2010).

55 Davids and Nombembe (2010).

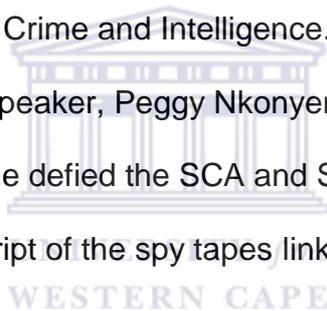
56 Tamukamoyo and Mofana 'A Justice system let down' *City Press* 28 May 2013 31.

57 Tamukamoyo and Mofana (2013).

58 A Basson 'The ties that bond' *City Press* 2 June 2013 31.

this illegal act clearly contravened section 22(2) (c) of the Act that provides that only the NDPP can receive such representations from the person being investigated and affected by such investigation in the process of reviewing a decision whether or not to prosecute.<sup>59</sup> But neither Radebe nor Jiba were prosecuted for this breach. Instead, charges against Jiba were withdrawn.

The negative impact of this manoeuvring by the Minister on the NPA is clearly reflected on Jiba's dismal performance during her tenure as an Acting NDPP. It was Jiba who suspended the Cape Town public prosecutor, Brytenbach, and subjected her to a malicious disciplinary hearing for, *inter alia*, pursuing the prosecution of Richard Mdluli, Head of Police Crime and Intelligence. Jiba also withdrew charges against provincial legislature Speaker, Peggy Nkonyeni and Economic Development MEC, Mike Mabuyakhulu.<sup>60</sup> She defied the SCA and South Gauteng High Court<sup>61</sup> orders to hand over the transcript of the spy tapes linked to the arms deal to the



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59 Sec 22, Powers, duties and functions of National Director (2) In accordance with Sec 179 of the Constitution, (c) the National Director-may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director, of the accused person, the complainant and any other person or party whom the National Director considers to be relevant.

60 SAPA 'Mkhize remains mum on charge withdrawal in Intaka case' available at <http://mg.co.za/article/2012-08-18-mkhize-remains-mum-on-charge-withdrawal-in-intaka-case> (accessed 29 July 2013).

61 DA wants Jiba held in contempt for failing to hand over Zuma spy tapes, available at <http://www.citypress.co.za/politics/da-wants-jiba-held-in-contempt-for-failing-to-hand-over-zuma-spy-tapes/> available at (accessed 20 June 2013).

opposition party, the Democratic Alliance.<sup>62</sup> Under her leadership the NPA has lost a number of high profile cases in which judges and magistrates were critical about the ill-preparedness of the prosecution.<sup>63</sup> This is partly because inexperienced prosecutors were assigned to handle complex cases at the expense of the experienced ones. During Simelane's tenure as NDPP the morale in the NPA was alarmingly low.<sup>64</sup> The lack of moral also had the effect of reducing the conviction rates during Simelane's incumbency.<sup>65</sup>

When the SCA nullified Simelane's appointment, the then Minister Radebe, approached the Constitutional Court in an attempt to keep him in his position. He and Simelane contended that the provision in the NPA Act requiring the appointment of 'a fit and proper person, with due regard to his or her experience, conscientiousness and integrity' as NDPP, is not an objective standard and affords the President a wide discretion to decide for himself whether an appointee is fit and proper or not. This contention was flatly rejected by the Constitutional Court. In another case, Mpshe who, in 2009, withdrew all the corruption charges against

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62 DA wants Jiba held in contempt for failing to hand over Zuma spy tapes, available at

<http://www.citypress.co.za/politics/da-wants-jiba-held-in-contempt-for-failing-to-hand-over-zuma-spy-tapes/> (accessed 20 June 2013).

63 Bulelani Ngcuka 'Spy tapes: NPA boss lied' *Sunday Times* 5 October 2014 1. See also

Brytenbach: Nxasane is being targeted.

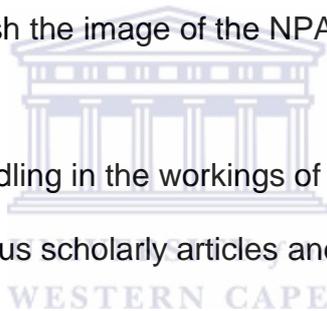
64 S Pityana 'Liberate public prosecution from politics' *Sunday Times* July 14 2013 21.

65 *Mail & Guardian* 'Jiba: NPA is above politics' SAPA available at <http://mg.co.za/article/2012-11-20-jiba-mpa-is-above-politics> (accessed 25 January 2013) and Evans S, 'NPA loses high profile case....against itself' available at <http://mg.co.za/article/2013-05-28-00-mpa-comes-under-attack> (accessed 25 January 2013).

Zuma, was rewarded with a high position in the criminal justice system when he was appointed acting judge in the North West High Court.

All the power abuses discussed above are the direct consequences of the provisions of section 179 (a), empowers the president and the executive to appoint and remove the NDPP and other prosecutors from office. And as highlighted above, this section seems to have, more often than not, been used coincidentally to weaken rather than strengthen the independence of the NPA. Since Pikoli's dismissal the NPA has been unable to recover from the perception that it is politically manipulatable. So far, Zuma has consistently appointed as NDPP persons with questionable backgrounds, which has served only to tarnish the image of the NPA even more.<sup>66</sup>

The damage that political meddling in the workings of the prosecution service has caused is documented in various scholarly articles and commentaries.<sup>67</sup> And since



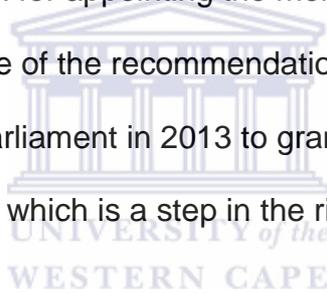
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<sup>66</sup> See also P De Vos 'No one is above the law', who wrote at the time that 'an editorial in Business Day this morning notes that President Jacob Zuma has acted consistently" to draw around him an iron ring of men he relies on to keep him safe. South Africa and its interests are not part of this particular calculation. The fact that the fraud and corruption charges against him, expediently dropped before the last general election, could quite easily be resuscitated is at the center of everything he does.' Part of this pattern was the appointment, early in his tenure as President, of Adv. Menzi Simelane as NDPP. The abolition of the Scorpions and the creation of the far less independent Hawks can similarly be seen as an attempt to protect the President from future prosecution for taking a bribe from fraudster Shabir Shaik.

<sup>67</sup> See for instance, 'Brytenbach's return spells trouble to Zuma's NPA cohorts' *Mail & Guardian* 31 May to 6 June 2013 2; A Saba, C Du Plessis and P Harper 'It started with Vusi' *City Press* 2 June 2013 4; Basson (2013).S Sole 'Jacob Zuma's decade of destruction' *Mail & Guardian* available at <http://mg.co.za/print/2012-11-02-00-jacob-zumas-decade-of-destruction> (accessed 2 June 2013);`

the public does not have the collective courage and means to challenge these abuses of power by the President and the executive the few individuals and organisations such as the Council for the Advancement of the South African Constitution (CASAC), Democratic Alliance (DA), Freedom Under Law (FUL) and Hugh Glenister, who is currently championing this cause, may not always be there or in a position to intervene through court challenges to preserve the constitution and uphold the rule of law.<sup>68</sup>

It was on account of the threat posed by political machinations to the independence of the Chapter institutions, that a committee headed by former Minister Kader Asmal urged reform of the mechanism for appointing the members of these independent bodies.<sup>69</sup> And as a result of one of the recommendations made, the then Minister Radebe tabled proposals in Parliament in 2013 to grant the NPA financial autonomy from the department of justice, which is a step in the right direction.<sup>70</sup>



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Editorial: Justice meddling simply criminal' *Mail & Guardian* available at <http://mg.co.za/print/2013-05-24-00-editorial-justice-meddling-simply-criminal> (accessed 2 June 2013). See also M Moshoeshoe 'NPA denting justice system's credibility' available at <http://www.iol.co.za/sundayindependent/npa-denting-justice-system-s-credibility-1.1493860#.UZ5VgpYaLIU> (accessed 20 April 2013); Serjeant at the Bar 'NPA's defiance shows institutional disrespect for law' available at <http://mg.co.za/print/2012-11-09-00-npas-defiance-shows-institutional-disrespect-for-law> (accessed 17 January 2013) and SAPA 'Radebe 'satisfied' the NPA is doing a good job' found at <http://mg.co.za/print/2013-05-29-radebe-full-jails-a-sign-the-mpa-is-working> (accessed 23 April 2013).

68 *DA v President of South Africa* (263/11) [2011] ZASCA 241 (1 December 2011).

69 Pityana (2013:21).

70 Pityana (2013:21).

### 3.4 Presidential abuse of appointing powers

In its 15 years of existence the NPA has had five NDPPs and three acting DPPs. In July 2015 President Zuma appointed the fifth NDPP, Shawn Abrahams. This high fluctuation of key personnel in the NPA is worrying, for it undermines the effective administration of justice by eroding the predictability of the criminal process. Redpath interprets the high personnel turnover as a symptom of how the NPA has become embroiled in political events which, in turn, affects its independence in the eyes of the public.<sup>71</sup> It shows, too, that the security of tenure provided for in the Act is not enough to safeguard the independence of the NDPP and other high functionaries within the NPA., De Vos, cited in Bauer argues that, '[w]here a person is not appointed for a fixed term they may be perceived as [being unprotected] and would make decisions to secure the permanent job instead of making decisions without fear, favour or prejudice.'<sup>72</sup> The fact of the matter is that anyone who acts in a position does not enjoy the same protection as a confirmed NDPP. Someone who acts in such a position is more vulnerable to political pressures and manipulation as he or she can be removed at any time without following the stringent procedure prescribed in the NPA Act. The government that is willing and committed to respect and safeguard the independence of the NPA as required by the Constitution would avoid removing its NDPP without valid legal reasons.

The delay in appointing a permanent NDPP after Simelane is a striking example of how President Zuma placed personal consideration before national interests,

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<sup>71</sup> Redpath (2012:7).

<sup>72</sup> N Bauer 'Jacob Zuma's legal dawdling bodes ill' found at <http://mg.co.za/article/2013-03-25-00-jacob-zumas-legal-dawdling> (accessed 23 May 2013).

notwithstanding the constitutional imperative spelled out in section 237 of the Constitution that '[a]ll constitutional obligations must be performed diligently and without delay.'<sup>73</sup> Zuma's procrastination in appointing a permanent NDPP contradicted his justification for rushing the appointment of Simelane whilst the litigation between Pikoli and the state was still underway – at a time when Pikoli was still legally the NDPP. Zuma substantiated the need for a speedy appointment on the grounds that 'it was undesirable to continue to have an Acting NDPP performing the important functions of the NDPP.'<sup>74</sup> But for as long as Jiba, in her acting capacity, abused her position to pander to the personal interests of Zuma, he did not perceive the need to make a permanent appointment to the office of the NDPP. Indeed, Zuma succeeded in buying time to keep Jiba in the post for almost 30 months to the detriment of the prosecution services.



### **3.5 Executive appointment of prosecutors**

The executive hand in the control of the NPA does not begin and end with the appointment of the NDPP and acting NDPP; it goes further to the appointment of senior prosecuting staff. The President and the Minister of Justice make most of the appointments. The President appoints up to four deputy NDPPs, after consultation with the Minister of Justice and the NDPP.<sup>75</sup> It is these powers that President Zuma used to appoint, largely for political considerations, Simelane as the Deputy Director in 2010, and few months later, elevate him to the NDPP position. The damage he

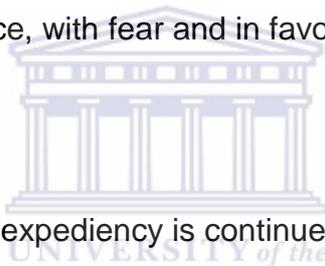
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<sup>73</sup> Sec 237 of the Constitution.

<sup>74</sup> *Pikoli v President of the Republic and Others* CASE NO: 8550/09 (11/08/2009) (accessed 1 January 2012). See also Ngalwa S 'Zuma on horns of NPA dilemma.'

<sup>75</sup> Sec 11(1) of the NPA Act.

has done to the integrity of the NPA is well documented. And it is widely argued, and correctly so, that the reason why the President and his executive side-stepped the law in the appointment of Simelane, were the reasons for which he was appointed. These reasons were to ensure that the corruption charges against President Zuma are not reinstated. He did this by frustrating the DA's court challenge for the review of the NPA decision to withdraw charges against him (Zuma).<sup>76</sup> And indeed, Simelane did well in this regard when he, among other things, blocked the AFU from attaching Hlongwane's assets, which had the effect of shielding the links of Zuma and a few other ANC leaders to the arms deal corruption. This is a clear abuse of power and it serves no other purpose than to erode the independence of the NPA, ensure it operates with prejudice, with fear and in favour of narrow personal and political interests.



This abuse of NPA for political expediency is continued under the leadership of Jiba. Her suspension of Advocate Brytenbach, the regional head of the Specialised Commercial Crimes Unit (SCCU), is an undisputable example. Brytenbach was suspended on 30 April 2012 after she submitted memorandum to the Acting NDPP, Jiba, motivating for the reinstatement of charges against Mdluli.<sup>77</sup> This was after her first efforts to prosecute Mdluli were thwarted by Lawrence Mrwebi<sup>78</sup>, the national

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76 'Brytenbach's return spells trouble to Zuma's NPA cohorts' *Mail & Guardian* 31 May to 6 June 2013 and Basson (2013:31).

77 Basson (2013:31).

78 Now suspended and being tried by the Gauteng High Court for, among other things, fraud and alleged murder in 1999 of his former lover Ramogibe's boyfriend. See Mdluli in court again for fraud charges available at <http://www.news24.com/SouthAfrica/News/Mdluli-in-court-again-for-fraudcharges-20141007> (accessed 13 October 2014).

head of the SCCU. But the NPA, in justifying her suspension, spuriously accused her of, *inter alia*, showing bias towards Kumba Iron Ore in the Imperial Crown Trading<sup>79</sup> / Sishen mining rights case in Kimberley.<sup>80</sup> Brytenbach consistently argued that ‘there was gross abuse of power in pursuit of political interests and thereby undermining the very principle that underpins prosecutorial independence – to prosecute without fear, favour or prejudice.’<sup>81</sup> She maintained her innocence and claimed she was being hit by trumped-up charges to distract her from prosecution of President Zuma’s friend, Richard Mdluli.<sup>82</sup> Brytenbach’s legal team stated in their final heads of arguments that ‘[t]his is not an ordinary disciplinary enquiry. It concerns a conflict between a prosecutor who has acted with integrity and courage in the performance of her functions without fear, favour or prejudice, and some of her superiors bent on subverting the rule of law by protecting a senior police officer from prosecution. It therefore also concerns the public interest in the vindication of the rule of law.’<sup>83</sup>

Despite the NPA’s counterfeit claim, Brytenbach has, after more than a year, been cleared of all the 15 charges levelled against her. Advocate Selby Mbenenge, the

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79 The Imperial Crown Trading had close ties with then-president Kgalema Motlanthe’s partner, Gugu Mtshali, who was later joined by Atul and Ajay Gupta and President Jacob Zuma’s son Duduzane as shareholders. See S Evans ‘Brytenbach disciplinary hearing digs up mine dirt’, available at <http://mg.co.za/print/2013-01-18-00-Brytenbach-disciplinary-hearing-digs-up-mine-dirt> (accessed 2 June 2013).

80 M Wiener ‘Analysis: After NPA’s epic loss, Glynnis Brytenbach must return to ALL her cases’ found at <http://www.dailymaverick.co.za/article/2013-05-28-analysis-after-npas-epic-loss-glynnis-Brytenbach-must-return-to-all-her-cases/#.Uash3JYaLIU> (accessed 2 June 2013).

81 Wiener (2013).

82 Wiener (2013).

83 Wiener (2013) (own emphasis).

NPA-appointed chairperson of the disciplinary hearing, found that '[i]n all these circumstances, the guilt of the employee on this plethora of charges has not been proven.' According to Trengrove SC, Brytenbach's lawyer, Brytenbach's victory 'was so important for Glynnis personally and so important for the preservation of the rule of law.'<sup>84</sup> Mike Hellens SC's reaction was that he 'would hope that the judgment in this matter would be the turning point and the beginning of the restoration on behalf of the public in confidence in the objectivity of the criminal justice system and the NPA.' Putting it differently, 'had it gone the other way and permanently remained so, it would have been a very, very sad day for the public's expectation of objective justice at the hands of the National Prosecuting Authority.'<sup>85</sup>

Brytenbach's revelation during the hearing that there is abuse of power and political interference in the NPA has badly dented the country's criminal justice system in the opinion of the public. Despite the fact that Mbenenge did not make a direct finding on these claims, Brytenbach's victory in this hearing give credence to this claim.

Wiener<sup>86</sup> analysed this situation as follows:

'The faith of the people is in doubt and as Lord Chief Justice Gordon Hewart said from the King's Bench in *Rex v. Sussex Justices ex parte McCarthy* in 1924, "Not only must

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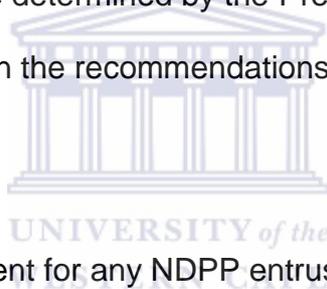
84 'An interview with Wim Trengrove' *Sunday Times* 2 June 2013 12.

85 Mike Hellens SC was central to the complaint laid against Brytenbach and also acted for Kumba Iron Ore in the ICT / Sishen matter. He was accused during the hearing of having an improper relationship with Brytenbach, the allegation both of them denied. See Wiener M 'Analysis: After NPA's epic loss, Glynnis Brytenbach must return to ALL her cases.'

86 Wiener is an Eyewitness News reporter. She has been following Glynnis Brytenbach's case since she was suspended in 2012 and co-authored "*My Second Initiation*" book with Pikoli which was launched in October 2013.

justice be done; it must also be seen to be done.” It is a firm precedent in law that the mere appearance of bias is sufficient to overturn a decision.<sup>87</sup>

The President may also, through proclamation in the Gazette, appoint special directors of public prosecutions with specific mandates to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to them by the President in the proclamation.<sup>88</sup> The Minister of Justice appoints provincial deputy directors of public prosecutions after consultation with the NDPP.<sup>89</sup> Some of the deputy directors are appointed, in terms of section 15 (1) (a), to serve as provincial directors of public prosecutions.<sup>90</sup> As with the NDPP, the remuneration and terms and conditions of service of the deputy national directors and the provincial directors are determined by the President.<sup>91</sup> The Minister of Justice also appoints, based on the recommendations of the NDPP, ordinary prosecutors.<sup>92</sup>



This is an unhealthy environment for any NDPP entrusted with the responsibilities attached to the office of the NDPP. To achieve such responsibilities one needs, among others, a supportive team of prosecutors bound together by a common vision and mission for a common goal, of carrying out the prosecution function on behalf of the State independently and without fear, favour or prejudice subject only to the constitution and the law. This is not possible where such prosecutors are appointed

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87 Wiener M `Analysis`.

88 Sec 13(1)(c) of the NPA Act.

89 Sec 15(1) of the NPA Act.

90 Sec 15(1)(a) of the NPA Act.

91 Sec 16(1) to (3) of the NPA Act.

92 See Sec 16(1) to (3) of the NPA Act.

by the Minister and the President for, among other objectives, hidden in the 'specific mandates.' Such a process often produces a warehouse of individual prosecutors who may not form a 'team' required in achieving the NPA mandate and objectives because they do not have common mandates and therefore do not share a common vision and mission required of them to assist the national director to achieve common goals.

It can safely be argued that it was as a result of this state of affairs that, McCarthy, in light of Powell's revelation, went astray to commission the compilation of and co-authored the Browse Mole Report<sup>93</sup> without Pikoli's permission. This report, *inter alia*, left much causality within the ANC and the Alliance. It has also, partly, cost Pikoli a job. His removal from the position of the NDPP also shook the government and indirectly caused some degree of instability in the country when former President Mbeki was recalled<sup>94</sup>, as a result. It also allowed Hofmeyr a passage to actively get involved in seeking a political solution for Zuma's legal problems without permission from Mpshe and against the oath of his office, the constitution and the law to which he is accountable. As it is known, Hofmeyr was not punished despite this being a serious offence in terms of the NPA Act. And he still remains in his job as the head of the AFU. And as Ginwala Commission concluded, the fact that McCarthy was

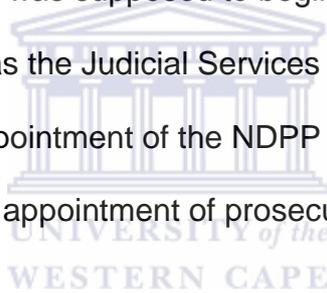
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93 V Pikoli and M Wiener *My Second Initiation* (Pan Macmillan South Africa 2013) 205. The Browse Mole Report was compiled by Ivor Powell, the former investigator, who was commissioned to do so in 2006 by the former head of the Directorate of Special Operations, Leonard McCarthy. McCarthy, who co-authored this report, is currently the vice President for Integrity at the World Bank. See *Mail & Guardian Online*, 'Smoke and Mirrors' 1 May 2009 available at <http://mg.co.za/article/2009-05-01-smoke-and-mirrorsc> (accessed 3 July 2011).

94 See F Chikane *Eight Days in September* (Picador Africa 2012).

appointed by the President, it meant that legally Pikoli had no authority over him and therefore could not have disciplined him.<sup>95</sup> The same principle applies to Hofmeyr, whom Mpshe could not discipline for engaging in the political project of seeking a political solution for Zuma. This state of affairs borders on selective prosecution and strengthens the allegations that the NPA's independent is a fiction since, in reality; it bows to executive and political manipulation.

On the contrary, this is possible not only where the NDPP plays an active role in appointing prosecutors, but rather where, most importantly, the President and the executive in general, play a lesser role in the process. The President and the executive's role in this process was supposed to begin and end with the appointment of an independent body such as the Judicial Services Commission which is empowered to facilitate the appointment of the NDPP and prosecutors on behalf of the state and not in the actual appointment of prosecutors and senior officials.



### **3.6 The office tenure of the NDPP**

The NDPP is appointed for a non-renewable period of 10 years, and the provincial directors of public prosecution for life – that is until they attain the retirement age of

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95 Although Ginwala at the same time opined that despite this legal position, Pikoli could have still reigned on McCarthy and stopped him from engaging intelligence information gathering exercise, she went on to say: 'It is my view that despite lacking the authority to formally discipline the head of the DSO, it was open to him to reprimand the head of the DSO for conducting the Browse investigation and preparing an intelligence report beyond the mandate of the DSO, ....The head of the DSO would then have had an opportunity, if he had a defence for the conduct, to raise such a defence or justification.' See Ginwala Commission Report para 185.

65.<sup>96</sup> The NDPP's 10-year term of office is designed to insulate the incumbent from arbitrary removal by whoever becomes president of the country. But this protective measure has proven to be inadequate, for in the space of 15 years there have been eight leaders of the NPA. The dubious basis on which Pikoli was removed from office underscores the insufficiency of the constitutional and statutory regime governing the security of tenure of an incumbent NDPP, especially one who shows himself able to 'undertake politically difficult prosecutions that have a basis in law.'<sup>97</sup> This exceptional high fluctuation points not only to the insecurity associated with holding of office, but even more troubling, it contributes to destabilising the prosecution service and demoralising the ordinary public prosecutors who like to have certainty about their own positions.<sup>98</sup>

### **3.7 Abuse of power by the NDPP**



The NDPP has the final say on whether or not to institute a prosecution and may review a decision to prosecute or not to prosecute taken by the other directors, but after consulting with the director concerned.<sup>99</sup> The phrase 'after consultation' means that, while the NDPP is obligated to consult with a provincial DPP, he or she need not obtain the consensus of the DPP before acting. This means the NDPP is responsible for the ultimate decision.<sup>100</sup>

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96 Sec 14(1) of the NPA Act.

97 Redpath (2012:13-14).

98 See Redpath (2012:7).

99 Sec 22 (c) of the NPA Act.

100 Redpath (2012: iv).

### 3.7.1. Examples where NDPPs abused their powers

#### 3.7.1.1. Ngcuka's decision in the Zuma case

In August 2003 the first NDPP, Ngcuka, decided not to prosecute Zuma together with his financial adviser, Shaik, despite the recommendation of the investigation team that the two be prosecuted together for corruption.<sup>101</sup> Ngcuka's reason was that, while there was a prima facie case against Zuma, the prospects of success were not strong enough.<sup>102</sup> In his affidavit, Ngcuka stated that '[t]he irony is that, far from abusing my powers in order to harm Zuma's reputation, I did everything within my powers to protect it. The extraordinary lengths to which the NPA went, on my instructions, to avoid the investigation entering the public arena are set out in my press release of 23 August 2003.'<sup>103</sup>

The question that arises is whether Ngcuka would have been as cautious if the person involved was not Zuma, the deputy president of the ANC. And would the Minister of Justice have appeared together with Ngcuka when this decision was made public on television had it been a decision in respect of someone else other than Zuma? The answer is 'no'.

When Ngcuka realised that the charge sheet presented to him by prosecutors was drawn up to charge both Shaik and Zuma, he allegedly responded that: 'I will charge the deputy president only if my president agrees.' This allegation is attributed to a former senior ANC official and Parliamentarian, Feinstein, who alludes to

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101 Feinstein *After The Party* (Verso 2007) at 173, 217 and 230.

102 Ngcuka's supporting affidavit in *State v Zuma and Others*.

103 Ngcuka para 8.

conversations with prosecutors, where they indicated that a ‘shadowy financier’ close to Mbeki and Zuma who played an on-going role in financing the ANC ‘was off limits’ and that he could be prosecuted too.<sup>104</sup> Pikoli’s view on this matter suggests that Ngcuka operated under some political pressure to which statements like this and the August 2003 controversial decision could safely be attributed.<sup>105</sup> The appearance of a lack of independence or bias by the NDPP, who holds the final say over all prosecutions, is perhaps just as damaging to the office and to criminal justice as the real existence of a lack of independence or bias.<sup>106</sup> Ngcuka’s decision in this matter was the most controversial of his tenure and was regarded as politically motivated.<sup>107</sup>

### 3.7.1.2 Mpshe’s’ withdrawal of the charges against Zuma

In 2009, Pikoli’s successor, Mpshe, dropped all the charges against Zuma while the investigating team advised him not to do so.<sup>108</sup> The investigation and prosecution team in this case advised that the Zuma case be continued in order to allow the court

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104 See Feinstein (2007:173, 217 and 230).

105 See Pikoli and Wiener (2013).

106 However, despite these concerns, during his tenure, high profile and struggle icon Alan Boesak was charged and found guilty of fraud committed during the *apartheid* years (which he justified as ‘struggle accounting’) in March 1999. Prosecutions of two senior ANC politicians, MP Winnie Madikizela-Mandela and party chief whip Tony Yengeni, both culminated in 2003, also under

Ngcuka’s tenure. And Looking at the performance of the NPA more broadly during Ngcuka’s tenure, the number of cases prosecuted with a verdict achieved in 2003, at the peak of Ngcuka’s tenure, has yet to be matched subsequently (see chapter 2). Although Ngcuka served for only six years, he remains the longest-serving NDPP South Africa has yet had. See Redpath (2012:11-13).

107 Redpath (2012:11-12).

108 *FUL v NDPP and Others* (CASE NO. 26912/12) para 111.

to decide on the legality and implication of the tapes.<sup>109</sup> The investigating team, also known as the 'Bumiputera team' led by senior state advocate, Billy Downer, further indicated in their recommendations to Mpshe that:

[t]he form of these representations is extremely unfortunate and it places us in an invidious position. We are unable to appraise properly the merits of these representations. They should be reduced to writing under oath and presented in the normal course, if Zuma wishes to continue to rely on them. Unless this is done, they amount to little more than blackmail. We should be given an opportunity after this is done to evaluate the allegations properly in the usual way by consulting all the parties allegedly involved and gathering whatever evidence there is to the contrary. Only in this way can the merits of these representations be determined, if necessary also after obtaining senior counsel's advice. The allegations are simply too serious to be avoided other than by proper investigation, even if the results are damaging to previous NDPPs or any other NPA personnel. Furthermore, in light of the Zuma camp's track record of making unfounded allegations, presenting distorted versions of the truth and even manufacturing blatantly false allegations and "evidence" to advance their cause, these allegation must be treated with a healthy dose of scepticism.<sup>110</sup>

They then recommended that Mpshe decline all representations in this case and that the matter be decided by a court of law, and not in a non-judicial way, behind the scenes, and away from the public.<sup>111</sup> But Mpshe did not heed this advice. Instead he used his power to veto the decision of his deputies and made the controversial decision to withdraw all the charges against Zuma.

Mpshe' predecessor, Pikoli, said that this was a bad legal decision because the alleged conspirators 'were not conspiring to manufacture evidence against Zuma.'<sup>112</sup>

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109 A Basson 'The NPA is very upset about it.'

110 *FUL v NDPP and Others* (CASE NO. 26912/12) para 111.

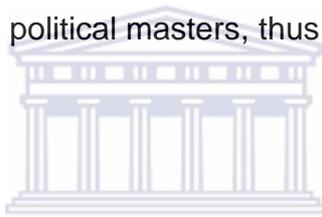
111 npacorrespondencekeyexcerptslongversion available at

<http://cdn.mg.co.za/content/documents/2013/08/29/npacorrespondencekeyexcerptslongversion.pdf>

(accessed 23 September 2013).

112 *Pikoli V and Wiener M* (2013) at 160.

He maintains that ‘Mpshe was put under political pressure.’<sup>113</sup> He argues that this was a political solution using legal decision to justify it.<sup>114</sup> This is in clear breach of the principle of legality. Unfortunately, according to Pilkoli, Mpshe used ‘a legal decision not really applicable to this case and which was overturned on appeal.’<sup>115</sup> This was a desperate time for both Mpshe and Zuma and required desperate measures. Zuma was on the verge of becoming the next president of the country and this would have been impossible had the charges against been pursued. Therefore, a political solution to legal problems had to be found, and very quickly so. Mpshe did not, as it was expected of him, apply his mind to the matter. He simply resorted to whatever reason he could find under case law to justify the political solution imposed on him by his political masters, thus embarrassing himself and the NPA.



However, as the charges against Zuma were withdrawn, he is not entitled to an acquittal, for the charges could be resuscitated again at a later stage. This is different to a stopping of the prosecution, which leads to the acquittal of the accused.<sup>116</sup> It is in accordance with this legal position that the DA is pursuing the reinstatement of charges against Zuma.

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113 Pikoli V and Wiener M (2013) at 161.

114 Pikoli V and Wiener M (2013) at 161.

115 Pikoli V and Wiener M (2013) at 161.

116 Section 6(b) of the Criminal Procedure Act (Act 51 of 1997) states that: (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge:

Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-

The other worrying aspect of Mpshe's decision is that it disobeyed a binding decision of the SCA in contravention of section 165(5) of the Constitution.<sup>117</sup> This provision states that a court decision binds all persons to whom and organs of state to which it applies.<sup>118</sup> In the similar vein, Wolf is concerned that the prosecuting authority and the presiding judge in the KwaZulu-Natal High Court did not query the legality of the prosecuting authority's power to enter a *nolle prosequi* where there is a *prima facie* case.<sup>119</sup> While these are genuine legal questions that worryingly remain unanswered, the reasons for the court not to have queried the legality of the NPA's decision seem very clear. First, whether legal or not, the NPA's decision to withdraw charges against Zuma remains a prosecutorial function with which, in terms of section 32 (1) (b) of the NPA Act, no one, including the court, has right to interfere. Secondly, there was no application before the court that invited the presiding judge to make such a pronouncement. It would have therefore been improper and irregular for the court to do so. In *NDPP v Zuma*, the SCA, per Harms DP, strongly criticised Nicholson J of the Kwa-Zulu Natal High Court, the court *a quo*, for making adverse pronouncements on matters that were not before the court. It ruled that 'judgment by ambush is not permitted.'<sup>120</sup>

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general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.'

117 Wolf (2011:89).

118 Constitution, Sec 165(5).

119 Wolf (2011:86).

120 *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2009) para 47.

### 3.7.1.3 Simelane stops seizure of assets in Hlongwane case

In 2011, the then acting NDPP, Simelane, stopped attempts by the Assets Forfeiture Unit (AFU) to freeze the foreign assets of businessman Fana Hlongwane as part of the arms deal investigation. Simelane did so against the AFU's belief that there was good reason to suspect that the R200 million Hlongwana received from successful arms deal bidders was paid as bribes, hence the decision to proceed with his prosecution. In justifying this decision, Simelane correctly argued that for the NPA to institute a forfeiture process it would require a solid basis rather than a simple suspicion. But whether or not there was indeed no basis to execute the attachment of assets order is questionable. Furthermore, such a test, however, is less than the criminal test of proof beyond a reasonable doubt. It is a civil test of a balance of probabilities. As De Vos observed:

'But curiously, he then applies this test in a rather eccentric manner, arguing that because the test is one of probabilities Hlongwane needed: to show on a balance of probabilities that the money was not obtained from criminal activities. Put another way, they needed to rebut the suspicion of criminal activity. They did not have to prove beyond a reasonable doubt that the money was obtained legally. For this purpose they were advised to submit a formal memorandum supported by annexures, if any.'<sup>121</sup>

De Vos goes on to argue that merely because Hlongwane provided a story that casts doubt on the version presented by the AFU does not mean that on a balance of probabilities Hlongwana was not involved in corruption. On balance, one has to decide which version is more plausible, not whether the AFU has a watertight case.<sup>122</sup>

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121 De Vos 'Simelane comes through for the ANC', available at

<http://www.bing.com/search?q=Piere%20De%20Vos%20on%20fana%20hlongwana&FORM=WLETLB&PC=WLEM&QS=n> (accessed 23 March 2010).

122 De Vos (2010).

Just like with the withdrawal of the corruption charges against Zuma, this case could have been subjected to a court of law to make a judicial pronouncement, but it was not. This conduct constituted a clear abuse of power by the NDPP and raised in the public mind the suspicion that the NPA is after all not independent, particularly when the accused is politically connected.

#### 3.7.1.4 The withdrawal of charges in the 'amigos' case

A further example of the abuse of the NDPP's powers was the failure to lay charges against the former Premier of Kwa-Zulu Natal (KZN), Zweli Mkhize, and the withdrawal of charges against former Speaker of the KZN provincial legislature, Peggy Nkonyeni and KZN provincial Minister for Economic Development, Mike Mabuyakhulu. The fact that these individuals are apparently connected to Zuma raises serious concerns<sup>123</sup>. The three high profile ANC politicians in KZN were involved what came to be known in the media circle as the 'amigos case or the 'Intaka case.'<sup>124</sup> The 'amigos case' is a corruption matter involving Uruguayan businessman Gaston Savoi. Savoi's company, Intaka, allegedly paid bribes to ensure that a contract to supply water purifiers and oxygen generators to hospitals, at hugely inflated prices, was awarded to him.<sup>125</sup> Also implicated is the former provincial treasury boss, Siphoshe Shabalala, who allegedly received a R1-million

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123 Staff Reporter 'Zuma man who cleared Mdluli reviews KZN speaker's case', available at <http://mg.co.za/print/2012-04-19-anc-politicians-corruption-case-in-doubt> (accessed 21 January 2013). See also S Pityana 'Liberate public prosecution from politics' *Sunday Times* 14 July 2013 21.

124 Cronje (2012).

125 Cronje (2012).

donation for the ANC.<sup>126</sup> What is more worrying is that the charges against Nkonyeni and Mabuyakhulu were withdrawn by Moipone Noko who was then Acting Provincial Director of Prosecutions in KZN. She was appointed in July 2012 after the then Kwa-Zulu-Natal's Acting Head of Public Prosecutions, Simphiwe Mlotshwa, was ousted, reportedly for refusing to withdraw the charges against the two politicians. Noko has now been elevated to the position of permanent DPP of Kwa-Zulu Natal.<sup>127</sup>

Another prosecutor who was intrinsically involved in the withdrawal of charges against the two politicians was Lawrence Mrwebi, the then head of NPA's commercial crimes unit in KZN. It had long been reported in the media that Mrwebi, who was appointed in this position by President Zuma in November 2012, had to, as his first assignment, withdraw the charges against Mdluli, which he did.<sup>128</sup> This was then followed by the withdrawal of charges against Nkonyeni and Mabuyakhulu. Mrwebi has since emerged as one of Zuma's 'praetorian guards'.<sup>129</sup> As a result of these and many other controversial prosecutorial decisions and activities he has been involved in, Mrwebi has fast emerged as a compromised and politically pliable prosecutor within the NPA with questionable respect for the Constitution and the law. In the case of *FUL v NDPP and Others*, Mrwebi was exposed as a person who lacks integrity, honesty and respect. He lied about having consulted the DPP North Gauteng (Mzinyathi), as required by Section 24(3) of the NPA Act<sup>130</sup> before withdrawing the charges against Mdluli. He also did not follow the law that required

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126 Cronje (2012).

127 Cronje (2012).

128 *FUL v NDPP* CASE NO. 26912/12, para 10.

129 Cronje (2102).

130 *FUL v NDPP and Others* para 42.

that he consult with the NDPP, Jiba, at the time, yet he purported to have done so. These lies were revealed when Jiba, in her affidavit, submitted in the matter of *FUL v NDPP and Others* that: ‘the decisions’ of the Special DPP and the DPP who instructed the charges to be withdrawn were not brought to her attention for consideration, implying that she made no decision in relation to the representations.<sup>131</sup> Mzinyathi, also in a confirmatory affidavit filed on the day before the application was enrolled for hearing, refuted that her engagement with Mrwebi on 5 December 2011, which Mrwebi claims was his consultation with her, was untrue and in fact it was a brief encounter in which the issues were not fully canvassed.<sup>132</sup>

The unfolding of these events is captured in the judgment as follows:

‘After lengthy cross examination by Mr. Trengrove, Mrwebi conceded that when he took the final decision, either on 4 December 2011 or 5 December 2011, to withdraw the charges and discontinue the prosecution of Mdluli on the fraud and corruption charges, he did not know Mzinyathi’s view of the matter and did not have his concurrence in the decision. He admitted that he took the decision prior to writing the consultative note and did so relying on representations made to him in confidence by anonymous people, who he was not prepared to name and whose input he did not share with Mzinyathi. Mzinyathi’s views were conveyed to Mrwebi for the first time in an email on 8 December 2011 in response to the consultative note, after Mrwebi had already informed Mdluli’s attorney that the charges would be withdrawn.’<sup>133</sup>

This is a clear breach of the constitution and the law as well as the oath of office that Mrwebi took. This is a strong *prima facie* case of pliable prosecutors who abuse their positions for political purposes. Mrwebi’s conduct could only serve to further damage public confidence in the NPA, particularly in the face of public disquiet about possible political interference in its prosecutorial function in favour of powerful politicians and their associates. It is one of the fatal blows to the independence of the NPA, the

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131 *FUL v NDPP and Others* para 36.

132 *FUL v NDPP and Others* para 42.

133 *FUL v NDPP and Others* para 48.

effectiveness of the criminal justice system and the application of the rule of law in SA. It is for this, among other reasons that Murphy J was contemptuously scathing of Mrwebi in his judgment in the case of *FUL v NDPP and Others* in the Northern Gauteng High Court. In one of his explosive findings he found that Mrwebi gave 'implausible' evidence and 'probably invented after the fact' an explanation as to why he dropped corruption charges against Richard Mdluli.<sup>134</sup> He concluded that all the decisions Mrwebi took to withdraw charges against Mdluli were 'illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it.'<sup>135</sup> It is doubtful that Mrwebi has done all this on account of incompetence on his side, and that he could risk his professional career and the NPA without any pressure, manipulation or any form of reward. Mrwebi was suspended by then NDPP, Mxolisi Nxasana, and appeared in the Pretoria Commercial Crime Unit for defeating the ends of justice, among other charges.<sup>136</sup> Nxasane laid charges against Mrwebi after the SCA ruled that Mrwebi acted improperly when taking the decision to withdraw charges against former crime intelligence unit head, Richard Mdluli.<sup>137</sup>

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134 *FUL v NDPP and Others* (CASE NO. 26912/12) para 175.

135 *FUL v NDPP and Others* (CASE NO. 26912/12) para 176.

136 'Mrwebi summoned to appear in court' *EWN* available at

<http://ewn.co.za/2014/09/04/Hawks-confirm-Mrwebi-to-appear-in-court> (accessed 8 October 2014).

137 'Mrwebi summoned to appear in court.'

#### 4. The notion of *prima facie* as a criterion for prosecution

In South African law, where a *prima facie* case exists, a duty to prosecute arises unless a compelling reason exists to decline to prosecute. A *prima facie* case means that the allegations and supporting statements available to the prosecution are of such a nature that if proved in a court of law on the basis of admissible evidence, the court should convict.<sup>138</sup> Under a constitutional order such as the one that pertains in South Africa, the exercise of all public power is constrained by the principle of legality and the provisions of the Constitution. Yet the NPA has maintained that it has an unfettered discretion not to prosecute, which is generally not subject to judicial review.<sup>139</sup> It concludes that the primary factors affecting the credibility and performance of the NPA is the inappropriate exercise of the discretion not to prosecute, most powerfully evident in the hands of the NDPP, who has a constitutionally-sanctioned power to veto the decisions of prosecutors under him. This right to veto has been exercised (or not exercised) with consequences that continue to cast doubt on the independence and impartiality of the NPA. This, in turn, affects internal staff morale and external public confidence.<sup>140</sup>

Ngcuka's 2003 *nolle prosequi* decision against Zuma, while a *prima facie* case existed, is again a case in point. The chief prosecutor in Zuma's corruption trial, Billy Downer, criticised all three consecutive heads of the prosecuting authority for the fact that Zuma's case never saw the light of day.<sup>141</sup> In terms of the Constitution,

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138 Redpath (2012:41).

139 Redpath (2012: iv).

140 Redpath (2012: iv).

141 Wolf (2011:61).

prosecutors are obliged to exercise the power to prosecute 'without fear, favour or prejudice.' This implies pre-trial equal treatment and precludes selective prosecution or the dropping of charges in *prima facie* cases for reasons of political expediency.<sup>142</sup> In the matter of the *NDPP and Jacob Zuma*<sup>143</sup> in which Zuma contested the reopening of the case, the SCA distinguished between *prima facie* evidence that would merit the prosecution of an accused and discharging the onus of proof during a criminal trial. The court further ruled that the judgment of Nicholson J was erroneous insofar as it confused the standards for a *prima facie* case that merits prosecution with the *prima facie* standard, which is required to discharge the onus of proof during a criminal trial. The court held that *prima facie* evidence does not need to be conclusive or irrefutable at the stage when criminal proceedings are instituted. It must have enough merit only once the criminal investigations are concluded 'in the sense of reasonable prospects of success.'<sup>144</sup> The rationale behind this requirement is to prevent the laying of spurious charges against innocent people. Whether or not a case would actually be winnable in court is the domain of the judiciary and not the prosecutors. That decision depends on the evidence presented to the court under cross-examination where the prosecution is required to present *prima facie* evidence of each element of the crime. Only if the prosecution can, during the trial, establish a *prima facie* case which is strong enough to discharge the burden of proof will the accused be required to rebut it by raising a reasonable doubt.<sup>145</sup> This being the case

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142 See Pikoli and Wiener (2013:140).

143 *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2009) para 31.

144 Wolf (2011:61).

145 Wolf (2011:61).

it means that Ngcuka's 2003 *nolle prosequi* decision offended this established legal practice.

## 5. The implications of the *nolle prosequi*

During Simelane's tenure as NDPP, a number of questionable *nolle prosequi* decisions were made by the NPA. This was clearly done in the interest of executive and political considerations than for prosecutorial reasons. These *nolle prosequi* decisions related to terminations of prosecutions and forfeitures against the high-profile and politically-connected people. The decisions were made in a manner that 'suggests that the decision not to prosecute is being exercised without due regard to the constitutional duty to prosecute.'<sup>146</sup> This decision relates, first, to the use of the spy tapes to effect a *nolle prosequi* against Zuma by Mpshe. This offends Section 32(1)(a) of the NPA Act, which requires members of the prosecuting authority to serve 'impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.'<sup>147</sup> The NPA acted in direct contravention of its constitutional powers by offending<sup>148</sup> the SCA judgment in the matter of the *NDPP and Zuma* which stated clearly that '[a] prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent....'<sup>149</sup> This decision and deliberate

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146 Redpath (2012: 41-42).

147 NPA Act No.38 of 1998.

148 In this regard, the NPA undermined the principle of judicial precedent or the doctrine of *stare decisis*. Under this doctrine a lower court, which includes the NPA, must honour findings of law made by a higher court that is within the appeals path of cases the court hears.

149 *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2009) para 37.

transgression of the law by the NPA suggest *prima facie* cases of selective criminal prosecution at the behest of political considerations which is prohibited by the law.

The 2010 Code of Conduct of the NPA encourages prosecutors subtly to exercise their discretion not to prosecute some cases. Excerpts from Paragraphs C and D of the Code read as follows:

‘The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference. Prosecutors should perform their duties fairly, consistently and expeditiously and...give due consideration to declining to prosecute, discontinuing criminal proceedings conditionally or unconditionally or diverting criminal cases from the formal justice system, particularly those involving young persons, with due respect for the rights of suspects and victims, where such action is appropriate...in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence.’<sup>150</sup>

Redpath is of the view that it is partly as a result of this Code of Conduct that the ‘tendency to decline to prosecute is currently the central malaise affecting the NPA.’<sup>151</sup> The problem is that the decision not to prosecute is fundamentally different from the decision to prosecute, precisely because it will not in the normal course be tested in court, as would a decision to prosecute. Coupled with this policy directive is the attitude of the NPA, conveyed in court documents, that such a decision not to prosecute is not ordinarily subject to review in the courts.<sup>152</sup> *Nolle prosequis* in *prima facie* cases are tantamount to non-judicial acquittals.<sup>153</sup>

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150 Department of Justice and Constitutional Development No R 1257 of 29 September 2010

*Code of Conduct for Members of the National Prosecuting Authority* under sec 22(6) of the NPA Act, 1998 paras C and D.

151 Redpath (2012: iv).

152 Redpath (2012: 41-42).

153 Wolf (2011:64).

As Redpath observed, the then Acting NDPP, Mpshe, in his answering affidavit to the application by the DA to have his decision to drop charges against Zuma reviewed, corrected and set aside, outlined the NPA's understanding of whether decisions to prosecute or not to prosecute are ever subject to review. Mpshe contended that such decisions are only reviewable on very narrow grounds such as bad faith (and not broader constitutional and administrative law grounds such as rationality). He claimed (without reference to authority) that this is the approach that our courts have always adopted in relation to prosecutorial decisions, and it is the approach adopted in other jurisdictions. It is indeed correct that for many years prior to 1994 the discretionary powers of prosecutors in South Africa were regarded as non-justiciable. However, this began to change during the 1980s, with the normal standards of review being applied to both prosecutors and Attorneys-Generals.<sup>154</sup> Furthermore, under a constitutional order, the exercise of all public power is constrained by the principle of legality and the provisions of the Constitution.<sup>155</sup> It is on this basis, among others, that the SCA in the matter of the *Democratic Alliance and National Director of Public Prosecutions* ruled that the NPA's *nolle prosequi* decision was subject to review by the courts.

This state of affairs raises the issue of whether prosecutors should not be more accountable to the public. The need for such a requirement arises against the background of prosecutors ordinarily making decisions (particularly the decision not to prosecute) which sometimes remain unexplained to or misunderstood by the ordinary public, which may undermine public confidence in the decisions taken.

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154 Redpath (2012: 41-42).

155 Redpath J (2012: 41-42).

Parliament, which is obligated to hold the executive to account, does not inspire confidence when it comes to holding the executive to account for leaning on the NPA to make decisions that are patently of a political nature. Its reluctance to do so encourages the executive to infringe the law without being held accountable.

## **6. The doctrine of the separation of powers with regard to the NPA**

The separation of powers implies a distinction between the function of making law (performed by the legislature), the function of executing or implementing law in the field of executive state administration (performed by the executive), and the function of enforcing law through prosecution and adjudication (the administration of justice by prosecutors and the judiciary). The idea is that each branch of government must have the power and the incentive to guard its own sphere and to counter the abuses of the other two.<sup>156</sup> It is for this reasons that the Minister of Justice and Constitutional Development, Michael Masutha, has recently transferred all the administrative functions and staff from the Department of Justice and Correctional Services, which were also displaced, to the Office of the Chief Justice.<sup>157</sup> Based on the above analysis, the prosecuting authority cannot logically be construed to be part of the executive since the prosecutorial function is not an administrative function; it is a law enforcing function.<sup>158</sup>

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156 Redpath (2012:70).

157 Announcement of the transfer of administrative functions and staff from the Department of Justice and Constitutional Development to the Office of the Chief Justice available at <http://www.gov.za/speeches/view.php?sid=48890> (accessed 8 October 2014).

158 Redpath (2012:70).

The scope of powers of the judiciary and the prosecutors are clearly delineated in the Constitution and the prosecutors may therefore not encroach upon the domain of the judiciary by entering, for instance, a *nolle prosequi* where there is a *prima facie* case.<sup>159</sup> This would amount to a non-judicial acquittal, which constitutes a forbidden form of exercise of power, as section 41(1) (f) of the Constitution explicitly states that no state organ may assume any power except those conferred upon it.<sup>160</sup> In other words, the scope of the discretionary power to prosecute is limited to those instances where there is doubt whether there are not reasonable prospects of success. While prosecutors have to consider the quality and the quantity of the evidence that needs to be presented to the court for it to find the accused guilty, it is essentially the domain of the court to decide whether the accused has been found guilty beyond a reasonable doubt. Prosecutors may not encroach on the adjudicative terrain of judges.<sup>161</sup>



The judicial powers relating to the administration of justice are obviously more encompassing and not restricted to the enforcement of criminal law only. The judiciary has to resolve disputes in all other fields of law as well. The role of the NDPP in particular, in terms of the current legal framework 'inevitably impinges on the principle of separation of powers.'<sup>162</sup> For instance, Mpshe's 2009 decision not to prosecute Zuma, in particular, clearly illustrates the blurring of the separation of powers lines. He could have referred the matter to court for adjudication.

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159 Redpath (2012: 41-42).

160 Sec 41(1)(f) of the Constitution.

161 Sec 41(g) of the Constitution.

162 Redpath (2012: 70).

## Chapter 5

### General Comments on the Prosecutorial Function in the South African Context

#### 1. Introduction

The NPA's institutional and structural arrangement within the executive branch of government clearly runs an avoidable 'risk of straddling both the executive and judicial spheres.'<sup>1</sup> In South Africa, this risk is exacerbated, because the decision to prosecute is arguably as important as the ultimate decision of the judiciary (guilty or not guilty) in a particular matter. This is because very few reported crimes are prosecuted with a verdict, and furthermore, approximately 80% of all crimes which are prosecuted result in a conviction. The decision either to prosecute or not is therefore a crucial one.<sup>2</sup> This chapter reflects on the role of the prosecution service in South Africa in the light of the decisions that the NPA has taken in the cases outlined in the previous chapter.

#### 2. Distinguishing the judicial and the prosecutorial function

It is clear that the decision to prosecute a matter does not pose a problem because whether a conviction is obtained depends, in the final analysis, on the judiciary; in theory, even a malicious prosecution will not succeed if the judiciary finds there is not enough evidence to prove the charge. It is however, a decision not to prosecute which is more problematic because there is no input into the outcome of such a decision from another branch of government.<sup>3</sup> In theory, the failure on the part of the

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1 Redpath (2012:70).

2 Redpath (2012:70).

3 Redpath (2012:41-42).

prosecution to carry out its obligations, in particular, by declining to pursue allegations of wrong-doing by members of the executive, leaves the NPA in this case no other choice but to have recourse to Parliament, to which it is accountable.<sup>4</sup> Parliament can therefore call the prosecution to account for the decisions it takes, particularly decisions to prosecute or not to prosecute. Although this is theoretically possible, an academic paper has argued that in a political systems where the president is elected by the legislature and therefore by the majority party in Parliament, the probability of Parliament calling the prosecution to account for its failure to prosecute is low.<sup>5</sup> This study appears to hold true in South Africa, where the majority party in Parliament effectively elects the president. The South African Parliament has yet to call the NDPP to account for his failure to prosecute on any matter, including the arms deal matter and the then deputy president's role in that matter.<sup>6</sup> An example confirming the study referred to above is the way Parliament handled the termination of Pikoli's tenure as the NDPP. Despite the fact that the Ginwala Commission Report found him to be fit and proper to hold the office of the NDPP and recommended his reinstatement, characteristically of a Parliament dominated by one (ruling) party, Parliament ratified Acting President Motlanthe's decision not to reinstate him.

The same applied with the National Council of Provinces, one of the important institutions of Parliament, in the decision-making process of this matter. And as Pikoli himself put it:

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4 Redpath (2012:71).

5 Redpath (2012:71).

6 Redpath (2012:71).

I was under no illusion that this was anything other than the rubber-stamping of the executive decision in Parliament. They didn't really consider the points I had put forward, and that even Ginwala herself had recommended that I be reinstated. The process made a mockery of the role of Parliament in terms of the executive truly being held accountable.<sup>7</sup>

It is flagrant failures like these by Parliament to carry out its constitutional duties honestly that often see the judiciary doing the executive's work or forcing Parliament to do its own work. This, therefore, creates an untenable situation in which the parameters of the doctrine of the separation of powers are enmeshed and which cause the tension that currently exists in SA between two of the three arms of government – the judiciary and the legislature.

The Constitution and the Act do not only provide for the independence of the NPA against political interference, but they also provide safeguards to protect it. These laws do this by prohibiting and criminalising any interference in the prosecutorial decision-making process of the NPA by any person, politicians and government officials alike.<sup>8</sup> Frank Chikane, the former Director General and Cabinet Secretary during Mbeki's term of office as president, revealed that there was a group of people that was 'constituted with the mandate to make the Zuma case go away.'<sup>9</sup> This group that was led by former Minister of Defence and Military Veterans and current Minister of Public Service and Administration, Lindiwe Sisulu, and included 'a brains trust'<sup>10</sup> of three intellectuals, namely, the former judge Willem Heath, the president of the South African Institute of Race Relations, Professor Sipho Seepe, and University

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7 Pikoli and Wiener (2013:133).

8 Sec 32(1)(b) of the NPA Act.

9 See Chikane (2011:129) (own emphasis).

10 A Basson *Zuma Exposed*, (Jonathan Ball Publishers, Johannesburg/Cape Town 2012) 71.

of Cape Town deputy registrar of legal services, Paul Ngobeni.<sup>11</sup> The other key members heavily involved were Matthews Phosa, the former ANC treasury, and Motlanthe the then deputy president of both the ANC and the country.<sup>12</sup>

This revelation by Chikane, who is also a senior member of the ANC, further gives credibility to the allegations that the NPA decision to drop the charges against Zuma was not taken independently and, most importantly, that the NPA was indeed manipulated by the executive and politicians for political ends. As earlier stated, unlike former President Mbeki, Zuma has not issued any firm and formal statement refuting these inferences and neither has Minister Sisulu and the other people who were allegedly involved in this illegal act. This clearly constitutes an institutionalised form of political interference in the prosecutorial independence of the NPA by both the government and the ruling party. History has shown that a single incident-setting precedent might soon start to snowball<sup>13</sup> and spiral out of control. This stratagem is, therefore, likely to be adopted anytime a high profile politician or politically-connected person stands to be prosecuted by the NPA.

It is also alleged that state institutions were used to influence the NPA decision in favour of Zuma. These institutions include primarily the National Intelligence Agency (NIA), the South African Police Services (SAPS) and the NPA itself.<sup>14</sup> This they did,

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11 Rossouw, Brümmer, and Alcock, 'Triple play to save Zuma' available at

[Zumahttp://mg.co.za/printformat/single/2008-07-11-triple-play-to-save-zuma/](http://mg.co.za/printformat/single/2008-07-11-triple-play-to-save-zuma/) (accessed 25 April 2012) (hereafter Rossouw *et al* 2008).

12 Rossouw *et al* (2008).

13 Wolf (2011:88).

14 Institute for Security Studies (20 March 2012) available at

*inter alia*, by spying on prosecutors, which illegal activity produced the spy tapes that the then Acting NDPP, Mpshe, used to drop the charges against Zuma.<sup>15</sup> From within the NPA, Willie Hofmeyr was the ruling party's key contact person and chief advocate for the dropping of charges against Zuma.<sup>16</sup> Hofmeyr happens to be one of the prosecutors with close historical links to the ruling party. The ANC's special committee engaged Hofmeyr in negotiations to find a political solution to save Zuma from his legal woes.<sup>17</sup> It is not surprising therefore that in the DA court challenge of the Mpshe decision. Hofmeyr authored an affidavit, the broader implication of which is a strong confirmation that the NPA's decisions are not always independent.<sup>18</sup> It is on the basis of these and other related revelations that it is believed today that Mpshe's decision was equally not free from political manipulation; this time from the politicians and government officials associated with and led by Zuma himself.

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<http://www.polity.org.za/article/why-a-south-african-anti-corruption-agency-must-be-independent-of-the-police-to-be-effective-2012-05-03> (accessed 17 April 2012). M Mkhabela 'Time to Undo Leadership' available at

<http://www.sowetanlive.co.za/columnists/2012/04/11/time-to-undo-leadership> (accessed 17 April 2012).

15 An unidentified spy then secretly passed on recordings of telephone conversations between Ngcuka and Scorpion's head Leonard McCarthy, which were bugged during 2007, to Zuma's legal counsel. The contents of the conversations centered on the timing of Zuma's trial. Mpshe and Hofmeyr then construed the (illegally?) bugged conversations as an abuse of power to justify the dropping of charges against Zuma.

16 Wolf (2011:64).

17 Wolf (2011:64). See also 'The man behind the Zuma deal' *Cape Argus* (2009-3-20); 'The high price of political solutions' *Mail & Guardian* 27 April 2009.

18 Legal brief 'Details of NPA abuse revealed' available at [legalbrief.co.za/diary/legalbrief-today/story/details-of-abuse-of-.../pdf/](http://legalbrief.co.za/diary/legalbrief-today/story/details-of-abuse-of-.../pdf/) (accessed 9 October 2015).

Failure by the NPA to investigate these matters and to prosecute the culprits renders the independence of prosecution service in particular, a fiction.

### **3. Aspects of the political background to the NPA's decision-making process**

The NPA's code of ethics provides that '[i]n the institution of criminal proceedings, the prosecutor will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.'<sup>19</sup> This is, *inter alia*, the policy basis that the NPA uses to select which cases to prosecute and not to prosecute. This basis is founded on the prosecutor's independent prosecutorial decision-making function as contemplated in the Constitution and the Act. The selection of cases on the basis of the reasons advanced in the policy is neither illegal nor wrong. In *Mohunram v National Director of Public Prosecutions & Another (Law Review Project as Amicus Curiae)* Sachs J, writing for the majority, stated in the context of the forfeiture of assets involved in organized crime as follows:

'If [the Asset Forfeiture Unit] is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its command. Its manifest function as defined by statute is to serve as a strongly empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA.'<sup>20</sup>

This approach applies similarly to the NPA's discretion to select which cases to investigate and prosecute and which one not to pursue. If the NDPP were to

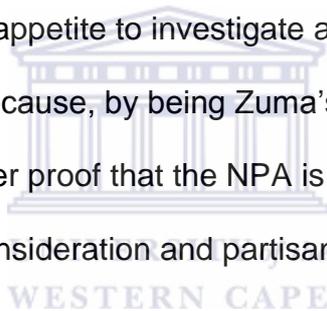
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<sup>19</sup> *A Practical Guide to the Ethical Code of Conduct for Members of the NPA* (2004:19).

<sup>20</sup> H Woolaver and M Bishop '*Submission to Ginwala Enquiry*' at 14.

prosecute every person whom he/she suspects of being involved in organised crime or breaking the law, The NPA would not have the resources to prosecute the people at the top of the organised crime pyramid.<sup>21</sup>

Then there is the case of Zuma's personal lawyer and official legal advisor, Michael Hully. Hully is deeply trapped in the spy tapes saga for having been illegally in possession of these illegally acquired tapes. The NPA has openly stated that the records required for handover to the DA are in Hully's possession and until he consents to release them the NPA's hands are tied. This is in direct contempt of the SCA judgment that ordered that these records be handed over to the DA. Again, the NPA has neither intention nor appetite to investigate and prosecute this matter. And there is no doubt that this is because, by being Zuma's lawyer, Hully is untouchable. This is yet another proof that the NPA is operating with fear, favour and prejudice based on political consideration and partisanship.



The NPA has also failed to investigate other allegations of corruption against other high profile politicians, including former President Mbeki, who is alleged to have solicited arms deal bribes to pay for the ANC 1999 election campaign.<sup>22</sup> Chippy Shaik, brother to Zuma's former financial advisor, Shabir Shaik, who was fingered in

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21 H Woolaver and M Bishop 'Submission to Ginwala Enquiry' at 14.

22 'The Arms Deal Special Report' *Mail & Guardian* available at <http://mg.co.za/report/the-arms-deal> (accessed 24 November 2012). See News24 'Articles relating to the arms deal' available at [http://www.news24.com/Tags/Topics/arms\\_deal](http://www.news24.com/Tags/Topics/arms_deal) (accessed 20 January 2010) and Corruption Watch 'The arms deal: what you need to know' available at <http://www.corruptionwatch.org.za/content/arms-deal-what-you-need-know> (accessed 24 November 2012).

the JIT (Joint Investigative Team) report and is widely believed to have benefited unlawfully from the arms deal was also not pursued.<sup>23</sup> Allegations of corruption against other high ranking ANC leaders were never pursued or were dropped by the NPA for reasons that seem unclear.<sup>24</sup> All these selective prosecution practices erode the trust that the public in general had on the NPA as an independent prosecution agency. Despite the fact that there is no hard evidence to prove the alleged abuse of power by the NPA, there is abundance of compelling circumstantial evidence to suggest that there is political interference in the NPA.

This study has already identified and discussed a number of controversial decisions taken by the NPA which clearly suggest political considerations and bias in favour of the government and politicians linked to the ruling party.



#### **4. Public interest v interests of justice**

It is undeniable that the balancing process of the public interests with the interests of justice is a delicate and complex one. However, it is one of the fundamental principles that the NPA, as lynchpin of SA's criminal justice system, has to take into serious cognisance when performing its prosecutorial function. In line with the enhancement of the protection for prosecutorial independence, the NPA Act in section 22 (4) (f), requires the NDPP to bring the *United Nations Guidelines on the Role of the Prosecutors* to the attention of all prosecutors and to 'promote their

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23 'The Arms Deal Special Report'.

24 'The Arms Deal Special Report'.

respect for and compliance with (the Guidelines) within the framework of national legislation.<sup>25</sup> These Guidelines mandate that:

‘In the performance of their duties, prosecutors shall ...[p]rotect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect....’

Relying, *inter alia*, on this provision, Ackermann and Goldstone JJ stated in *Carmichele v Minister of Safety and Security and Another (Centre G for Applied Legal Studies Intervening)*, that ‘prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.’<sup>26</sup> In *R v Riekert* the Court stated that the prosecutor’s role is wider than that of defence counsel, for the prosecutor represents the state. The Court went on to say that the criminal law of the land should, subject to immunity or exemption sanctioned by law, apply to all alike, for the ‘maintenance of public confidence in the administration of justice requires that it be, and be seen to be even handed.’<sup>27</sup>

## **5. Prosecutions in adversarial and inquisitorial criminal justice systems**

There are two basic systems of justice that are particularly relevant in the analysis of the independence or lack thereof of the NPA. These are the adversarial and inquisitorial systems. The former is also referred to as the accusatorial or the

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25 Sec 22 (4) (f) of the NPA Act.

26 *Carmichele v Minister of Safety and Security and Another (Centre G for Applied Legal Studies Intervening)* 6. 2002 (1) SACR 79 (CC) at para 72 at 105 d-e.

27 *Pikoli v President of the Republic and Others* CASE NO: 8550/09 (11/08/2009) available at <http://www.saflii.org.za> (accessed 1 January 2012).

common law system, while the latter is also known as the continental or the civil law system. The goal of both the adversarial system and the inquisitorial system is to find the truth. However, they differ in terms of the procedural approaches. In the adversarial system the court depends largely on the two parties – the prosecutor for the state and the defence lawyer for the accused (the adversaries) – to help it find establish the truth.<sup>28</sup> The prosecutor and the defence each present the facts as they see them and their theories of the case. Both sides are allowed to present evidence and witnesses to support their positions. The opposing side can cross examine witnesses, analyze the evidence independently, and challenge arguments made before the court. The goal of this process is to present all of the facts of the case for the benefit of the judge or jury, who can sift through the material to decide what happened and who, if anyone, should be held responsible. The neutral judge then weighs the arguments and produces a verdict or judgment, hence the term ‘blind justice.’ Not blind to the facts but blind to the wealth, colour, religion etc. of the parties, particularly, the accused.<sup>29</sup> In this approach in criminal matters, the accused is presumed innocent until proven guilty, and the burden of proving guilt rests with the prosecution.

In the inquisitorial system, the presiding judge is not a passive recipient of information but rather active in supervising the process of gathering evidence necessary to resolve the case. The judge actively steers the search for evidence and

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28 A body of people sworn to give a true verdict according to the evidence presented in the court of law found at <http://www.definitions.net/definition/jury> (accessed 3 September 2013).

29 What is the difference between adversarial system and inquisitorial system? Found at <http://www.answers.com/topic/adversarial> (accessed 2 July 2013).

questions the witnesses, including the accused. The prosecution and defence lawyers play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. The prosecution and the defence lawyers' questioning is often brief because the judge tries to ask all relevant questions. All parties, including the accused, are expected (but not required) to cooperate in the investigation by answering the magistrate's questions and supplying relevant evidence.<sup>30</sup>

The South African criminal justice system is based on adversarial approach. However, the way in which the NPA's now defunct Directorate of Special Operation (DSO) was designed to deal with criminal cases was such that it blurs the lines between the adversarial and inquisitorial systems. This is so because, the DSO's integrated investigative approach is such that investigators, analysts and prosecutors work close together right from the initiation of the investigation and throughout the trial. This approach, in which prosecutors, in particular, are intrinsically involved in the initiation of the case, investigation and ultimately its prosecution, has been criticised for harming the prosecutorial integrity and for breaching the constitutional rights of the accused.<sup>31</sup> This is confirmed by Montesh who, referring to it as a troika system, states that:

‘The use of a troika system by the DSO where the investigator sits with the prosecutor and the intelligent / analyst right from the beginning of the investigation puts them in an advantageous position. This means that the prosecutor has inside knowledge of the

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30 Trial systems, The Royal Court of Justice available at

<http://www.judiciary.gov.bt/html/court/trial.php>. (accessed 2 July 2013).

31 G Wannenburg (ed) ‘Putting Paid to the Untouchables? The Effects of Dissolving the Directorate of Special Operations and Specialised Commercial Crime Units’ in (2008) 24 *SA Crime Quarterly*.

case, making it easy to secure a conviction; hence the so-called high conviction rate is achieved.<sup>32</sup>

Zuma and one of his staunch supporters throughout his botched corruption cases, in particular, Moe Shaik, have been very critical of the DSO approach. Zuma consistently argued that this integrated approach creates a loophole through which politically-driven charges against him were enforced by his detractors. This, according to him, unnecessarily impaired his integrity and breached his constitutional rights. Shaik argued that this approach goes against the South African legal system which is adversarial in nature. He argued, in effect, that the DSO's approach, on the contrary, is bending towards inquisitorial approach - a legal system 'where the court or a part of the court is actively involved in investigating the facts of the case, as opposed to an adversarial system where the role of the court is primarily that of an impartial referee between the prosecution and the defence.'<sup>33</sup> Zuma claimed that in his case, the prosecutor played the role of both the investigator and prosecutor – which made him privy to the dossier prior the trial giving him an unfair advantage over his (Zuma) defence lawyers.

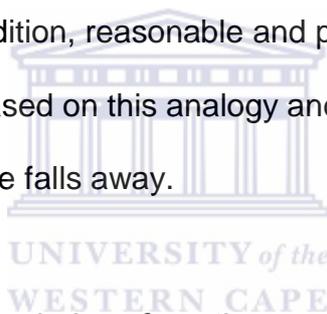
While these are valid concerns, at least in theory, there is no evidence that suggests that the NPA, through the DSO had, in any way, provided space for Zuma's political enemies to fabricate either the corruption charges or any other case he faced in

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32 M Montesh *A Critical Analysis of Crime Investigative System within the South African Justice System: A Comparative Study*, University of South Africa. November 2007, at 11.

33 See Inquisitorial system available at <http://legal-dictionary.thefreedictionary.com/Inquisitional+system> (accessed 2 July 2013); D Jackson Adversarial and Inquisitorial Systems of Justice Medico-Legal Society of NSW Inc. Scientific Meeting - March 2009 available at <http://www.sputtr.com/inquisitorial/> (accessed 26 July 2011).

recent past. Nor is there case law that suggests that charges against Zuma or anyone originated as a result of the investigators, analysts and prosecutors working closely together in investigating matters. Even when prosecutors are involved in directing the investigations, the parties being investigated are still guaranteed fair and 'blind justice' in the sense that, first, such a case is still subject to be presented before an independent magistrate or judge. Secondly, the defence would still have an opportunity to rebuff the state's case. Thirdly, if there is no truth in the state's case, the independent magistrate or judge will certainly rule in favour of the defence. As stated by the SCA in the *National Director of Public Prosecution and Zuma* that '[a] prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent...'<sup>34</sup> Based on this analogy and SCA ruling, the complaint about the DSO approach above falls away.



The only logical reason one can deduce from these complaint against the DSO's investigative approach is that it strengthened the state's chances of a successful prosecution that meets the threshold of 'beyond reasonable doubt.. And this it does by eliminating the loopholes that criminals have so far used to get off the hook that range from lack of evidence to prove their guilt to the procedural and technical mistakes made during the investigations by police in general due to lack of experience and how the courts operate. And indeed, the real concern behind Zuma's claim that, in his case, the prosecutor played the role of both the investigator and prosecutor, is clearly not that any of his constitutional rights have been violated, but rather that the state happened to have discovered and known if at all he was

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<sup>34</sup> *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2009) para 37.

involved in the alleged crimes for which he was charged. This view is supported by Pikoli's observation that when the DSO was arresting and prosecuting the 'small-time crooks' the chief critics of the Scorpions did not complain. But when politicians became targets also and felt the heat, they went like 'Aah, now this is beginning to involve us' and they 'suddenly became vocal about the Scorpions' style of operations and that they were picking and choosing only the cases they believed would earn good press coverage and that (Scorpions) members were being trained by international agencies.<sup>35</sup>

Judge Khampepe, who was appointed by former President Mbeki to head the Commission that investigated this matter, found that there was nothing wrong with the DSO's approach. Judge Khampepe concluded thus:

I am satisfied that the practice of housing multiple disciplines under one command structure is sound practice. The structure of the DSO in this regard, enhances a closer co-operation amongst the various disciplines. The one discipline benefits from the expertise of the other, making the cross-pollination an effective strategy in combating crime and ensures a return of higher conviction ratios.<sup>36</sup>

The truth of the matter is that, while accusatorial and inquisitorial systems differ, they are slowly converging, although they are never likely to be exactly the same.<sup>37</sup>

According to Jackson, 'the differences between is essentially the role of the judge in the pre-trial phase in which, in the inquisitorial system, he is able to direct the obtaining of evidence and the stage of the proceedings at which the evidence is

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35 Pikoli and Wiener (2013:130-131).

36 Khampepe Commission Report, February 2006 para 155.

37 Jackson 2009). See also Justice Mogoro, Fifth Interim Report on Simplification of Criminal Procedure, Project 73, the South African Law Commission, August 2002.

taken. In Jackson's view, nations may have different views on this matter, and as there is no absolute rule, nations are entitled to decide their own ways of arriving at a just result.<sup>38</sup> And as Judge Khampepe puts it, the DSO's investigative approach of teaming up investigators, analysts and prosecutors together is a 'sound practice' of combating crime that 'ensures a return of higher conviction ratios.'<sup>39</sup>

## **6. Concluding remarks**

There is no escaping the fact that the NPA has become embroiled in politics – precisely what the drafters of the Constitution sought to avoid. More than this, personal and party political interests have come to bedevil the exercise of prosecutorial discretion at the highest level where the course of justice threatens to have an adverse outcome for persons in high office and those aligned or connected with the private interest of the President. The vulgarity and impunity with which constitutional and statutory principles are thrown overboard for the sake of pandering to political whims is an inexpressibly unfortunate, for it is destined to subvert the rule of law completely. Fortunately, we are reminded continually by the courts, writers and commentators that constitutional tenets underpinning the office of the NDPP and the NPA in general are cornerstones of a constitutional state built on the rule of law. It is therefore important to continue to be vigilant and critical of abuse of office, even when the abuse threatens to be a matter that is taken for granted.

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38 Jackson (2009).

39 Khampepe Commission Report, February 2006, para 155.

## CHAPTER 6

### Conclusion and Recommendations

#### 1. Introduction

It is my observation that the independence of the NPA is important in the proper functioning of the judiciary and maintenance of the rule of law. This thesis has traced the history of the prosecution service from the beginning of statehood in South Africa in the mid-17<sup>th</sup> Century to the present. The study has focused mainly on examining the relationship between the prosecution service and the executive arm of government.

#### 2. NPA independence – a fiction

There is no hard case-law evidence to date to corroborate the claim that the NPA is not as independent as contemplated in the Constitution and the NPA Act. However, the events chronicled in this thesis show that, at the behest of mainly President Zuma, the integrity of the prosecutorial discretion of the NPA has taken a severe knocking political considerations have on several occasions influenced the NDPPs decision-making at the expense of the interests of justice. Circumstances surrounding the charging, prosecution and withdrawal of charges against President Zuma, and the NPA's role in blocking the handing over of the spy tapes to the Democratic Alliance, in contempt of court orders has, in the main, elucidated this regretful state of affairs about one of the most important agencies of the South African criminal justice system.

It also does not require case law evidence to agree with the observation that the rule of law has been compromised and that the general public has lost trust on the NPA, government's seriousness about the fight against crime and corruption. And in any situation where rule of law is eroded and anarchy prevails, the economy collapses and so do institutions of state. It is therefore important that integrity be restored to the administration of criminal justice.

### **3. Lack of political will**

There is clearly a dearth lack of political and executive will to allow the NPA to function without interference. This is clearly signified by the continued failure by the ANC-led government to comply with the orders of the courts (Constitutional Court<sup>1</sup> and the Western Cape High Court, to ensure through amendment of *the National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) (B23-2008)*, that the DPCI is adequately insulated from executive and political interference and manipulation to be able to carry out its function without fear or favour.

The ruling party's continuous overwhelming dominance in Parliament has had the effect of it dictating the political agenda and the priorities of government. Securing the independence of the prosecution service is not regarded as a priority. It is therefore up to civil society to bring pressure on the government to ensure the integrity of the administration of justice. Fortunately, South Africa has a vibrant and

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<sup>1</sup> *Hugh Glenister v the President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 (17 March 2011) and *Helen Suzman Foundation v the President of the Republic of South Africa and Others* CASE NO: 23874/2012.

resilient civil society which has shown itself very able to galvanise public opinion and force government to address issues of concern to society, for example HIV/AIDS and the provision of municipality services.

#### **4. Recommendations**

It is recommended that the following measures be introduced to strengthen the independence of the NPA:

- (a) The NPA needs to be modeled along the lines of Chapter 9 Institutions. More precisely, its independence from political interference needs to be written into the law. The fact that outside interference in the exercise of discretion by the NPA is punishable under the existing law has not prevented political interference to take place with impunity. A legally, proactive safeguarding of the NPA would entrench its functional independence more boldly and deter interference by the executive with its workings, especially the exercise of prosecutorial discretion. However, the Chapter 9 Institutions are not necessarily wholly insulated against political interference, for the existence of a one-party dominant political system that has characterised South Africa before and after 1994, has proved that the President may still appoint to a key position someone who is likely to further the interests of the ruling elite's political agenda. But so far, it has been easier to manipulate the NPA than some of the key Chapter 9 Institutions, such as the Office of the Public Protector.
- (b) What has contributed partly to rendering the NPA vulnerable to political caprices is the absence of the word 'independent' in the constitutional and

statutory clauses that create the NPA. The word 'independence' must be included in section 179 of the Constitution and in the NPA Act as well. This, however, will serve only to guarantee the NPA of independence but not to safeguard the same against unscrupulous NDPPs, members of the executive and politicians.

(c) To forestall the possibility of circumventing the constitutional and statutory imperative of 'independence' by appointing submissive party adherents to positions that require the genuine exercise of independent discretion, the power to recommend potential appointees to the positions of NDPP, DPPs and Special Prosecutors must be vested with the JSC. Just like in the case of the Chapter 9 Institutions, the author is aware that the JSC is not immune to leaning towards the executive and acting in the manner that seem to advance political causes rather than the interest of the public. But a JSC-approved appointee to a key position in the NPA would be more credible than the present system of appointment allows. Besides, the appointee would be more in the public eye than is the case at the moment where appointments are made quietly and out of the public glare. This transparency would require the appointee to be more accountable for his or her decisions.

(d) The role of the Minister of Justice must be limited to policy-making only to ensure it is in line with the government's priorities and objectives but not in overseeing the implementation of the same. That must be the responsibility of the Office of the Chief Justice to whom the NDPP must account on prosecutorial matters. The budget of the NPA must also be allocated by the Office of the Chief Justice as opposed to the Ministry of Justice and

Correctional Services (formerly Ministry of Justice and Constitutional Development) as it is the case now.

The importance of an independent judiciary including an independent prosecuting authority cannot be over-emphasised.<sup>2</sup> As Atkin in *Liversidge v Anderson* [1942] AC 206 at 244 correctly said: '[A]mid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace....[J]udges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'<sup>3</sup>

To achieve this, the rule of law must be observed and this cannot be possible where there is no accountability by the government, state institutions and public officials. This is confirmed by Nasva J in the *Democratic Alliance v The President of the RSA & Others* that to 'ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.'<sup>4</sup> As discussed above, the government (President, Cabinet and Parliament and relevant state institutions and office bearers) have, in relation to the functioning of the NPA, since its inception to date, failed to be responsible and accountable for, *inter alia*, not having observed the requirements and limitations of their powers. And if the Constitution and the NPA Act

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2 M Lumphondo (2011:22).

3 *Liversidge v Anderson* [1942] AC 206 at 244.

4 *DA v President of South Africa* (263/11)[2011] ZASCA 241 (1 December 2011) para 66.

are not amended as suggested above, the NPA will continue to be exposed to political interference regardless under which government.

Finally, it is worth quoting Tumwine, who said that any 'democracy will fail if its functionaries cannot distinguish or respect the difference between party and state. The recent unfortunate history of the prosecution services as outlined here could be indicative of a situation that may slide into anarchy / or a repressive regime that could set the country back for many years or ripen it for serious upheaval and civil disorder. Such are the *unavoidable* wages of failure to develop and maintain a well-functioning institutional framework.'<sup>5</sup>



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<sup>5</sup> W Tumwine *The role of public opinion in court decisions on the legality of the death penalty: a look at Uganda and South Africa* (unpublished LLM dissertation, University of Ghana, Legon 2006) at 65.

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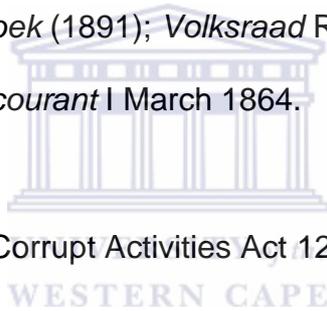
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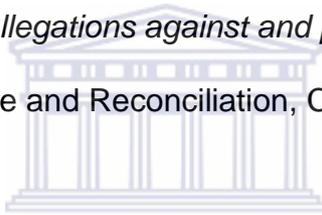
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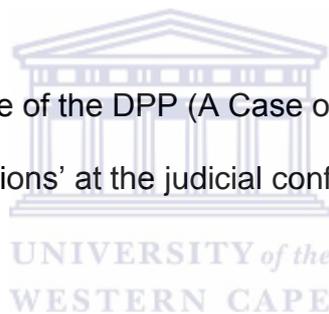
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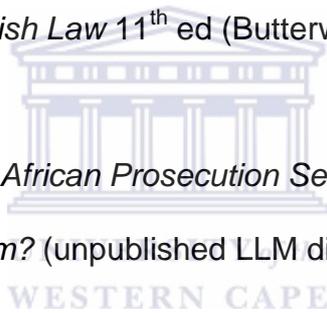
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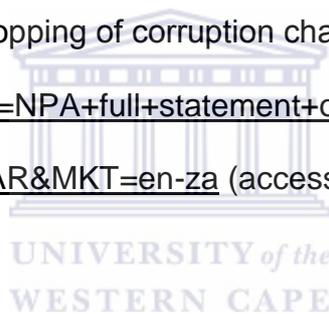
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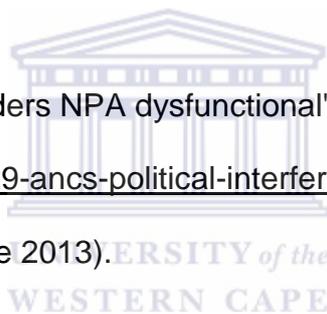
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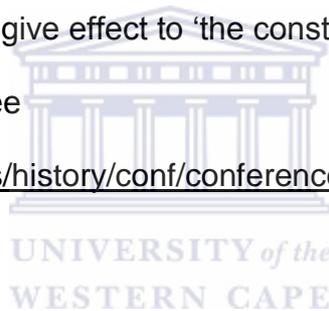
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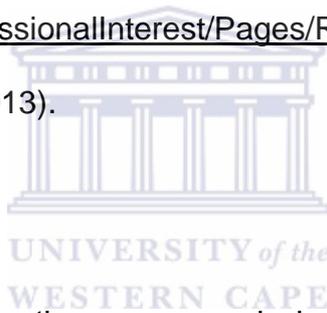
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